81. The responding party Nutra 2000 is directed to post copies of this decision at the workplace in conspicuous locations where they are likely to come to the attention of all employees in the proposed bargaining units.

0320-98-R; 4303-97-R United Steelworkers of America, Applicant v. **Maxi,** Responding Party v. The United Food and Commercial Workers of International Union, Local 175, Intervenor; United Steelworkers of America, Applicant v. Maxi & Co., A Division of Provigo Inc., Responding Party v. The United Food and Commercial Workers of International Union, Local 175, Intervenor

Certification - Evidence - Practice and Procedure - Voluntary Recognition - Applicant and intervenor disputing whether restriction on use or disclosure of document produced by intervenor to applicant should continue after document entered into evidence - Board concluding that implied undertaking will not limit use to which applicant may put the document once it has been produced into evidence in the course of proceeding - Board identifying no other basis in this case upon which it should restrict use to which document could be put outside of proceedings, or extent of its disclosure in the hearing

BEFORE: *Pamela Chapman,* Vice-Chair.

APPEARANCES: *James Hayes, William Gibson* and *Doug Hammond* for the applicant; *Richard Anstruther* and *Tim Timpano* for the responding party; *Alan M. Minsky* for the intervenor.

DECISION OF THE BOARD; June 16, 1998

1. These are applications for certification for units of employees working at two different retail stores operated by Provigo Inc. carrying on business as Maxi and/or Maxi & Co. ("Provigo").

2. By decisions dated February 25, 1998 and May 1, 1998, the Board directed the taking of representation votes at the two locations, but in each case ordered the ballot box to be sealed. Indeed, the ballots have still not been counted, as there is a dispute as to whether or not the applications by the United Steelworkers of America ("the USWA") are timely. At each location the United Food and Commercial Workers International Union, Local 175 ("the UFCW") claims to have pre-existing bargaining rights by virtue of a voluntary recognition agreement with Provigo, and it is not disputed that the instant applications would not be timely should the voluntary recognition agreements be determined to be valid. However, the USWA argues that there are no voluntary recognition agreements within the meaning of the Act, and in the alternative that any agreement found by the Board should be terminated pursuant to section 66 of the *Labour Relations Act, 1995* ("the Act"), or because of employer support contrary to section 15 of the Act.

3. At the hearing of this matter on June 12, 1998 the Board considered a preliminary issue relating to the document claimed by the UFCW and Provigo to be a voluntary recognition agreement applying to both stores. The UFCW filed a copy of this agreement dated August 15, 1997 with its intervention in each file, but significant portions of the document had been deleted. At the request of counsel for the USWA on an earlier hearing date, an unedited version of the document was produced for his and his client's review, but this production was made subject to an explicit undertaking by counsel not to show the document to anyone other than a single advisor, and not to disclose its contents.

4. Counsel for the UFCW and for Provigo wish to rely upon this document at the hearing of this matter to establish that there is a valid voluntary recognition agreement in place between them, but they do not intend to have the entire document admitted into evidence. However, counsel for the USWA, having reviewed the document in its entirety, argues that the Board must have before it the whole document in order to fairly characterize its significance, and intends to rely upon certain portions sought to be excluded by the other parties in support of his arguments on the status of the document, and on the allegation of employer support.

5. The dispute which was argued before me on the last hearing date is over the status of the document in terms of its disclosure to others if and when it is admitted into evidence. The UFCW and Provigo seek to restrict the use of the document to these proceedings, and to ensure that it is not copied, excerpted or otherwise disclosed to persons outside of the hearing. The USWA, on the other hand, takes the position that the document becomes a public one once it has been relied upon in these proceedings and that its contents can therefore be disclosed to anyone, by anyone.

6. There was no real argument that there is a limit to the use that may be put to a document that one party obtains from another in the course of litigation before the Board. In the present case counsel agreed to an explicit and extremely restrictive undertaking in order to obtain production of the document on consent. In any event, all three parties agreed that there is in Ontario an implied undertaking on a party who obtains production of a document from another party in the course of litigation not to use the document for a purpose other than that of the proceeding in which the document was obtained, except with consent of the other party or with the leave of the court or tribunal. While there has been some confusion in Ontario over the status of this common law rule, it appears to have resolved by the decision of the Court of Appeal in *Goodman* v. *Rossi*, (1995) 24 O.R.(3d) 359, where the court determined that the implied undertaking should be applied where production of otherwise private documents is obtained through litigation.

7. The Board has concluded that such an undertaking ought to be implied where documents are produced in the course of proceedings before it in several cases, including *Shaw-Almex Industries Limited*, [1984] OLRB Rep. April 659. In that case the Board considered the significance of the implied undertaking where parties produce documents pursuant to a subpoena *duces tecum* issued and enforced by the Board, and concluded that a breach of such an undertaking, which is to the Board as much as to the other party, would be punishable by a finding of contempt (at paragraph 19). It seems clear that documents produced in compliance with a Board order would also be subject to the implied undertaking limiting their use.

8. In *Goodman* v. *Rossi, supra* at page 370, the Court of Appeal expressed some concern about the extension of the implied undertaking to the automatic production of documents required by the Rules of Civil Procedure, given that the rule originated as a condition for the issuance of an order for discovery, but ultimately concluded that it should apply to discovery pursuant to the Rules. Similarly, it makes sense that the rule should apply where the parties in proceedings before the Ontario Labour Relations Board produce documents to each other and file them with the Board in compliance with the Board's Rules of Procedure. As the Court of Queen's Bench said in *Prudential Assurance Co.* v. *Fountain Page Ltd.*, [1991] 1 W.L.R. 756 (Q.B.) (cited in *Goodman* v. *Rossi, supra*):

> This undertaking is implied whether the court expressly requires it or not. The expression of the obligation as an implied undertaking given to the court derives from the historical origin of the principle. It is now in reality a legal obligation which arises by operation of law by virtue of the circumstances under which the relevant person obtained the documents or information. However treating it as having the character of an implied undertaking continues to serve a useful purpose in that it confirms that the obligation is one which is owed to the court for the benefit of the parties, not one which is owed simply to the parties; ...

9. However, the law is not so settled, and the parties in this proceeding do not agree, on the question of what restriction, if any, there is on the use of documents admitted into evidence. Counsel for the intervenor and the employer argue that the implied undertaking continues to apply even after a document is determined to be relevant and is tendered as an exhibit, and they cite the decision of the House of Lords in *Home Office* v. *Harman*, [1983] 1 A.C. 280 in support of that position. In that case, a majority of the House of Lords found a solicitor in contempt of court when she allowed a reporter, at the conclusion of a trial, to review certain documents which had been produced to her in the course of litigation. The documents had been read in open court during the opening statement made on behalf of her client (although they were subsequently ruled inadmissible). The majority determined that the implied undertaking continues to restrict the use to which documents produced by a party to a proceeding can be put by the party opposite and its counsel, despite the essentially unrestricted use (subject to the laws of copyright and defamation) to which the same material could be put by a member of the public and/or the media who chose to attend at the hearing and make a note of its content.

10. In a strong dissent, a minority of the Lords expressed concern with this anomaly and concluded that the requirements of public justice and freedom of speech were inconsistent with a continuation of the undertaking:

> ... The undertaking of the litigant and his solicitor not to use documents disclosed to them on discovery for any purpose other than the action does not apply to the documents once they have been produced and read out, in whole or in part, in the course of a public trial. Whether they be held to be admissible or inadmissible as evidence is immaterial; ...

11. While counsel for the employer urged me to follow the House of Lords on this point, it appears that the majority decision is no longer good law in England. As part of the settlement of an application to the European Commission on Human Rights made by the solicitor who had been found in contempt, the specific holding in the case was reversed by an amendment to the rules in 1987. The Rules of the Supreme Court (in the United Kingdom) now provide that:

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> [a]ny undertaking, whether express or implied, not to use a document for any purposes other than those of the proceedings in which it is disclosed shall cease to apply to such document after it has been read to or by the Court, or referred to, in open court, unless the Court for special reasons has otherwise ordered on the application of a party or of the person to whom the document belongs.
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12. Having reviewed this decision carefully, I must agree with the approach taken by the minority and now incorporated into the rules of civil procedure in England. The purpose of the implied undertaking is to protect the private documents of one party, to which another party would have no access but for a legal proceeding, by restricting their use to the proceeding in which they are produced. This protection is particularly important where the relevance and admissibility of documents has not yet been established, and it serves to encourage generous production of all documents which are arguably relevant to the proceedings.

13. Once a document has been admitted into evidence, however, it is no longer confidential in the same sense and its contents may be disclosed to all persons present at the hearing, and reported by them to others. In these circumstances it can no longer be said that the party to whom production was made could not obtain access to the document by any means other than by way of that production, and it makes little sense to impose an arbitrary limit on the use of the document by the litigant and counsel which does not apply to others attending at the hearing or reading or hearing reports.

14. This issue as to the duration of the undertaking has not been decided definitively in Ontario, but the Court of Appeal in *Goodman* v. *Rossi, supra*, expresses support for the dissenting reasons in *Home Office* v. *Harman, supra*, and suggests that the implied undertaking should be limited as it has been by the change of the rules in the United Kingdom.

15. For all of these reasons, I have concluded that the implied undertaking which presently applies to limit the use to which the USWA may put the document which has been produced to its counsel, will not so limit its use once the agreement of August 15, 1997 has been introduced into evidence in the course of these proceedings.

16. Is there any other basis on which I can and should restrict the use to which the document can be put outside of these proceedings, or the extent of its disclosure in the hearing?

17. Section 9 of the *Statutory Powers Procedure Act*, R.S.O. 1980, c. 484 ("the SPPA") establishes that oral hearings shall be open to the public except where the tribunal determines that matters involving public security, intimate financial or personal matters, or other matters where the need to avoid disclosure outweighs the principle of public hearings, ought not to be disclosed. In these circumstances, a tribunal may hold a hearing *in camera*.

18. The circumstances in the present case do not justify the exclusion of the public from the hearing when the document which is alleged to be a voluntary recognition agreement is being considered. Certainly the issues before me do not raise matters involving public security or intimate financial or personal matters, and I am satisfied that the concerns of the UFCW about use by the USWA of the information contained in the agreement, for campaigning and propagandizing, do not establish an exceptional interest in non-disclosure sufficient to meet the requirements of section 9 of the SPPA.

19. Outside of the provision for the holding of hearings closed to the public which is contained in the SPPA, the Board has a general power, pursuant to section 109(16) of the Act, to establish its own practice and procedure, which might well lead the Board in an appropriate case to impose restrictions on the disclosure of evidence and/or documents, or to limit the use of such material outside proceedings before the Board. Certainly the Board has and will undoubtedly continue to edit sensitive documents which disclose personal information about third parties which is not required for the adjudication of the issues in a particular matter. One can also imagine that in an appropriate case the Board might restrict the use to which the parties could put certain evidence in a particular case because of a concern that labour relations harm would otherwise result.

20. In the present case, however, no compelling reason for the imposition of such a restriction has been offered, other than the desire of the intervenor and responding party to shelter the details of the arrangements between them from scrutiny. The main concern of the UFCW, as described by their counsel, is that excerpts from the August 15, 1997 document will be taken out of context and publicized by the USWA in a way which is prejudicial and misleading. Frankly, the best way to ensure that this does not occur is not to impose conditions of secrecy on the document, but rather to deal with it openly and fairly in the course of the hearing, and in the Board's decision, in order that an objective characterization of its significance may be reported and discussed. Counsel for the UFCW argued that restricting the document *outside* the hearing would have no impact on the holding of a fair hearing by the Board, as the Board could ensure that all parties were able to rely upon whatever portions of the document were found to be relevant, and would be able to review the whole document for its deliberations. However, holding a fair hearing is not just about the conduct of the hearing, but also about the *appearance* of fairness. Where the parties intend to rely to a significant degree upon a particular document, and the Board will need to interpret it in order to reach and to explain its conclusions, an atmosphere of secrecy around its contents is inconsistent with the goal of transparent decision-making and will not encourage support for the Board's processes.

21. In the circumstances of this case I see no reason to make any particular order limiting the extent to which any document admitted into evidence can be disclosed, or the use to which it can be put, and the motion of the intervenor is therefore denied.