

IN THE MATTER OF AN ARBITRATION

BETWEEN:

UNITED STEELWORKERS OF AMERICA, Local 5890

(Hereinafter referred to as the "Union")

AND

IPSCO SASKATCHEWAN INC.

(Hereinafter referred to as the "Company")

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A W A R D

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SOLE ARBITRATOR: Kenneth A. Stevenson, Q.C.

COUNSEL: Bill Craik  
On behalf of the Union

Larry LeBlanc  
On behalf of the Company

## A W A R D

This Arbitration Hearing commenced on October 27, 1998. On November 27, 1998, I issued an Interim Award in respect of the Company's preliminary objection to the arbitrability of the Grievance.

The Hearing reconvened on March 3, 1999. At that time the parties agreed that they would deal only with the liability portion of the grievance and in the event that the Board determined that there had been a breach of the Collective Agreement, the Board would remain seized of this matter for the purposes of determining the appropriate remedy in the event the parties were unable to reach an agreement.

### RELEVANT BACKGROUND

On July 31<sup>st</sup>, 1996, the Company discovered what it believed to be three (3) marijuana plants growing in a garden plot on the Company's premises. The garden plot was in the use of the Grievor. On August 1<sup>st</sup>, a disciplinary meeting was held at the Company premises. At this meeting, the Grievor acknowledged his use of the garden plot; however, he denied any knowledge of the marijuana plants. The Company terminated the Grievor's employment as of August 1<sup>st</sup>, and on August 2<sup>nd</sup>, wrote a letter to the Grievor confirming this termination. The substantive portion of the letter reads as follows:

"This letter will confirm your termination from IPSCO on August 1, 1996.

In our opinion, you violated Work Rule #1, *'the possession and/or use of alcohol and/or narcotics on Company property, or reports to work under the influence of alcohol and/or narcotics, is strictly prohibited'*, by growing marijuana plants in your IPSCO garden plot."

On August 2, 1996, the Grievor filed a Grievance in the following terms:

"Particulars of Grievance"

NATURE OF GRIEVANCE: I grieve under the C.B.A. that I have been discharged without just cause. I feel the Company has been excessive and unreasonable in issuing this discipline"

ARTICLE NUMBERS: 3.02; 5.01, 5.03, the company's Rules of Employee Conduct Book, but not excluding any other provisions of the C.B.A., or applicable legislation.

SETTLEMENT REQUESTED: I wish to be re-instated immediately with no loss in seniority and that I be made whole with regards to pay and benefits, and that any discipline be removed from my employment record."

On September 12<sup>th</sup>, following the processing of the Grievance through the grievance procedure, the Company advised Mr. Gushel that the termination would stand in regard to the violation of Work Rule #7.

**RELEVANT PROVISIONS OF THE COLLECTIVE AGREEMENT:**

The Interim Award referred to a number of relevant provisions including Article 5.01, 6.02, 6.04 and Article 7.01 and 7.06. Other relevant provisions of the Collective Agreement include the following:

**Article 3.02 - Management**

Such management function shall be:

- (b) To maintain discipline of employees, including the right to make reasonable rules and regulations, providing however, that any dispute as to reasonableness of such rules and regulations or any dispute involving claims of discrimination against any employee in the application of such rules and regulations shall be subject to the grievance procedure of this Agreement.
- (c) To discharge, suspend or discipline employees for just and reasonable cause, and also hire, transfer, promote, demote and to assign employees to shifts with due regard to seniority in Article 12 of this contract.

### **Article 5.03 — Reasonable Discipline**

The Company and the Union agree that disciplinary penalties shall not be imposed unreasonably or unjustly. Any warning and/or penalty (excluding dismissals) shall be cleared from the employee's record after a period of twelve months

In the event of a reinstatement, the employee's record will be cleared after 12 months from the date of return to work.

### **Article 5.04 — Employee Reinstatement**

If it is determined or agreed at any steps in the grievance procedure or decided by an arbitrator that an employee has been discharged unjustly, management shall reinstate the employee without loss of seniority or regular wages or make other arrangements as to compensation which is just and equitable in the opinion of the parties.

In addition, the parties relied upon and the Board has considered the IPSCO Work Rules and Regulations, including Work Rule #7:

- "7. The possession and/or use of alcohol and/or narcotics on company property, or reporting to work under the influence of alcohol and/or narcotics, is strictly prohibited.

Reference was also made to the discipline procedure, including the following part thereof:

"Disciplinary action at IPSCO consists (1) written warnings; (2) suspension from work, without pay, for various lengths of time; (3) dismissal.

In most instances of misconduct, disciplinary action will progress through these stages. Nevertheless, employees should be aware that certain acts of misconduct (such as, but not limited to, possession and/or consumption of alcohol and/or narcotics on company plant property, theft, or deliberate damage to property, falsification of company records and certain safety rule violations)\_"

The Work Rules are the rules of the Company and are not subject to negotiation and agreement with the Union.

## REVIEW OF THE EVIDENCE:

The Grievor, Wesley Gushel, began his employment at IPSCO approximately January, 1991. During the course of his employment, Mr. Gushel has worked in the pipe plant. In May, 1996, Mr. Gushel was laid off from his employment and did not return to work prior to his termination on August 1, 1996. The Company operates a steel making operation on the outskirts of the City of Regina. Raw steel is manufactured from scrap; it is manufactured into coils. The Company also has a large pipe operation. For some years now, the Company has set aside a fenced enclosure on its property which contains approximately forty (40) garden plots. These plots are assigned to employees who wish to grow a garden. The enclosure is locked and keys are provided to those employees who have garden plots.

On July 31<sup>st</sup>, Jack Mathieson, Director of Safety and Administration Services for the Company, received information from an IPSCO employee that he believed marijuana plants were growing in the garden enclosure area. Mr. Mathieson attended the garden area and observed three (3) plants which he believed to be marijuana. Subsequent investigation determined that the plot had been assigned to a Mr. Eisler, however, it was learned from Mr. Eisler that the plot had been turned over to the Grievor. The Grievor, in addition to the Eisler plot, had been assigned his own plot which abutting the Eisler plot. On July 31<sup>st</sup>, Mr. Mathieson photographed the marijuana plants and a portion of the plots being used by the Grievor. The Company called in the RCMP to confirm that the plants were in fact marijuana and to have the RCMP remove the plants.

On August 1<sup>st</sup>, the Grievor, who was on lay off, was contacted by Company personnel who requested that he attend a meeting at the Administration Building on Company property. Mr. Gushel was not advised of the reason for the meeting. On August 1<sup>st</sup>, Mr. Gushel attended at the plant. Prior to attending the meeting in the Administration Building, Mr. Gushel went to the garden enclosure and attended at his garden plot.

The August 1<sup>st</sup> meeting was intended by the Company to be a discipline meeting. Present at the meeting, on behalf of the Company were Mr. Mathieson and Grant Shortridge, the Director of Personnel for the Tubular Products Division. In addition to Mr. Gushel, Mr. Paul

Amon, a Shop Steward, was present. At the August 1<sup>st</sup> meeting, Mr. Gushel advised that he had gone to check his garden plot. In the course of the meeting, the Grievor acknowledged that he was using the Eisler plot and that he and his daughter were caring for the same, although he advised he had not attended upon it for some time. During the course of the meeting, the Grievor was advised that the Company had found marijuana plants growing on the Eisler plot and that the RCMP had been informed. The Grievor advised that it was not his marijuana.

The Company's evidence is that the August 1<sup>st</sup> meeting was held for the purpose of investigating this matter to determine who had the actual use of the garden plot. As a result of the meeting the Company was satisfied that it was the Grievor's garden growing on the Eisler plot. Following the August 1<sup>st</sup> meeting, and confirmation that the plot was under Mr. Gushel's control, the Company decided to terminate Mr. Gushel and, in this regard, sent him the termination letter of August 2<sup>nd</sup>.

Mr. Mathieson tendered in evidence three (3) polaroid photographs taken on July 31, 1996. The photographs show the marijuana plants growing among other garden produce and depict the general nature of the subject plots. Mr. Mathieson's evidence is that the marijuana plants were approximately two (2) feet or slightly taller. Mr. Mathieson believed them to be growing among the cabbage. In Mr. Mathieson's opinion, the plot was very well taken care of with no sizable weeds; the only weeds being in the range of 2 to 4 inches in height. Mr. Mathieson testified that he walked around the remainder of the garden plots and did not find any other marijuana plants growing.

Michael Krushlucki gave evidence on behalf of the Grievor. In July 1996, Mr. Krushlucki was President of the Local; he has worked for IPSCO for approximately 32 years. Mr. Krushlucki testified that within 3 or 4 days of Mr. Gushel's termination, he attended upon the subject garden plots and took a video tape to show the condition of the Eisler and Gushel plots as well as other parts of the garden. Mr. Krushlucki describes, and the video depicts, areas where the garden plots are well maintained, areas that are not so well maintained and others which are poorly maintained. That portion of the video tape, which Mr. Krushlucki describes as depicting portions of the plots controlled by the Grievor, depicts plots which are not particularly well maintained, and shows some weeds in excess of 3 feet in height.

I also heard evidence from Scott Mackie who had a garden plot very near the Gushel plot. Mr. Mackie has worked at IPSCO for 9 ½ years in the Spiral Pipe section. Mr. Mackie said he believed that Mr. Gushel was in his second year of having a garden plot and he knows Mr. Gushel through work. In his opinion, Mr. Gushel never really maintained his garden very well and was not there very often to weed. He acknowledged that a few times Mr. Gushel may have asked him to turn the water on. He indicated that there were times when you could not see the vegetables for weeds. This wasn't uncommon in many of the plots. In his opinion, the Gushel plots, by the end of July 1996, were a mess with weeds which were thick and close to the height of the table.

Mr. Mackie testified that in the Summer of 1996, he had seen marijuana plants in the garden enclosure. These plants were not in the Eisler or Gushel plots, but were on plots that were two or three removed from the Grievor's plots. Mr. Mackie's evidence was that he noticed these marijuana plants in mid to late June when they were approximately four inches tall. Mr. Mackie was initially reluctant to touch them, but on reflection, decided it was a bad idea that they should be left there. He went back with the intention of pulling the plants out, however, when he returned, the plants were gone. He testified that he did not see any other marijuana plants in the garden compound.

Mr. Ivan Pierce was called to give evidence on behalf of the Grievor. Mr. Pierce has worked at IPSCO for approximately 11 years and is employed as Yard Maintenance Operator. He is a friend of Mr. Gushel; he testified that he assisted the Grievor in the preparation and planting of the garden which he believed was done in the spring at the time others were planting. He was aware that the Grievor had two plots. Mr. Pierce testified that in June or July, he would go to the plots on most days before or after his shift and water the plots. He indicated that he would be at the plots between 15-20 minutes holding the hose and watering the plants; he says that he never observed any marijuana plants. Mr. Pierce testified that he never helped weed nor did he weed the plots. Mr. Pierce says that after the Grievor returned from vacation, he would have returned the garden compound key to Mr. Gushel. Mr. Pierce said that he never planted any marijuana and never saw any marijuana plants growing.

**COMPANY POSITION:**

It is Mr. LeBlanc's position that the evidence establishes that it is more likely than not, that the Grievor grew or allowed the marijuana to be grown in his garden plot. The Company submits that the cultivation of marijuana on its property is a violation of Work Rule #7 and further, that no work rule or code of conduct is required to permit the Company to discipline an employee for using its property to produce or grow an illegal substance. It is the Company's position that in the circumstances, dismissal was an appropriate and reasonable discipline.

The Company submits that the evidence establishes that the Grievor was growing or permitting the growth of marijuana in a garden plot on Company property. The Company says that the garden plot was under the Grievor's control and was managed and attended to by the Grievor. Mr. LeBlanc submits that having regard to the size of the marijuana plants on July 31, the evidence of the rate of growth and the fact that the Grievor admits to having worked in and hoed the plot near the end of June 1996, this Board should conclude that the Grievor had to have known about the presence of the marijuana plants. Mr. LeBlanc invites this Board to consider the relatively clean nature of the plot as evidenced in the Company photographs and the evidence of Mr. Mathieson that the weeds were only in the range of 2 to 4 inches in height. Mr. LeBlanc submits that the fact that the Grievor first attended the garden plot, prior to his attendance at the Disciplinary Meeting on August 1<sup>st</sup>, should lead to an inference of knowledge and a conclusion that Mr. Gushel went to check on the marijuana plants prior to attending the meeting at the Company's request.

**UNION POSITION:**

Mr. Craik submits that the Company has not established any breach of the Collective Agreement nor conduct on behalf of Mr. Gushel deserving of discipline. Mr. Craik submits that there is no clear and cogent evidence to satisfy the Board that Mr. Gushel either grew or knew that marijuana was growing in the plot. The Union acknowledges as a fact that there were three marijuana plants growing in the plot assigned to Mr. Gushel. The Union submits that the fact that these were growing in a plot assigned to and being used by Mr. Gushel for the purpose of



growing his garden, does not establish his knowledge of the presence of marijuana plants in these circumstances. Mr. Craik says that this Board must consider the fact that there were 40 garden plots assigned to employees, none of whom would have exclusive control over any plot. At least 40 people would have access to the garden plots. In addition, others who would accompany and assist in managing the plots, would have access. Mr. Craik points out that members of the public and other employees of IPSCO also have access to the general area of the garden compound. The Union notes that the marijuana plants were found to be growing on a plot which was next to a portion of the perimeter fence.

Mr. Craik asks the Board to consider the evidence relating to Mr. Gushel's attendance at the plot. Mr. Gushel was on lay off since May and by his evidence, had last been at the garden plot approximately the end of June. Mr. Gushel was absent from the City on vacation for the nights of July 7 through 22 inclusive. Mr. Craik also submits that this Board must consider Mr. Gushel's denial of knowledge of the marijuana plants when confronted with their existence at the meeting held on August 1<sup>st</sup> and his continued denial of any knowledge of the existence of the marijuana plants in his evidence at the Hearing. Mr. Craik also argues that, in light of the evidence of Mr. Gushel's operation of a strip club and the associated police surveillance of his club and his activities, along with the fact that Mr. Gushel had a sizable criminal record associated with narcotics over 20 years ago, this Board, in considering the probabilities, should consider the probability that Mr. Gushel would knowingly engage in the cultivation of marijuana in such a public manner. Mr. Craik submits that the Company has failed to establish that Mr. Gushel had any knowledge that the marijuana plants were growing in the plot. He says that in light of the fact that many other people had access to the plots and Mr. Gushel was not seen, at any time, attending or managing the marijuana plants, that this Board should conclude that the evidence does not establish that it is probable that Mr. Gushel grew or allowed the marijuana to be grown in his garden plot.

Mr. Craik submits that the Company's actions were premature. He says they jumped to a conclusion that because the marijuana plants were growing on Mr. Gushel's plot, they were there as a result of the act of Mr. Gushel or with the knowledge of Mr. Gushel. Mr. Craik submits such a conclusion cannot be reached in the absence of evidence connecting Mr. Gushel to the plants in any active way or the establishment of temporal relationship. He says that the

uncontradicted evidence is that Mr. Gushel had not been to the garden plot for approximately 4 to 5 weeks prior to the discovery of the plants on July 31<sup>st</sup>. It is Mr. Craik's position that for Mr. Gushel to have possession of the marijuana plants, the evidence must establish some control over the plants or knowledge that the plants were growing in the Company plot.

**DECISION:**

When the Company terminated Mr. Gushel's employment, they did so on the basis that he had breached Work Rule #7 by having possession of a narcotic on Company property, and in particular, by growing three marijuana plants in his assigned garden plot on Company property. The Company submits, that no Work Rule or code of conduct is required to say that an employee could not use Company property to produce or grow an illegal substance.

On July 31, the Company found three marijuana plants growing in its garden compound on a garden plot which was being used by Mr. Gushel for the purposes of growing a garden. The evidence is that Mr. Gushel attended to the garden plot for preparation, planting and near the end of June, on one occasion, for the purposes of hoeing and weeding. Mr. Gushel exercised some control over the plot. While absent from the City on vacation, Mr. Gushel gave the key to the compound to Mr. Pierce so that he could attend to water the Grievor's garden. Mr. Mackie testified that he had been asked by the Grievor to water the plots for Mr. Gushel. The Company asserts that because of the management and control of the plot and Mr. Gushel's admission that he hoed and weeded the plot at the end of June, the Board should conclude that the marijuana plants were in the plot on the occasion when Mr. Gushel hoed at the end of June. The Company says that this conclusion is reasonable having regard to the fact that the marijuana plants were 2 feet or greater in height and having regard to the evidence on the growth rate of marijuana. The Company also asks this Board to infer that having regard to the condition of the plot including being reasonably clean and the relatively small size of the weeds, the plot must have been tended or managed shortly before July 31<sup>st</sup>, and that by inference, this Board should conclude that the management or weeding was performed by Mr. Gushel.

This Board received conflicting evidence as to the condition of the subject plot. The Company photographs taken on July 31 show, and the evidence of Mr. Mathieson is, that the plot

was relatively clean and reasonably well maintained with only small weeds growing. On the other hand, the evidence of Mr. Krushlucki and the video taken by Mr. Krushlucki within a week of July 31<sup>st</sup> show a garden patch with many weeds and weed growth of a substantial size.

This Board must decide whether or not the Company has established, on the balance of probabilities, that the Grievor has committed conduct worthy of discipline. When terminating the Grievor's employment, the Company relied upon its conclusion that Mr. Gushel was in possession of three (3) marijuana plants growing in a garden plot which was in the actual use and management of Mr. Gushel. This Board is satisfied that the Company has established that the plot was in the use and management of the Grievor for the 1996 growing season and that on July 31<sup>st</sup>, marijuana plants were found growing in that plot. The Board must determine if the Grievor had possession of the marijuana plants.

The Company alleges that the Grievor had possession of the marijuana plants through his control, management and use of the garden plot. Possession in ordinary daily language and use involves an element of ownership or control. Possession may be by having something personally or by knowingly having it in the possession or control of a third party. The Grievor had possession of the plot in the Summer of 1996. The Grievor had the right to exercise control over it and did so by growing a garden. It is clear that the Grievor did not have exclusive access to the garden plot nor the practical right to exclude others from the plot in any meaningful way. There were forty plots within the garden compound. There was a key for each plot; each key would give access to the employee, as well as any others that the employee may decide to have with him or to give the key to. There was obviously an unknown number of people who had access to the garden plot. No record of those who accessed the garden enclosure was maintained.

It is the Company's position that the Grievor is in possession of all that growing on the plot. Alternatively, that in the circumstances, this Board should conclude that the Grievor knew the marijuana plants were there as a result of his management and attendance on the garden plot, or that Mr. Gushel permitted the marijuana to be grown on his plot. For this Board to conclude that the Grievor was in possession of the marijuana growing on the plot, the Company must satisfy the Board, on the balance of probabilities, that the Grievor knew that the marijuana was

growing there. Such knowledge might result from personally planting it, directing others to plant it, or by maintaining or cultivating the marijuana after he became aware of its existence.

There is no direct evidence that the Grievor exercised any control over, or had knowledge of the existence of, the marijuana plants. The Company submits that the evidence is more probable and consistent with a conclusion that Mr. Gushel had knowledge of the marijuana, than with a finding that Mr. Gushel did not know about the marijuana plants. The Company submits that this conclusion or inference ought to be drawn from the facts proven. Specifically, the Company refers the Board to the Grievor's work in the plot at the end of June, the condition of the garden plot, including the size of the marijuana plants on July 31<sup>st</sup> as well as Mr. Gushel's attendance at the garden plot prior to meeting with management personnel on August 1, 1996.

The Company referred me to a number of cases of circumstances where employees had been found in possession of narcotics in the work place. In *Re Canadian National Railway Co. and Canadian Automobile Workers, Local 100* (1993), 33 L.A.C. (4<sup>th</sup>) 17, Arbitrator Picher concluded in the circumstances of that case that the suspicious conduct of the employees without explanation was more consistent with the company's observations of possession and use of marijuana. In those circumstances he found that the employees had, in fact, possessed a marijuana cigarette, notwithstanding the employees' denial. In *Re McDonnell Douglas Canada Ltd. and Canadian Automobile Workers, Local 1967* (1990), 14 L.A.C. (4<sup>th</sup>) 235, Arbitrator Gorsky concluded that the company had established a *prima facie* case and that in the circumstances, the evidence of the grievors could not be believed and was not consistent with the probabilities. In the *McDonnell Douglas* case, the two employees had been observed acting in a very suspicious manner including locking themselves into a crib area by an external padlock and having exited from a door which could only be opened from the inside. In light of the suspicious conduct of the grievors and the precautions which were taken to ensure that they would not be discovered, along with the smell of marijuana, the Arbitrator concluded that the employees' explanation for the reason for entering was contrived and that the more likely conclusion was that the grievors had been smoking marijuana.

The Union argues that there is no evidence that Mr. Gushel had possession of or exercised control over the marijuana plants. They submit that the evidence given by the Grievor

establishes that he had no knowledge of the marijuana plants. The Union further submits that any circumstantial evidence does not support a finding of possession. Mr. Craik argues that no inference can be drawn from the Grievor's work in the plot at the end of June, nor does the condition of the plot or size of the marijuana plants lead to a logical inference of knowledge; Mr. Craik says no inference can be drawn from Mr. Gushel's attendance at the garden plot on August 1<sup>st</sup>.

The Company's onus is to establish the Grievor's possession of the growing marijuana plants; this must be established on a balance of probabilities. On all the evidence, this Board must be satisfied to a reasonable degree of probability; if it is concluded that it is more probable than not that the Grievor had possession of the marijuana plants, then the Company will have satisfied the burden of proof. In the absence of direct evidence of the Grievor having possession of or exercising control over the marijuana plants, it is open to the Board to find possession or control from circumstantial evidence or by inference from established facts. It is open to this Board in its common sense consideration of and reasoning about the established facts to conclude or infer that the Grievor knew of the existence of the marijuana plants.

In its determination of whether or not the Company has satisfied its onus, the Board must examine all of the evidence to determine if it establishes any other reasonable explanation for the presence of the plants other than that the Grievor knew of their existence. The Grievor has consistently denied any knowledge of the marijuana plants. This denial was given when confronted at the investigation meeting and at the Hearing. Mr. Gushel testified that he had not been at the plot since the end of June. The Company's position is that Mr. Gushel's evidence is not credible and should not be accepted. Mr. Gushel was not shaken on cross-examination. The determination of credibility of evidence must be made by examining its consistency with probabilities of the surrounding conditions; is the evidence in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions?

The Board received conflicting evidence as to the level of care and management of Mr. Gushel's plots on July 31<sup>st</sup>. I am satisfied that the photos taken by Mr. Mathieson accurately depict the condition of the plot at the time; these conform with Mr. Mathieson's observation and

description of a plot as one which received a reasonable level of care. The video which Mr. Krushlucki took was taken a number of days later. It is well known that weeds and plants can grow very rapidly in Saskatchewan. I am not satisfied that conditions would necessarily be the same after several days of growth at the beginning of August. The Mathieson photos show a garden plot which is reasonably well cared for and tended; there are no large weeds visible among the garden produce in the area where the marijuana plants were found. On the evidence, I conclude that the condition of Mr. Gushel's plot, in the area where the marijuana was growing, is consistent with the garden having been tended and the weeds controlled more recently than at the end of June.

The Grievor's evidence is that his last attendance at the garden plot prior to August 1<sup>st</sup>, was at the end of June. This may seem like a lengthy period for a gardener to not attend his plot. However, Mr. Gushel had been laid off from his employment with the Company since May, he had a garden patch nearer his residence, he was fully involved in operating his strip club enterprise, and absent on vacation between July 7<sup>th</sup> and 23<sup>rd</sup>. Mr. Gushel asked Mr. Pierce to water the plot during his vacation. Mr. Mackie testified that he watered Mr. Gushel's plot. This evidence is consistent with the Grievor's evidence that he had not been to the garden plot since approximately the end of June. Mr. Gushel's evidence in this regard is credible. In assessing Mr. Gushel's credibility, I have also considered his evidence that as the owner of a strip club, he believes he is regularly under police surveillance. This is not an unreasonable belief. Mr. Gushel has a substantial drug-related record from over twenty years ago; he testified, and it seems reasonable to believe, that it would be extremely foolish for him to grow marijuana in a place where its presence would be obvious to many and it easily could be associated with him. In assessing probabilities, I am mindful of the fact that an unidentifiable number of employees, their friends and families have access to the garden compound for the purposes of tending the plots. Other IPSCO employees also would have access for the purpose of maintenance of the garden compound and removal of plant materials.

× I am unable to infer from Mr. Gushel's attendance at the garden plot on August 1<sup>st</sup> that he necessarily went for the purposes of checking on the marijuana plants prior to the discipline meeting. The Grievor testified that as he had arrived early for the scheduled meeting, he went to check on his garden plot to see if any of the produce was ready. I find that the Grievor's

evidence that he went to check on his garden to be at least as consistent with that probability as with the probability that he went to check the marijuana plants. The Grievor's evidence is that he had not been at the plot for approximately 4 to 5 weeks including a two week absence from the City on vacation. It is clear from the Grievor's evidence that he was a person who enjoyed gardening. However, he like many gardeners, seemed to be more interested in the planting and harvesting than in the regular maintenance of the plot. I cannot infer that the Grievor's attendance at the plot on August 1<sup>st</sup> was evidence of knowledge that the marijuana plants were growing in the garden plot.

Both Mr. Mackie and Mr. Pierce admitted being at Mr. Gushel's garden in the period preceding July 31<sup>st</sup> for the purpose of watering. Each denies seeing the marijuana plants or doing any weeding. Mr. Pierce regularly hand-watered the plots while Mr. Gushel was on vacation in July. If the marijuana was growing during this time, one must wonder how it is that he did not see the marijuana plants. The Board was not favourably impressed by the evidence of either Mr. Mackie or Mr. Pierce. Neither of these witnesses gave evidence in a direct manner. Mr. Pierce's evidence that he never saw the marijuana plants in the period shortly before July 31<sup>st</sup> does not seem consistent with the probabilities having regard to the times during which he was admittedly hand-watering at the garden plot. The Board wonders as to the nature of any weeding or cultivation either of these witnesses may have given to the garden plot. However, even if either of these witnesses was aware of the presence of the marijuana plants, there is no evidence that such awareness was shared with Mr. Gushel.

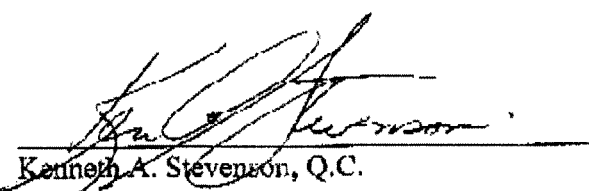
✓ This Board cannot conclude that Mr. Gushel had control over the plot such as to permit this Board to hold, on the evidence presented, that he must have known what was growing in the plot, and could therefore be found to have the knowledge necessary to establish possession of the marijuana plants. While it is useful to review other authorities, each case must be decided on its own factual circumstances. In this case, the Company has been unable to satisfy this Board that Mr. Gushel knew that the marijuana plants were growing in his garden plot on July 31<sup>st</sup>. There is no evidence of Mr. Gushel attending upon, cultivating or managing the marijuana plants, nor is there any suspicious circumstances or evidence which would lead this Board to conclude that Mr. Gushel must have known of the existence of these marijuana plants. This Board is not satisfied on the balance of probabilities that on July 31<sup>st</sup>, 1996, Mr. Gushel was in possession of

or growing the 3 marijuana plants . The Company has not established that Mr. Gushel breached Work Rule #7, nor that he was illegally growing marijuana plants in the garden plot on July 31<sup>st</sup>.

✓ For these reasons, the grievance is allowed. Accordingly, Wes Gushel is to be reinstated not later than April 1, 1999 without loss of seniority and with his discharge and all reference to this discipline to be removed from his record. As agreed by counsel, I shall remain seized for the compensation and remedial aspects of this Award should the parties be unable to agree on compensation or implementation.

Mr. LeBlanc requested an order requiring the Grievor to produce documents relevant to the damage aspect of the Hearing. These documents were identified in Mr. LeBlanc's January 26, 1999 correspondence to Mr. Craik. On March 3<sup>rd</sup>, the parties agreed to split the issues of liability and damages. In light of my Award, document production will be relevant. It is my understanding that Mr. Craik is prepared to make production of some of the requested documents as the same become available, but some issue as to production may remain. In the event the parties are unable to agree on document production, I will convene the Hearing by telephone to fully consider the issue and make such order for production as may be required.

DATED at the City of Saskatoon, in the Province of Saskatchewan this 19<sup>th</sup> day of March, 1999.

  
Kenneth A. Stevenson, Q.C.  
Chairman.