IN THE MATTER OF THE ONTARIO *LABOUR RELATIONS ACT, 1995*

-and-

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CUDDY FOOD PRODUCTS
- The Employer

-and-

UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, Local 175
- The Union

AND IN THE MATTER OF two grievances of Hanna Baddaoui regarding suspensions

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

W. Jason M. Hanson	- Counsel
Lynn Mulbrecht	- Supervisor
Peter DeRosse	- Director, Human Resources
Mark Bossy	- Manager, Labour Relations

On behalf of the Union:

John R. Evans	- Counsel
Hanna Baddaoui	- Grievor & Chief Steward, Plant B
Betty Pardy	- Recorder, Local 175 & Chief Steward, Plant C
A. G. Sherman	- Union Representative
Ron Tucker	- Chief Steward, Plant A

Hearings held September 27, December 3, 4, 9 and 10, 1996 and February 6, 12 and 13, 1997 in London, Ontario

INTERIM AWARD

I. INTRODUCTION

Hanna Baddaoui grieved two suspensions imposed by his Employer, Cuddy Food Products. The first was a three day suspension and involved allegations that on July 25, 1996 the grievor mishandled food products. The second, a five day suspension, involved allegations that the grievor assaulted Joseph Francis, a fellow employee, on July 27, 1996.

Mr. Francis was the Employer's first witness. During the re-examination of Mr. Francis, the Employer sought an order for the production of certain documents. The Employer originally sought notes made by Anna-Marie Brown, a Union Steward, with respect to the events of July 27. The Union objected to the production of the documents, submitting that they were not relevant and that the timing of the request was inappropriate as it came during re-examination of an Employer witness. I ruled that the items were arguably relevant and that no reason of timing prevented an order for production.

When the request was initially made, the Union was unaware whether there were any such notes, and unaware of the contents of any such notes. I allowed the Union the opportunity to make further submissions with respect to a claim of privilege which might arise following examination of any such documents. The Union contacted Ms Brown and learned that there were notes. Mr. Evans, Union counsel, reviewed the notes and then indicated that the Union would make further submissions with respect to the production request. The Union asserted a privilege, that is the Union asserted that the documents were exempt from production. The Union sought an adjournment in order to prepare argument on this issue.

At this point the Employer indicated that if there was to be full argument on the matter, the Employer would broaden its request for production. The broadened request was as follows:

"All documents in the possession or control of the Union or Union officials pertaining to the events of July 25, 26, and 27, 1996, (that is the events which are the subject matter of this arbitration) whether or not the notes were made on those days including, without limitation, notes or documents made by or given to Anna-Marie Brown (Steward), Wally Crossan (Steward) or A. G. Sherman (Union Representative) relating to the events of those dates, and including notes made by the grievor."

In a February 10, 1997 letter, Mr. Evans indicated that the following documents were captured by the request:

Documents prepared by Walter Crossan (Steward):

1. Interview notes from July 26, 1996, prepared by Mr. Crossan in the presence of other company officials during Mr. James McAllister's interview.

Documents prepared by Anna-Marie Brown (Steward).

1. Notes prepared by Ms Brown during a private conversation between Hanna Baddaoui and Ms Brown on July 27, 1996. At this time there were no company officials nor anyone else present. During this meeting, Ms Brown was acting as Steward to Mr. Baddaoui.
2. Series of notes prepared by Ms Brown on July 27, 1996, during interviews conducted by company officials with Hanna Baddaoui, Chris Barrett and Hopeton Lewis.
3. Employee's statements (unsigned) dated July 27, 1996, for Joe Francis, Chris Barrett and Hopeton Lewis. These notes were prepared during the evening of July 27, 1996 and on July 28, 1996.

Documents prepared by Betty Pardy (Chief Steward):

1. Notes from telephone interview dated July 29, 1996, with Hanna Baddaoui relating to events of July 25, 26, and 27, 1996.
2. Notes from telephone interview dated July 29, 1996, with Chris Barrett

relating to events of July 27, 1996.

3. Notes from telephone interview dated July 29, 1996, with Hopeton Lewis relating to events of July 27, 1996.

4. Notes from telephone interview dated July 29, 1996, with Dave Barrow relating to events of July 27, 1996.

Documents prepared by A. G. Sherman (Union Representative):

1. Notes prepared on August 28, 1996, during telephone conversation with Joseph Francis relating to the incident of July 27, 1996.

Other Documents:

1. Various documents relating to the criminal charge. All documents are prepared on London Police letterhead and were provided at counsel's request in preparation for arbitration.

At the hearing, Mr. Evans indicated that two other documents had been located. They were as follows:

1. Rough notes prepared by Ms Brown during the company officials' interview of Mr. Joseph Francis on July 27, 1996.

2. A summary of the events of July 27, 1996, prepared by Ms Brown either late on July 27, 1996, or on July 28, 1996.

The Union claimed a litigation privilege with respect to all the documents. With respect to two of the documents, the notes prepared by Ms Brown of her private conversation with the grievor on July 27 and the notes prepared by Ms Pardy of her telephone interview with the grievor on July 29, the Union claimed an evidentiary privilege arising from the Wigmore principles adopted by the Supreme Court of Canada in the case of *Slavutych v. Baker* (*infra*).

Both claims for privilege are fact-based and must be decided on a document by document

basis. It is thus necessary to outline the factual background to this dispute and indicate how the various documents originated. To that I now turn.

II. EVIDENCE

The Employer operates three food production facilities in London, Ontario. The three facilities are covered by one collective agreement but the collective agreement indicates that the three facilities, or plants, are dealt with separately for some purposes in the administration of the collective agreement. The events in this grievance occurred at what is referred to as Plant B. The grievor is the Union's Chief Steward at Plant B.

The grievor was working on an assembly line where a chicken product was prepared. The product is bagged on the line and the bags are then boxed and shipped. Certain bags of the product are filled or sealed improperly . Defective bags and other defective product are returned to a tote box. When the tote box is full, the product is returned to an earlier point on the line.

On Thursday, July 25, the grievor and another worker, James McAllister, were alleged to have improperly thrown defective product into the tote box for the purpose of upsetting the tote box from its stand, spilling some bags and loose product. When the tote box was upset it required additional work by other employees to return the tote box to its stand and retrieve the product which spilled on the floor. When loose product fell on the floor it was unusable.

The next day Joseph Francis, an employee, complained to the Employer about the conduct of the grievor and Mr. McAllister. The Employer conducted an investigation and it appears that the grievor became aware that Mr. Francis had complained about the grievor's conduct on July 25.

Both Mr. Francis and the grievor worked overtime on Saturday, July 27. Mr. Francis alleged that early in the morning of July 27 the grievor attacked him in the Employer plant, pushed and punched him and knocked him to the floor. Mr. Francis complained to the management about the alleged attack by the grievor and the police were summoned. Many people were involved in interviews that morning. Criminal charges were laid by both Mr. Francis and the grievor. The grievor was sent home that morning pending a further investigation. He filed a grievance before leaving the plant.

On or about August 1, 1996 the Employer suspended the grievor for five days for his conduct on July 27, when he is alleged to have attacked Mr. Francis. In addition, the Employer suspended him for three days for his conduct on July 25, when he is alleged to have mishandled the company's chicken product. The three day suspension was also grieved. The two grievances are being heard together.

The Employer's first witness was Mr. Francis. Mr. Francis testified about the events of both July 25 and 27. It is not necessary at this point to detail his evidence. It is sufficient to indicate that the Union position with respect to Mr. Francis' evidence was that in many instances he did not tell the truth and that he had invented parts of his story. The Union indicated during the cross examination of Mr. Francis that on many issues the evidence of the grievor or other Union witnesses would be very different from the evidence of Mr. Francis.

The Union produced, and cross examined Mr. Francis on, three documents of relevance to the issue of the Employer's request for production of documents. The Union used the three documents to repeatedly challenge the evidence Mr. Francis had provided earlier and noted inconsistencies between that evidence and what was indicated in the documents.

The first of the three documents was a letter prepared by Mr. Francis and mailed to A. G. Sherman, the Union representative. The document is undated but it was prepared at Mr. Sherman's request. The request was made during a telephone conversation, a conversation during which it appears Mr. Sherman prepared notes. That conversation appears to have taken place on August 28, 1996. In any event, the Union claimed a privilege in Mr. Sherman's notes of a conversation with Mr. Francis on August 28. I heard no evidence as to the preparation of those notes.

The two other documents used in cross examination of Mr. Francis were notes prepared by Walter Crossan, a Union Steward in Plant B, of an interview of Mr. Francis which Mr. Crossan conducted on July 27. There were two versions of the same notes. Both were signed by Mr. Crossan and Mr. Francis. The first version was the rough notes. The notes were recopied and again signed by both Mr. Crossan and Mr. Francis.

Mr. Crossan also interviewed Mr. McAllister, the other employee alleged to have been mishandling the product on July 25. The Union claimed a privilege in Mr. Crossan's notes of the McAllister interview. I heard no evidence as to the preparation of those notes.

The Union led evidence with respect to the circumstances under which Ms Brown and Ms Pardy, both of whom are Union stewards, prepared their notes, notes for which the Union claimed a privilege.

Ms Pardy is the Recorder of Local 175 and is also the Chief Steward at Plant C, another of the Employer's London plants. She has been employed at Cuddy for sixteen years and been a Chief Steward since 1988. She indicated that she received a call on Monday, July 29 from Paul Magee, an International Representative of the United Food and Commercial Workers International Union who was working for Local 175 to clear up a backlog of grievances. Mr.

Magee told Ms Pardy that he had received a call from the grievor regarding an incident on the previous Saturday and, as the grievor was the Chief Steward in Plant B, Mr. Magee asked Ms Pardy to conduct an investigation and obtain the facts regarding the incident. Ms Pardy advised Mr. Magee that, as the matter involved a different plant than her own, there might be a problem but she would endeavour to obtain the information.

Ms Pardy's first call was to the grievor. She called the grievor in his capacity as Chief Steward at Plant B. She explained the reason why she was interfering in his plant. She indicated that she wished his consent to talk to employees. She obtained names of people who might advise her as to what had taken place on July 27. She then spoke by telephone with Messrs. Barrett, Lewis and Barrow; she attempted to speak to Mr. Francis but was unable to contact him. Ms Pardy testified that her purpose in making the three calls to Messrs. Barrett, Lewis and Barrow was to gather facts about the incident on July 27, facts which she could then forward to the Union as an impartial investigator. She testified that she thought that she had been told by Mr. Magee that a grievance had been filed and that she believed the grievor had indicated he had filed a grievance and that there were "more coming".

Ms Pardy took rough notes of each of her four telephone conversations. She then rewrote the notes and provided them to Mr. Sherman, the Union's staff representative responsible for this bargaining unit. She threw her rough notes in the garbage. Ms Pardy indicated that she took notes of her conversations as she had been the Chief Steward for ten years, dealt with a large number of incidents, and there was no way she could remember specific dates or facts of occurrences unless she took notes. In general she used her notes as a memory refresher for herself, and for the Union. Ms Pardy was asked if she had ever considered that her notes might have to be provided to the Employer. She indicated that it had never crossed her mind, that in ten years she had never been asked by the Employer to produce her notes. She

indicated that she had always considered her notes to be confidential, to be given to the business representative in the same way as the Employer's notes were for the use of the Employer. If producing her notes were to put her members in jeopardy, she testified that she would probably stop taking notes, or make only brief notes.

In cross examination Ms Pardy indicated that she did not normally represent employees at Plant B and did not normally represent the grievor. She confirmed that she approached the investigation with an open mind, intending to remain as neutral as she could. She was aware that there had been an altercation between or among members but she was neutral with respect to the altercation. She confirmed that she tried to conduct an impartial investigation at the request of Mr. Magee and that she had provided her notes of the interview to her union representative. She agreed that she was acting as a conduit of information to the Union. Finally, she agreed that her investigation was on a separate track from the filing of the grievances.

Anna-Marie Brown is a Steward in Plant B and served as Alternate Chief Steward. The Alternate Chief Steward replaces the Chief Steward when he is absent. She indicated that she was in the cafeteria early on the morning of July 27. Lynn Mulbrecht, a supervisor, approached her there and asked her to accompany her to the Board Room as Mr. Baddaoui needed Union representation. When they arrived at the Board Room Ms Mulbrecht advised that she was sending the grievor home. Shortly thereafter Ms Brown conducted a private conversation with the grievor, during which she took notes. She indicated that when she spoke with the grievor she was acting in the capacity of Steward.

Ms Brown then sat in on interviews conducted by the Employer of Messrs. Barrett, Baddaoui, Lewis and Francis and she took notes. She indicated that her capacity during those interviews was as Alternate Chief Steward.

With respect to the summary of events which she prepared, Ms Brown relied in part on the private conversations she had with the grievor.

Ms Brown indicated that at no time did she coordinate with Ms Pardy although she did learn on the plant floor that Ms Pardy had been making inquiries of the other witnesses.

Ms Brown indicated that when she sat in on the Employer's interviews of Messrs. Barrett, Lewis and Francis, along with the interview conducted of the grievor, she tried to remain neutral among the employees. She did not pick sides at that time. Ms Brown provided her notes to Mr. Magee whom she met at a later grievance meeting.

Finally, while Ms Brown was speaking with the grievor, Mr. Crossan (another Steward) was speaking with Mr. Francis. Ms Brown indicated that there was no arrangement between Mr. Crossan and herself that he would represent Mr. Francis and that she would represent the grievor.

Regarding the documents on police letterhead, I heard no evidence. Mr. Evans indicated that the documents were secured at his request after he had been retained by the Union in order to assist him in the preparation and presentation of the case.

III. PROVISIONS OF THE COLLECTIVE AGREEMENT

The Articles of the collective agreement referred to in argument are as follows:

ARTICLE 8
STEWARDS AND DIVISIONAL COMMITTEES

. . .

8.08

(a) The Company acknowledges the right of the Union to appoint Chief Stewards and Stewards

from within each Division as follows:

Division "A" - One (1) Chief Steward and one (1) Steward from each shift within each Department.

Division "B" - One (1) Chief Steward and one (1) Steward from each shift within each Department.

Division "C" - One (1) Chief Steward and one (1) Steward from each shift within each Department.

Boning Department:

Turkey Line - one (1) Steward per shift
Chicken Line - one (1) Steward per shift

. . .

8.09 The Company agrees that whenever an interview is held with an employee for disciplinary reasons, a Chief Steward or Steward will be present as a witness. The employee may request that the Steward leave the meeting.

. . .

ARTICLE 10
DISMISSAL OR SUSPENSION

. . .

10.02 . . . When an employee has been dismissed without notice, he shall have the right to interview his Steward, or in his absence, the Chief Steward, in the Grievance Room for a time not to exceed thirty (30) minutes.

IV. SUBMISSIONS OF THE UNION

As the Union claimed a privilege in the documents being sought by the Employer, the Union proceeded first with its submissions.

The main submissions of the Union were as follows:

1. All the requested documents are covered by litigation privilege; and,
2. Privilege attaches to the notes of the confidential communications between Ms Pardy and Ms Brown, as Union Stewards, with respect to their conversations with the grievor.

With respect to the litigation privilege, the Union submitted the basic rule is that one party cannot dip into another party's work product in order to advance the litigation. The privilege

does not attach simply to communications between a solicitor and his client. Instead, it attaches to all documents after Ms Mulbrecht had discussions with the grievor and indicated that she would be sending the grievor home.

The Union submitted that from the time the grievor knew he would be sent home it was reasonable to contemplate that there would be a grievance and a subsequent arbitration hearing. The policy reasons for litigation privilege are based on the adversarial nature of the litigation process. The Union suggested that to allow the Employer to obtain access to the documents prepared by the Union would send a chilling message to the Union, to the Stewards and to the members indicating that they should say nothing. It would be contrary to the policy of encouraging the settlement of disputes. In particular the Union noted that Ms Pardy indicated if her notes had to be produced she might stop making notes or, alternatively, might make very brief notes.

In the alternative, the Union submitted that from the time the grievance was filed on July 27 litigation should have been contemplated and that any documents which followed the filing of the grievance should be protected by litigation privilege. The Union submitted that the right of Union representation is recognized in the collective agreement (see, for example, Article 8.09 and Article 10.02) and that the Union had been representing the grievor throughout this period.

On this submission the Union relied upon the following: *Evidence and Procedure in Canadian Labour Arbitration,* Gorsky, Usprich, and Brandt, (Carswell), pages 8-5 through 8-9 and 11-72 through 11-89; *The Art and Science of Advocacy* John A. Olah, (Carswell, 1990) pages 5-70, 5-71, and 5-76 through 5-79; *Regina v. Westmoreland,* (1984), 48 O.R. (2d) 377 (High Court); *Yri-York Ltd. v. Commercial Union Assurance Co. of Canada et al.,* (1987), 17 C.P.C. (2d) 181(Ontario High Court); *Vernon v. Board of Education for the*

Borough of North York (1975), 9 O.R. (2d) 613 (High Court); *Susan Hosiery Ltd., and Minister of Natural Revenue* [1969] C.T.C. 353 (Exchequer Court).

The Union also submitted that the first documents listed as prepared by Ms Brown and by Ms Pardy, that is their notes of conversations with the grievor, were privileged under the Wigmore rules adopted by the Supreme Court of Canada in *Slavutych v. Baker* [1976] 1 S.C.R. 254. The Union submitted that the documents met the following conditions:

> "1. The communications must originate in a *confidence* that they will not be disclosed.
>
> 2. This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> 3. The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
>
> 4. The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation." (at p. 260, emphasis in the original)

The Union submitted that with respect to these two documents all four conditions were met. On the first point, the Union referred me to Ms Pardy's testimony and asked me to take note of the fact that Union Stewards speak to grievors in a situation of confidence. Secondly, the Union submitted that the maintenance of that confidentiality was essential to the relationship between grievors and their bargaining agents as represented by Stewards. Thirdly, the Union said that the relationship ought to be fostered and noted the evidence of Ms Pardy as to what would happen if her notes were to be made available to the Employer by way of a production request of this nature. Finally, the Union asked me to conclude that the injury from disclosure would be greater than the benefit that might flow from the correct disposal of the litigation if the documents were disclosed. With respect to the latter issue the Union

submitted that if the Union was required to produce the statements it would significantly undermine the Union's ability to impeach Employer witnesses and would seriously undermine the Union position in the case. In so doing it would extend an unfair tactical advantage to the Employer. The Union relied upon the following: R*e Canada Safeway Ltd. and Retail Clerks Union, Local 1518* (1984), 21 L.A.C. (3d) 50 (McColl)*; Re Humber Memorial Hospital and Ontario Nurses' Association (Tomlinson)* (1993), 37 L.A.C. (4th) 125 (Kaufman); *Re Government of Province of British Columbia (Ministry of Transportation and Highways) and British Columbia Government Employees Union, Local 1103* (1990), 13 L.A.C. (4th) 190 (Larson).

Finally, the Union referred to *Re West Park Hospital and Ontario Nurses' Association* (1993), 37 L.A.C. (4th) 160 (Knopf) on the issue of production requests. Relying on that case, the Union submitted that the documents were not relevant to the underlying issues at the hearing, that the Employer was engaged in a fishing expedition and that there was insufficient connection between the information requested and the positions in the dispute.

V. SUBMISSIONS OF THE EMPLOYER

The Employer submitted that the position advanced by the Union would have to apply to both parties in an arbitration. If the Union was correct that everything prepared by the Union after the supervisor indicated she would be sending the grievor home on the morning of July 27 was covered by litigation privilege, then the same privilege would have to apply to the Employer. That would mean that the Union would no longer be entitled to obtain access, through production orders, of similar documents prepared by representatives of management.

The Employer submitted this would result in a system in which a party can claim a privilege and then be selective in its disclosure of documents. Here, for example, the Union had used

the document prepared by Mr. Francis and mailed to Mr. Sherman, the Union representative, to cross examine Mr. Francis. The Union used that document to say that Mr. Francis was inventing his evidence. But the Union submitted the notes of the conversation in which Mr. Sherman asked Mr. Francis to prepare the letter were covered by litigation privilege.

Based on the Union submission, the Employer would also be entitled to maintain litigation privilege in its documents without having to demonstrate that the dominant purpose of preparing the documents was litigation. The Employer asserted that Ms Pardy did not at any point indicate that her purpose in preparing notes was to advance litigation. Nor did the Alternate Chief Steward, Ms Brown, indicate that her purpose was to prepare documents for any anticipated litigation. Neither of them gave any evidence of any contemplation that their documents would be used in litigation.

The Employer asserted the principal issue in the case was what had actually happened, and thus the credibility of the witnesses was crucial. That issue of credibility was put squarely before me by the Union. The Union has made use of statements made to the Steward. The Union put in evidence two statements signed by both Mr. Francis and Mr. Crossan, a Union Steward. Those documents were introduced in evidence for the sole purpose of attacking Mr. Francis' credibility and his testimony generally. The Union had caused the communications made by the two protagonists to become a major issue. The Union put in evidence a signed statement made to Mr. Sherman for the purpose of cross examining and endeavouring to destroy Mr. Francis' credibility. The Union has alleged that Mr. Francis invented his evidence as he went along. Now that the Employer wanted access to similar documents, the Union indicated that production would be unfair. The Union wanted to remain selective about claiming and waiving privilege and, by implication, had no concern over the way in which the litigation was conducted. The Employer thus asserted that the Union submission could not stand.

Dealing with litigation privilege, the Employer submitted that the documents were not prepared in contemplation of litigation as it would have been impossible to contemplate litigation. The Employer submitted that the earliest point at which litigation privilege might arise would be after the Employer suspended the grievor. That did not take place until approximately August 1. In addition, the Employer indicated that the evidence fell far short of demonstrating that the dominant purpose for producing these documents was for use in litigation. In particular, there was no evidence regarding purpose from Mr. Sherman, or from Mr. Magee who asked Ms Pardy to prepare the notes, or from the grievor. In addition, there was no evidence from Mr. Barrett, or Mr. Lewis, or Mr. Barrow. In those circumstances it was impossible, submitted the Employer, for me to conclude that the dominant purpose for the production of these documents was to further litigation.

The documents prepared by Ms Pardy were prepared at the request of Mr. Magee. Mr. Magee simply asked Ms Pardy to find out what had taken place. It was thus impossible to find any purpose beyond Ms Pardy undertaking interviews and supplying information to the Union. Her conduct of the interviews was done outside the normal chain of command for union representation established in Article 8.08, which provides for the appointment of Chief Stewards and Stewards for each of the three Plants. It could be that Mr. Magee had received an allegation that the Chief Steward attacked one of the Union's members and wanted to determine whether the Union should intervene. If the Union had assumed that Mr. Francis' allegations were correct and desired proof of them for internal Union reasons, that would not be a litigation purpose. The Employer submitted that, in the absence of any testimony from Mr. Magee, the most realistic assessment was that the information was required for internal union purposes.

With respect to Ms Brown's notes, she did not say why she took the notes. She then rewrote the notes so that they could be understood but she had no idea for whom she rewrote them.

She attended a meeting at which Mr. Magee was present and she asked Mr. Magee what she should do with her notes. Mr. Magee asked her to give them to him. She indicated that in the interviews conducted by the Employer she was neutral. Ms Brown was in attendance at the interviews with Messrs. Lewis, Baddaoui, Barrett and Barrow as a matter of right as a Union Steward under Article 8.09. As the Union has a right to attend as a witness, the Employer submitted it was impossible for me to find that the notes were prepared in contemplation of litigation.

As for the submission that this would give a tactical advantage to the Employer, the Employer acknowledged that it was seeking a tactical advantage. That was precisely why the Employer was pursuing the documents.

With respect to the alternate argument that these documents were privileged under the Wigmore rules, the Employer submitted that none of the four requirements were met with respect to Ms Pardy's notes. In particular, there was no evidence from the grievor that there was any confidence that the notes would not be disclosed. Secondly, it should be clear, having regard to the earlier use of the notes prepared by Mr. Crossan with respect to Mr. Francis, that confidentiality was not essential in this relationship. There was, in any event, no Steward/employee relationship between Ms Pardy and the grievor. Thirdly, with respect to fostering the relationship, the Employer asked what relationship? This was not a Steward and grievor relationship. In any event there was no evidence on which I might conclude the community thinks the relationship ought to be sedulously fostered. Fourthly, with respect to the injury versus benefit comparison, the Employer submitted that in the absence of any clear evidence it was very difficult to find that the injury would be greater than the benefit. In any event, the Union had already disclosed three similar documents indicating that in the Union's view the correct disposal of the litigation was more important than the maintenance of confidentiality in similar documents.

With respect to the documents prepared by Ms Brown, the Employer indicated the first criteria, the confidentiality, had not been met. The Employer noted that there was no evidence from the grievor on this issue and that Ms Brown had not testified they were prepared in a confidence. With respect to the second element, the maintenance of the confidential relationship clearly could not be essential as the Union had already disclosed similar notes made by Steward Crossan with respect to Mr. Francis. The Employer submissions on the third and fourth points were the same as with respect to the documents prepared by Ms Pardy.

Finally with respect to the documents on police letterhead, the Employer submitted litigation privilege could not attach. The grievor had documents in his possession and had provided them to his counsel. The Employer submitted that the essential issue was the purpose for which the document was created. To find a litigation privilege would mean that either party could immunize itself against production by sending documents to its lawyer.

The Employer relied upon the following authorities: *Re Toronto Star Newspapers Ltd. and Southern Ontario Newspaper Guild, Local 87* (1993), 33 L.A.C. (4th) 174 (Springate); *Re Great Atlantic & Pacific Co. of Canada Ltd. and United Food & Commercial Workers International Union, Locals 175 and 633* (1995), 47 L.A.C. (4th) 59 (Samuels); *Re Leamington Nursing Home and Service Employees Union, Local 210* (1993), 39 L.A.C. (4th) 270 (Samuels); and *Burnell v. British Transport Commission* [1955] 3 All E.R. 822 (C.A.).

VI. CONCLUSIONS

I begin with several matters which form the background for my conclusions.

First, as reflected in the summary of the parties' submissions, the parties proceeded as though

the various rules of evidence, rules which were largely formulated for the conduct of civil trials in the common law courts, apply fully in labour arbitrations. The rules of evidence do not apply fully in labour arbitrations. Arbitrators are authorised to accept evidence which is "considered proper, whether admissible in a court of law or not" (*Labour Relations Act 1995,* Section 48(12) (f)). In some instances there may be good labour relations policy reasons to deviate from the normal application of the rules of evidence which would apply in civil matters. There may be valid reasons to reject the outcome which is suggested by the application of the rules of evidence. An arbitrator may thus deny production of documents which are not privileged or protected by the rules of evidence.

Nevertheless, the rules of evidence have been formulated over many years and are designed to ensure that a proceeding is conducted in a fair manner and that the search for truth is assisted. A fair hearing and the search for the truth are primary goals in an arbitration. For that reason, the rules of evidence are generally followed and are the usual starting point in assessing questions of evidence which arise in an arbitration, including questions relating to the production of documents.

Secondly, the Union suggested the documents were not relevant. The usual test of relevance when considering a request for production by one party who does not have access to the document(s) and is not currently seeking to use the document(s) in evidence is one of "arguable relevance". This is a lower standard than that which is used when a party actually seeks to use a document as evidence in a hearing. Under this standard, the party seeking production of documents need not demonstrate that the material is sufficiently relevant as to be admissible in the hearing, but rather need simply demonstrate that it is arguably relevant to the issues at the hearing. Arguable relevance is the standard which I adopt. As all the documents appear to be notes of participants', or witnesses', recollections of the events and to have been made shortly after the events which are so clearly at issue in this hearing,

I find that all of the documents being sought are at least "arguably" relevant.

Thirdly, parties involved in civil litigation have long been required to disclose documents of relevance to the proceedings. The principle is similar in arbitration. There is no doubt that I can direct disclosure. [See *Labour Relations Act, 1995,* Section 48(12).] Disclosure of documents is intended to aid in the speedy resolution of a grievance. Disclosure of documents also minimises the need for adjournments which might otherwise be required if parties were surprised by documents and required additional preparation time.

Fourthly, my principal function is to determine, in so far as possible, the truth of the events of July 25, 26 and 27, 1996. There are many authorities which make this point very clearly (see, for example, *Re Great A. & P and U.F.C.W., supra,* and the authorities cited therein) and I will not repeat them here. As my principal function is to determine what occurred, and as the material being requested appears likely to assist in that function, then it follows that any submissions which would keep that material from the other side and which might thus hinder the determination of the truth should be assessed with care.

Fifthly, the Union submitted that the timing of this request, coming during the re-examination of an Employer witness, was improper. However, it was not clear why the Union felt this rendered the request improper. In any event, I find no grounds to support the Union claim that the timing of this request was improper.

This brings me to the Union's assertion of a litigation privilege. The Union claimed a litigation privilege in all the documents requested by the Employer.

Litigation privilege is sometimes referred to as a work product privilege. Litigation privilege attaches to documents that have been prepared for the conduct of litigation. It can include

reports, notes of interviews with potential witnesses and other material prepared to assist in the conduct of the case. The rationale generally given for this privilege is that the preparation of cases might be discouraged if unfavourable material had to be disclosed for use by the other side. Thus, rather than preparing thoroughly, lawyers might be reluctant to pursue some avenues of inquiry for fear that they would turn up damaging evidence which they would then have to provide to the other side. Secondly, it is thought to be unfair to allow one party in a dispute to take advantage of the work done by the other side in preparation for the hearing.

Litigation privilege is not limited to material prepared by a lawyer. It can apply to documents prepared by other persons in anticipation of litigation. As such, it is clear that it could apply to documents prepared by Stewards or by Union Representatives.

There are two key elements of litigation privilege. First, the material has to have been prepared at a time when either (a) litigation was pending, or (b) if litigation was not yet pending, litigation was reasonably contemplated. Secondly, the material has to have been prepared for purposes of that litigation. If material has been prepared for multiple purposes, it is sufficient for purposes of litigation privilege if the "dominant purpose" was preparation for litigation. (See, for example, Gorsky *et al*, Olah, *R. v. Westmoreland*, *Yri-York Ltd.*, and *Vernon v. North York, supra.*)

The application of the doctrine of litigation privilege in this case does not turn on the precise limits of the privilege. Rather, the issue here is one of applying the general concept to the particular facts of this case.

Was litigation pending or contemplated? The Union largely works through its Chief Stewards. I think it reasonable for the Union, particularly for the Chief Steward of Plant B

(the grievor), to have been contemplating litigation from the time the grievor was advised of the allegations against him and was advised that he would be sent home on the morning of July 27. From that point I think it fair to conclude, and I do conclude, that legal proceedings were "pending or threatened or anticipated" as it is often described in the authorities. (I note that the grievor actually filed a grievance before he left the plant that day.)

All the documents, except the notes prepared by Mr. Crossan (Steward) of his interview with Mr. McAllister (the other employee alleged to have mishandled product), were prepared after the Union reasonably anticipated litigation. With respect to Mr. Crossan's notes of the McAllister interview, I do not think the litigation privilege can attach. These notes pre-date the earliest time at which even the Union submitted it was reasonable to contemplate litigation. Apart altogether from that difficulty, I do not have any evidence from which I can conclude that a reason, let alone the dominant reason, for the preparation of these notes was to further litigation. Thus I conclude that no privilege attaches to the notes prepared by Mr. Crossan of his interview with Mr. McAllister.

The major question regarding the other documents is this: Were they prepared for purposes of litigation? It is necessary to determine whether the purpose, or the dominant purpose, for the preparation of each of the other documents was to assist in the conduct of the litigation.

I turn first to the notes prepared by Mr. Sherman, the Union representative, of his telephone conversation with Mr. Francis. I have no evidence of the purpose for which Mr. Sherman prepared these notes. While it appears that Mr. Sherman was endeavouring to secure from Mr. Francis information which would be of use to the Union in this grievance, I have no evidence from which I can conclude that Mr. Sherman prepared his notes for purposes of advancing the grievance. It thus follows that the litigation privilege does not attach to the notes prepared by Mr. Sherman of his conversation with Mr. Francis.

I turn next to the various documents relating to the criminal charge which were prepared on London Police letterhead and provided at counsel's request in preparation for the arbitration. I understand from Mr. Evans' statement regarding these documents that they were provided to him at his specific request after he was retained by the Union for the conduct of this grievance. I understand further that they were sought by him and provided to him to aid him in the conduct of the arbitration. That being the case, they are covered by litigation privilege.

The more difficult documents are those prepared by Ms Brown and Ms Pardy. I had evidence from both Ms Brown and Ms Pardy as to the preparation of the documents. As I have indicated, all the documents were prepared at a time at which the Union contemplated litigation. The issue is the *purpose* for which the documents were prepared.

I deal first with the notes prepared by Ms Brown. The essential question is the purpose for which these documents were prepared. Were they prepared to further the grievance?

Ms Brown testified as to the preparation of these notes. There are three categories of documents. I deal with each separately.

First are the notes of a private conversation between the grievor and Ms Brown. At that time there were no company officials present. Mr. Evans indicated in his listing of the documents that Ms Brown was acting as Steward to the grievor at that time. Her evidence was similar. With respect to the notes prepared by Ms Brown of her private conversation with the grievor, Ms Brown did not explicitly state that she was preparing notes to further the grievance. However, Stewards do prepare notes of private conversations with grievors as a means of assisting in the processing of grievances. I think it clear that at this point Ms Brown was acting as a Steward, as an advocate, for the grievor. I conclude that Ms Brown's notes were prepared principally for the purpose of advancing a grievance which might be filed by the

grievor with respect to the incidents of July 27. Those notes are thus covered by litigation privilege.

The second category of documents prepared by Ms Brown are the rough notes of interviews conducted by the Employer of the grievor, Mr. Barrett, Mr. Lewis and Mr. Francis, together with what I will refer to as "good copies" of some of those notes. Again Ms Brown did not indicate the purpose for which she made these notes. She did nothing with these notes until she was in a meeting with Mr. Magee and, at his request, she provided the notes to Mr. Magee. These interviews were conducted by the Employer. It appears that Ms Brown's attendance in these interviews was in accordance with Article 8.09 of the collective agreement. Article 8.09 indicates that when interviews are held with an employee for disciplinary reasons, a Chief Steward or Steward will be present as a witness, although the employee can ask for the Steward to leave the meeting. Ms Brown indicated that she was in attendance as Alternate Chief Steward, as a witness. These were not private, Union conducted, interviews. There was no element of Union strategy being planned in these meetings. The Chief Steward or Alternate Chief Steward attends these interviews as a witness, and there is no indication in the Agreement that the reason for this is to enable the Union to advance grievances. In fact, the Agreement simply states the Steward is present "as a witness". There is no requirement in the Agreement for the Steward to prepare notes of the Employer interviews.

From Ms Brown's testimony, and noting the collective agreement Article 8.09, I am unable to conclude that the dominant purpose for Ms Brown making these notes was to further the grievance. Ms Brown did not suggest that her purpose in attending these interviews was to assist the grievor in the conduct of his grievance. There were other reasons why she might be there and why notes might be taken. The situation would be different if Ms Brown had said she attended the meetings to defend the grievor and that her purpose in taking notes was

to help her Union overturn any discipline which might be imposed. However, in the absence of any clear indication from Ms Brown as to her purpose in preparing notes, and as Ms Brown indicated her role was that of a neutral in these meetings, I am unable to find that sort of purpose which is required in order for litigation privilege to attach.

The third category of document prepared by Ms Brown is the summary of events. She prepared this document at home after the interviews. In preparing the document she relied on her private conversation with the grievor and the interviews conducted by the company. I have already decided that litigation privilege attaches to the notes of the private conversation with the grievor. Because of that, I think it would be unfair to require production of this summary document which relies upon the privileged notes, and that it should be regarded as privileged.

I have given consideration to whether the summary document could reasonably be edited. I do not think in the circumstances that directing the editing of the document is necessary. The Employer will have access to both sets of Ms Brown's notes of the interviews with Messrs. Francis, Barrett and Lewis. In addition, the Employer will have access to Ms Brown's rough notes of the company interview with the grievor. If the summary of events was edited to remove any information which came from the private conversation between Ms Brown and the grievor, it would leave only the information obtained in the Employer interviews, and the Employer will have Ms Brown's notes of those other interviews. Given Ms Brown's reliance upon the private conversation with the grievor, I have concluded that if ultimately the notes of the private conversation do not have to be provided then the summary does not have to be provided to the Employer in any form.

I deal next with the notes prepared by Ms Pardy. Ms Pardy was contacted by telephone by a Union Representative, Mr. Magee, and asked to conduct an investigation. Mr. Magee did

not testify and thus the purpose for which Mr. Magee wanted an investigation is not clear. I note that the grievor, a senior representative of the Union as Chief Steward at Plant B, was alleged to have attacked a fellow employee. It is possible that the Union was conducting an internal investigation out of concern that one of its Union officials may have engaged in improper conduct. As such, the Union may have wanted to protect its own position by obtaining a review of the situation.

Ms Pardy conducted the investigation and testified that she did so as a neutral. While she testified that she thought she was aware at the time of her investigation that a grievance had been filed, at no point did she indicate that her purpose in conducting her investigation was to assist in the pursuit of the grievance. Under this agreement Ms Pardy is Chief Steward at Plant C; she is not a Steward for any of the four persons she interviewed from Plant B. Thus, there is nothing in the nature of the relationship that Ms Pardy has with any of the four employees she interviewed which would suggest that she was investigating as a Steward. Nor is there anything in the relationship to suggest that she was otherwise acting as a person attempting to assist the grievor in the conduct of his grievance. She testified that her reasons for speaking with the grievor were (a) to find out the names of people she might interview and (b) to advise the grievor, in his capacity as Chief Steward, as to why she was talking to employees in his plant. Ms Pardy confirmed that her investigation was on a separate track from the filing of the grievances.

On the evidence, I am unable to conclude that Ms Pardy's dominant purpose in preparing the notes of her telephone conversations was to further the litigation. In particular she testified that her investigation was on a separate track from the grievance procedure. She testified that her investigation was that of an independent neutral investigator. She looked into the facts and provided them to the Union. There is nothing to suggest that her purpose in looking into the facts and providing them to the Union was to further any litigation. As a result, the

litigation privilege does not attach to the notes prepared by Ms Pardy.

The Union made an alternative submission with respect to Ms Pardy's notes of her conversation with the grievor and I deal with that next.

The Union submitted in the alternative that the documents listed earlier as No. 1 for both Ms Brown and Ms Pardy, notes of conversations with the grievor, were privileged. Given my conclusion that Ms Brown's notes of the conversation she had with the grievor are covered by litigation privilege, I will consider only Ms Pardy's notes of her conversation with the grievor.

I accept the following principle from the decision in *Slavutych v. Baker* - certain private or confidential documents can be elevated to the status of privileged documents. I have reproduced above in the Union submissions the four requirements from *Slavutych v. Baker*.

In my view each of these four requirements is fact-based. Thus in order to uphold a claim of privilege, the *evidence* must indicate that:

1. the communication originated in a confidence that it will not be disclosed;
2. confidentiality is essential to the full and satisfactory maintenance of the relation between the parties to that communication;
3. the community believes the relationship between the parties to the communication is one which ought to be sedulously fostered; and,
4. the injury that would be caused by disclosure would be greater than the benefit gained for the correct disposal of the litigation.

I note that the fourth condition re-emphasizes the primary principle which guides the introduction of evidence, the necessity to determine the true facts, in so far as the tribunal can do so. The ascertainment of truth is the essential focus of my inquiry. Relevant or

arguably relevant documents which are withheld from the other party must be withheld pursuant to some greater purpose.

On the first requirement, while Ms Pardy indicated that she did not anticipate that the documents would be disclosed, there was no evidence that there was any understanding between the grievor and herself at the time that of their conversation that their discussion was confidential. It may be that Ms Pardy, as a Chief Steward, and the grievor, as a Chief Steward in another plant, shared a general understanding that their conversation would be confidential. However, I do not have such evidence before me. I thus have difficulty with the first point from *Slavutych v. Baker.*

I have great difficulty with the second element. I had no evidence from which I can conclude that confidentiality was essential. The Union had already released into evidence notes of a conversation between a Shop Steward and Mr. Francis. It appears that the Union's own conduct in this arbitration makes it clear that the maintenance of confidentiality between a Steward and a member is not essential. Information from that relationship can be disclosed, and has been disclosed by the Union, apparently because the Union does not fear disclosure. While Ms Pardy indicated that if her notes were produced she might act differently in the future, there was no suggestion that she would be unable to effectively represent her members, or that she would be unable to conduct inquiries for her Local. In this instance, Ms Pardy was not acting as a Steward working on behalf of a member in trying to resolve workplace grievances. If Ms Pardy had been acting as a Steward trying to address and resolve a grievance, the outcome would no doubt have been that her notes of her discussion with the grievor were covered by litigation privilege and I would not have to consider the Unions' alternative submission. In the circumstances, however, I am unable to conclude that the maintenance of confidentiality is essential to the relationship.

The third aspect (whether the relation is one which, in the opinion of the community, ought to be sedulously, or diligently, fostered) also presents difficulty. Given the disclosure by the Union of Mr. Crossan's notes of the interview with Mr. Francis and the disclosure by the Union of the notes which Mr. Francis sent to Mr. Sherman at Mr. Sherman's request, it is difficult for me, *in the absence of any other evidence on this point*, to conclude that the community thinks the maintenance of a confidential relationship between Ms Pardy and the grievor, assuming there was one, ought to be sedulously fostered. I cannot make such a finding.

Finally, I am required to balance the injury that would result from disclosure against the benefit gained for the correct disposal of the litigation. I have little evidence from which to make this assessment. However, these notes may enhance the proper disposal of the litigation. The Union has made it clear that there will be major differences between Mr. Francis' testimony and the grievor's testimony. It is possible that disclosure of this document may assist in the search for truth and thus the correct disposal of the litigation. I am left to hypothesize as to what injury might "inure to the relation by the disclosure of the communication". Ms Pardy indicated that if her documents were disclosed she might make only brief notes of conversations, or alternatively make no notes. I repeat my earlier conclusion that these notes were not made by Ms Pardy as a Steward in order to advance the grievance. A conclusion favouring disclosure should not be seen as disrupting private conversations between Stewards and members which are undertaken to advance grievances, as this was not such a conversation. In the circumstances, then, I am not persuaded that the injury to the relationship is greater than the benefit gained for the correct disposal of the litigation.

It follows that Ms Pardy's notes of her conversation with the grievor are not privileged under the rules set out by the Supreme Court of Canada in *Slavutych v. Baker*.

In my view, there is no reason for Union Stewards to be concerned by this decision. When a Steward discusses a grievance or potential grievance with a grievor or with a witness for the purpose of advancing the grievance, any notes which are made of the conversation in order to assist the Union in processing the grievance will be privileged. Those notes will not have to provided to the Employer. But privilege will not apply to notes if there is no evidence as to the purpose for which the notes were prepared. Nor does privilege apply when the purpose for making the notes is one of general Union business.

The outcome at this point in a civil trial would no doubt be an order that the documents which are not privileged be produced, or turned over, to the Employer. However, I now return to the question of whether there are any labour relations reasons to alter the outcome which would otherwise flow from the application of the rules of evidence. There was no suggestion that there was any over-riding policy reason not to apply the evidence rules and, in the circumstances of this case as I know them currently, I find no basis for altering the result which flows from my analysis above. Thus the documents to which a privilege attaches need not be produced, but all of those documents for which there is no privilege have to be provided to the Employer.

In summary, for the reasons given above, I direct the Union to produce to the Employer the following documents:

Documents prepared by Walter Crossan (Steward):

1. Interview notes from July 26, 1996 prepared by Mr. Crossan in the presence of other Company officials during Mr. James McAllister's interview.

Documents prepared by Anna-Marie Brown (Steward).

1. Series of notes prepared by Ms Brown on July 27, 1996 during interviews conducted by Company officials with Hanna Baddaoui, Chris Barrett and Hopeton

Lewis, as well as Ms Brown's notes of the Company interview of Joe Francis to which Mr. Evans referred at the hearing.

2. Employee's statements (unsigned) dated July 27, 1996 for Joe Francis, Chris Barrett and Hopeton Lewis. These notes were prepared during the evening of July 27, 1996 and on July 28, 1996.

Documents prepared by Betty Pardy (Chief Steward):

1. Notes from telephone interview dated July 29, 1996 with Hanna Baddaoui relating to events of July 25, 26, and 27, 1996.

2. Notes from telephone interview dated July 29, 1996 with Chris Barrett relating to events of July 27, 1996.

3. Notes from telephone interview dated July 29, 1996 with Hopeton Lewis relating to events of July 27, 1996.

4. Notes from telephone interview dated July 29, 1996 with Dave Barrow relating to events of July 27, 1996.

Documents prepared by A. G. Sherman (Union Representative):

1. Notes prepared on August 28, 1996 during telephone conversation with Joseph Francis relating to the incident of July 27, 1996.

The above direction was communicated to the parties in my letter dated February 24, 1997.

Dated in London, Ontario, this _______ day of March, 1997.

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Howard Snow, Arbitrator