0290-83-U International Woodworkers of America Local 2-69, Complainant, v. **Consolidated Bathurst Packaging Ltd**., Respondent

BEFORE:George W. Adams, Q.C., Chairman, and Board Members W. H. Wightman and B. F. Lee.

***APPEARANCES**: Paul J. J. Cavalluzzo, David I. Bloom and Brain Herlich for the complainant; and Michael Gordon and Ronald Gruber for the respondent.*

DECISION OF GEORGE W. ADAMS, Q.C., CHAIRMAN; September 30, 1983

1. This is a complaint filed under section 89 of the *Labour Relations Act* alleging violation of sections 15, 41, 50, 64 and 66 of the Act. Essentially, the matter centres on an allegation that the respondent violated the *Labour Relations Act* by failing to disclose during bargaining that a particular plant was to be closed. There is much in common between the parties.

2. The complainant is the bargaining agent for all employees of the respondent at its Hamilton plant with the exception of foreman, those above the rank of foreman, office staff, cafeteria staff, art department staff, design department staff, technical and development department staff, industrial engineering department staff, production schedulers, quality control department staff, waste co-ordinators and watchmen. Until April 26th, 1983 the respondent operated five plants in Ontario, namely Etobicoke, Hamilton, Whitby, St. Thomas and Brantford. Various locals of the International Woodworkers of America (I.W.A.) hold the bargaining rights at all five locations. The practice has been for the locals at Etobicoke, Hamilton, Whitby, St. Thomas, Ontario; St. Laurent and Montreal East, Quebec; to bargain jointly for the negotiation of renewal collective agreements on behalf of their various members. The collective agreement between I.W.A. Local 2-69 and Consolidated Bathurst, Hamilton expired on December 31st, 1982. On or about November 2nd, 1982, Mr. W. Pointon, SecretaryTreasurer of the I.W.A., Regional 2, wrote to Mr. R. Gruber, Manager of Industrial Relations, Consolidated Bathurst, in which he expressed the desire of the union to open negotiations. Negotiating meetings took place on December 15th, January 4th, 5th, 6th and 7th. Present at these meetings, on behalf of the union, were J. M. Bedard, D. Chaisson, W. Pointon, P. Collin, and all of the members of the various committees from the other various local unions involved in the said negotiations. Present on behalf of the company were Mr. Gruber and all of the plant managers. A memorandum of settlement was reached on January 13th, 1983. During the negotiations the provision in the collective agreement regarding plant closure and severance pay was not changed from the previous agreement. At no point during these negotiations did the company indicate that the Hamilton plant would or might be closed during the term of the collective agreement. In its demands, the union sought the following provision with respect to plant closure:

> In the event the company decides to cease, in whole or in part its operation at the location covered by this agreement, regular employees affected will be given a minimum notice of two months. A regular employee holding seniority rights, whose employment with the company ceases because of plant closure, in whole or in part, will be paid a severance allowance based on the formula of two weeks' pay for each year of service or fraction thereof. The allowance will be paid upon severance.
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> In the event the company relocated any operation, in whole or in part, the employee so affected shall have the right to exercise full seniority and recall rights in the new location. It is understood that this particular provision shall not apply to any Consolidated Bathurst operation currently under agreement with the International

Woodworkers of America.

Any employee affected by any closure outlined above shall have the right to take a job elsewhere following closure announcement and at the same time, retain his eligibility to all entitled severance pay which shall be paid to him immediately upon his departure.

In the event of a lockout or a strike, and the company decides to close plant, severance pay will be paid.

This provision, however, was unilaterally dropped from the demands of the union during bargaining and the following provision of the collective agreement was simply renewed:

Article 18.26 Plant Closure

In the event of the planned closure of the entire plant, the company will notify the union as soon as possible of such plans but in any case not less than two (2) months prior to the closing date.

18.27 Eligible employees terminated as a result of the plant closure will receive severance pay as follows:

(a) An eligible employee with one (1) to ten (10) years of service will receive twenty (20) hours pay for each year of service at the employee's current hourly rate.

(a) An eligible employee with more than ten (10) years of service will receive twenty (20) hours pay for each year of service up to and including ten (10) and forty (40) hours pay for each additional year of service at the employee's current hourly rate to a maximum of one thousand and forty (1,040) hours total severance pay.

18.28 In order to be eligible for severance pay under this Article, employees must be on payroll at the time of the announcement of plant closure, have one or more years of service and remain in the employ of the Company until the closing of the plant or until the employee's services are no longer required. Employees eligible for any early retirement benefits proposed by the Company will be entitled to either the early retirement benefit or the severance pay.

18.29 Employees eligible for severance pay as provided by Government legislation will receive either the Government legislated provision or the Company severance pay provision, whichever is greater.

3. On or about March 1st, 1983, at about 2:00 p.m. at a meeting with the union committee, Mr. Beettam, the area manager, Consolidated Bathurst, announced that the Hamilton plant would cease operations as of April 26th, 1983. The union alleges that at this meeting Mr. Beettam said that had it not been for the strike, the plant would have closed last year. The respondent takes the position that he said "had it not been for the strike the plant might well have been closed last year". Also present at the meeting on behalf of the company were Mr. Gills and Mr. Gruber. On or about March 4th, 1983, a meeting took place between Mr. Gruber, Mr. Gills and Mr. Bell and members of the union committee. The union alleges that Mr. Gruber said that if the other companies in the corrugated industry had not gone on strike that the Hamilton plant would have closed in 1982. The company takes the position that Mr. Gruber stated that the plant ..... probably would have been shut down last year had it not been for the industry-wide strike".

4. In April of 1983 The Honourable John Munro, Member of Parliament, whose riding

embraces the Hamilton plant, attempted to set up meetings between the union and the company. He also met with company representatives in Montreal. It would also appear that other politicians including The Honourable Russell Ramsay, Minister of Labour, Province of Ontario, Mr. Bob MacKenzie, M.P.P., Ann Jones, Sheila Copps, M.P.P., and Robert Morrow, Mayor of Hamilton, met with company officials with respect to the plant closing. On or about April 26th, 1983, the officers of the union sent an offer to purchase the plant to the company which was later rejected.

5. The respondent denies that any of its actions or conduct relating to the Hamilton plant closure were in violation of the *Labour Relations Act* or the collective agreement between it and the complainant. The respondent states that no decision was made with respect to the closing of its Hamilton plant until the 25th of February, 1983 and that such a decision was neither contemplated nor known at the time the company engaged in collective bargaining with the trade union. The complainant trade union takes the position that the respondent had made a decision to close the plant prior to the completion of bargaining and that it failed to disclose this information in violation of the *Labour Relations Act.* Alternatively, the complainant alleges that even if a firm decision to close the plant had not been made prior to the completion of bargaining, the respondent was under a duty to disclose its thinking with respect to the potential closing of the Hamilton plant before executing the collective agreement. Finally, the complainant submits that there is a "mid-term" duty to bargain or consult with the trade union where a decision is taken by an employer which significantly affects critical job interests of bargaining unit employees. The complainant seeks a declaration, postings in local newspapers, a make-whole remedy, an order that the plant be re-opened, a direction that the respondent negotiate with the complainant regarding the closure, that a hiring preference be given to all employees of the bargaining unit in all other facilities owned and operated by the respondent in Ontario, an order that the respondent pay moving and other expenses relating to the relocation of employees who obtain employment in such other facilities, and an order that the respondent compensate fully the remaining employees pursuant to the collective agreement until such time as the employee obtains reasonable alternative employment or the expiry of the existing collective agreement, whichever occurs first.

6. It was agreed that newspaper reporters could be called by the complainant to give the following evidence. On February 14th, 1983 the Spectator under the title "Lay off Sparks Shut-Down Rumor at Carton Plant" published an article reporting "rumors of permanent lay offs and even plant closures.. .swirling around a Hamilton factory after the lay offs of about 80 employees over the last two months". General Manager, Don Beettam is reported to have said "there are always rumors going around in the market place about one thing or another" and "I am not in the Corporate Head Office. I am just responsible for two plants in the market". Again, on March 2nd, 1983 the Spectator, under the title "140 More Jobs to Disappear" published an article reporting the announcement of the plant closure slated for April 26th. The article, in part, read:

> Hamilton general manager Don Beettham was not available for comment, but spokesman Denise Dellaire said the cardboard box industry is plagued with overcapacity.
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> *The possibility of closing the plant has been under study for a number of months, she said.*
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> A decision has not yet been made on how the plant will be disposed of, but some of its new machinery will probably be transferred to other company plants, Ms. Dellaire aid.
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> Montreal-based Consolidated-Bathurst has seven other corrugated container plants in Canada, including three in Ontario in Etobicoke, St. Thomas and Whitby

> Some sales and office staff now employed in Hamilton will be transferred to other company facilities and other employees will be eligible for special early retirement benefits, the company said.
>
> The remainder will receive severance pay amounting to a half-week's pay for each of the first 10 years of service, and a full week's pay for each year above 10 years, up to a maximum of 26 weeks' pay.
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> Consolidated-Bathurst is currently exploring the possibilities of merging its corrugated box plants with those of MacMillan Bloedel Ltd. of Vancouver to form a new, joint-venture company, but any decision will come too late to save the Hamilton plant.
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> Ms. Dellaire said the proposed merger "has nothing to do" with the Hamilton plant closing.
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> Consolidated-Bathurst, which also makes and sells pulp, lumber and glass and plastic packing products, had a $53.4-million profit last year, down 47 percent from a $1 12-million profit in 1981.
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> The company has about 16,500 employees in Canada, the United Kingdom and Germany.
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> The Cavell Avenue plant was purchased by Bathurst Paper Ltd. in 1946 from Kraft Containers Ltd. Its name was changed in 1967 when Bathurst merged with Consolidated Paper.
>
> [emphasis added]

7. In the Spectator of March 14th, 1983 under the title "Union Wants Probe of Plant Closing" Consolidated-Bathurst spokesman, Denise Dellaire, was reported to have said that "the Hamilton plant was relatively well off in 1982 largely due to a six month strike that closed most of the corrugated box industry, except for Consolidated-Bathurst and a few independents". She went on to say "had it not been for the strike it is conceivable the Hamilton plant would have closed last spring". It was also agreed that the respondent could have called a newspaper reporter to testify that on April 29th, 1983 the Hamilton Spectator carried a story under the heading "Writs filed against Consolidated-Bathurst" in which it was reported that Walter Lopata, Vice-President of Local 2-69, said "the bargaining in bad faith charge had been filed if only to get better severance pay for union employees and possible relocation of some workers".

8. By memorandum dated December 15th, 1982 it was agreed that the company's final proposal would be subject to a ratification vote by secret ballot and that if a majority of the eligible employees in the six company plants voted to accept the company's final proposal, it would be deemed to be ratified. From the evidence of Mr. Pointon we are satisfied that there was absolutely no discussion of the economic situation of the Hamilton plant during negotiations. The complainant did not ask whether such problems existed or whether the company was contemplating major changes. The company did not raise any significant financial problem faced by the Hamilton plant or reveal any change being contemplated. Mr. Pointon testified that the trade union did not ask for financial information about the Hamilton plant because the company did not at any time during bargaining plead an inability to pay. A strike involving major companies in the corrugated industry commenced in June of 1982 and involved Domtar Packaging, MacMillan Bloedel, Kruger Paper and CIP. This strike was not settled until approximately Christmas of 1982 and there was little doubt that it would set the pattern for Consolidated-Bathurst. Thus, both the complainant and respondent wanted to know

where the industry settlement would be before they reached agreement. Accordingly, while the complainant gave notice to bargain on November 1st, 1982, the first meeting between them was not until a conciliation meeting was held on December 15th and at that meeting the complainant sought a no-board report in order to put maximum pressure on the respondent when the industry pattern became clear. The next meetings between the parties were not until the January dates referred to above and during which a memorandum of agreement was achieved. Mr. Pointon, for the union, denied being aware of rumors of a potential plant closing at the time of bargaining. It would appear, however, that in 1978 the respondent threatened to close the Hamilton plant if changes to an incentive scheme it desired were not made. Indeed, it had made a decision to close the plant after it had been struck and subsequently reconsidered this decision when the employees agreed to return to work and to accept the changes to the incentive plan.

9. The average age of the 180 employees in the bargaining unit is between 40 and 65 years of age. Over 100 of the employees fall within this category and over 110 of the employees have 20 years of service with the company. Mr. Rudy Oliverio testified that had the company revealed its intention to close the plant the trade union would have taken a completely different strategy during negotiations. Mr. Oliverio had denied that any economic problem facing the plant was raised with the trade union and in fact pointed to a letter sent by D. E. Beettam to all bargaining unit employees wishing them "a very Merry Christmas and a prosperous New Year" and stating "I have no doubt that the objectives met this year will provide a strong base for our goals in the future". Mr. Oliverio stated that the following article was published in the St. Thomas Timmes on Friday, February 4th, 1983 under the heading "Two-thirds of workers at Bathurst now laid-off". It read:

> The layoff of 39 employees at Consolidated-Bathurst Packaging Ltd. Thursday brings to 100 the number laid off during the past three weeks, said Verne Warren, president of Local 2-337 of the International Wood Workers of America.
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> Mr. Warren said the latest layoff means two-thirds of the company s 150 employees have been laid off since signing a three-year agreement with the company in January. However, he said he does not believe the agreement has anything to do with the present employment situation at the plant.
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> He said he is certain the layoffs were motivated by the overall economic outlook in general — "we're all sure of that".
>
> Bathurst employees, however, are also concerned about unconfirmed rumors the plant may merge or "pool its resources" with other financially-stricken corrugated plants in the province, he said. *As well, they are concerned that one of Bathurst's four Ontario plants is about to be closed-down, a plant located in Hamilton, Mr. Warren added.*
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> The St. Thomas plant suffered through a period of layoffs in 1982, when about 70 workers were laid off, some of whom were out of work for up to nine months, he said.
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> Mr. Warren said the company feels the latest round of layoffs will be short term.
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> Plant Manager Allan Stapleton could not be reached for comment this morning.
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> [emphasis added]

10. Around December 17th and 24th, 40 to 45 employees were laid off at the Hamilton plant and given official notice under the *Employment Standards Act.* Another large lay off was advised in a

notice dated January 19th, 1983 to be effective March 16th, 1983. Mr. Oliverio received the following notice dated March 1st, 1983 dealing with the actual closure of the plant. It reads:

> I regret to advise that the operation of our Hamilton Plant will be discontinued on or about April 26, 1983. The decision to close the Hamilton Plant was an extremely difficult one for us to make, particularly because of the effect it will have on our employees. *However, over the past several years, the viability of the Hamilton Plant has been continuously under review mainly because of increasing costs and serious loss situations. Given the present very difficult economic and business situations we can no longer continue to operate the Hamilton Plant.* Accordingly, this letter constitutes official Notice of Lay-off pursuant to the provisions of the Employment Standards Act.
>
> We are advising the Provincial Government of this situation and in an effort to assist in and help minimize the effects of the closure, we are indicating to them that we are prepared to co-operate fully in any pertinent programs that would assist our employees.
>
> Meetings will be held between now and March 11th on an individual basis with all employees to advise you of specific details and answer any questions you may have.
>
> [emphasis added]

11. The news release provided by Consolidated-Bathurst on the plant closing is also dated March 1st, 1983 and took the following form:

> Toronto — Consolidated-Bathurst Packaging Limited today advised supervisors and employees at its Hamilton corrugated container plant that the Company will close that plant permanently on April 26, 1983. Approximately 140 employees currently at work will be affected. The Ontario Ministry of Labour has been advised of the shutdown.
>
> *The closure is attributed to the fact that the operation has accumulated serious losses over the last several years. "Under present markets and difficult competitive conditions" a Company spokesman explained "and with no improvement in prospect, there is no way we can continue to operate this plant".*
>
> *The decision was inevitable, the Company said, because of mounting costs which it has not been successful in containing in spite of some $2.8 million spent over the last five years on new machinery, updating plant equipment and on major repairs.*
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> The stated number of employees affected does not include certain sales and staff positions that will be relocated to other Company facilities. A number of employees will be eligible for special early retirement arrangements and other employees will qualify for severance pay.
>
> Consolidated-Bathurst expects that the cost of the closing will be approximately $2 million. The Company has assured its employees and the government of its full cooperation in pertinent relocation or retraining programs that may be available.
>
> The plant on Cavell Avenue is one of eight corrugated container plants operated by Consolidated-Bathurst from Winnipeg to Saint-John. It was purchased by Bathurst Paper Limited in 1946 from Kraft Containers Limited.
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> [emphasis added]

12. Mr. Oliverio testified that a meeting with the company to discuss the closing lasted 30 minutes during which severance and pension entitlements of affected employees were discussed. The company indicated that it was not thinking about relocating employees at that time. Oliverio testified that he and others asked "why this plant?" and Mr. Gruber replied "if it was not for the strike the plant would have been closed last year". The parties met again on March 4th and the union indicated its willingness to grant concessions to avoid the plant closing. Mr. Gruber replied that if the company had wanted to "talk concessions" it would have approached the trade union. However, it was the decision of head office in Montreal that the matter was "final and binding". Oliverio testified that at a meeting on March 7th, 1983 with plant manager, Gills, and others, Mr. Gills said he knew of the decision to close the plant one month earlier. Oliverio further testified that the company refused to meet with both union officials and politicians on at least two occasions following the announcement of the plant closure. Since the 1978 negotiations there was the intervening negotiations leading to the 1980-1982 collective agreement. Mr. Oliverio agreed that in September of 1981, after Mr. Beettam had been appointed as the new plant manager, Mr. Beettam attended a meeting with the union and indicated his intention to "turn the plant around and make it viable". Subsequent discussions between the complainant and respondent took place with respect to a number of work practices and Mr. Oliverio agreed that considerable money had been expended on the plant during the last few years "to make it viable". Mr. Gruber took notes of these union-management meetings during the months of September and October of 1981 and January of 1982. From these memoranda it would appear that the union was concerned about "the plant going down" in September of 1981 and Mr. Beettam advised that "no decision had been made to close the plant at this time". He said that the company wanted to turn it around but if this was not possible further decisions would be made. In October of 1981 employees committed themselves to a productive work effort and raised concerns that every time something went wrong they were threatened with being put out on the street. The company repeated that the plant was in trouble and that the company was looking at a loss of $2 million. The company however agreed not to threaten employees and noted that the company was still putting capital into the plant. At the same time it cautioned that the company could not continue to throw "good money after bad". On January 8th, 1982 a joint management-labour meeting reviewed 1981 and upcoming 1982. It was reported that the plant lost $1.3 million in 1981 and the reasons related to "volume, sales, price, quality, waste, etc.". $480 thousand in capital had been invested in the same year. It was reported that capital was "tight" and that there was a 3 month moratorium on spending. There was also a one month delay on all salaried increases which was pointed to as an "indication of things to come in 1982". The company noted that productivity had improved but there were still some areas which needed improvement. By May of 1982 approximately 25 employees were on lay off and the company was operating only two shifts and on a four-day work week. However, as the industry-wide strike began in May, Consolidated-Bathurst experienced a "boom" with the Hamilton plant and all other plants operating at full three shifts-seven days a week capacity. Oliverio recalled Gruber saying during negotiations that a contract was needed because customers were watching and they were nervous. He further testified that Beettam's message in 1981 was not new in his 35 years of experience with the company. Walter Lapada testified and confirmed Oliverio's evidence with respect to the meetings of March 1st and 4th with the company. His recollection of what Beettam and Gruber said on those days was similar to Oliverio's recollection. He further confirmed the statement of Gills on March 7th, 1983. He pointed out that the company during negotiations had agreed "to fix" a number of things about the plant and that it was very slow in undertaking these items in late January and February.

13. Mr. J. E. Souccar, Senior Vice-President, North American Packaging for Consolidated-Bathurst Inc. testified. He was called by the company but subpoenaed by the complainant trade union to produce all documentation pertaining to the plant closure. The only two documents produced and said to exist were the following excerpts from a minute reporting a directors' meeting of February 25th, 1983 and a resolution dated June 16th. 1983. They read:

Excerpt from the Minutes of the Directors' Meeting held on February 25, 1983:

"It was noted that the proposal also reflected the closing of the Hamilton plant of the subsidiary, Bathurst Paper Limited. Mr. Stangeland noted that management is recommending that, because of serious losses accumulated over the last several years and mounting costs despite investment of $2.8 million over the last five years on new machinery, equipment and repairs, the Hamilton plant should be closed down. This closing, which is expected to cost approximately $2 million, is to be carried out even if the proposed joint venture does not take place and Mr. Stangeland requested approval of the board to close the Hamilton container plant on April 26, 1983. The land and buildings of the Hamilton plant will not be assets of the joint venture.

On motion, duly made and seconded, it was unanimously

RESOLVED:

THAT the closing on April 26, 1983, of the corrugated container plant of the subsidiary, Bathurst Paper Limited, in Hamilton, Ontario, is hereby approved."

CONSOLIDATED-BATHURST INC.

RESOLUTION

"On motion, duly made and seconded, it was unanimously

RESOLVED:

THAT the closing on April 26, 1983, of the corrugated container plant of the subsidiary, Bathurst Paper Limited, in Hamilton, Ontario, is hereby approved."

Mr. Souccar testified that the Vice-President and General Manager of the Container Division, Mr. Ted Haiplik, reports to him and he had come to the conclusion that the plant closure was a necessary action. Mr. Souccar testified thatMr. Haiplik advised Mr. Souccar of this recommendation in the "first or second week of February during one of their regular meetings". In terms of corporate hierarchy, Mr. Gruber reports to Mr. Haiplik, Mr. Haiplik reports to Mr. Souccar and Mr. Souccar reports to Mr. Stangeland, the President of the company. The Board of Directors meet during the last week of every month and they require four to six days' notice of the agenda. Mr. Souccar agreed with Mr. Haiplik's recommendation and in turn made the recommendation to Mr. Stangeland who then with Mr. Souccar placed the matter before the Board of Directors Meeting in the end of February.

14. Mr. Souccar is President of Domglass, a subsidiary of the respondent, and as of April 1982 was given the additional responsibilities of Senior Vice-President, North American Packaging for Consolidated-Bathurst Inc. He said that when he took over the company was experiencing a new economic environment in that the "recession was manifesting itself'. He concluded that there was a need "to rationalize in order to stem losses". Market growth and development had to be reversed. There was considerable over-capacity in the industry and increasing competitive pressures from U.S. competition. He said that the company had to make sure its over-all operations were structured to meet this competitive challenge. He testified that there were at least two loser plants in Ontario in April of 1982 and the Hamilton plant was the "bigger loser". He testified that over-capacity was absolutely clear and that he set into operation a rationalization program. He said that this plan was to be completed by September of 1982 and that he had a number of analysts working with him under the

direction of the Senior Vice-President of Corporate Planning, a Mr. Suutari. Later in his evidence he testified that it was Mr. Haiplik's responsibility to make the decision with respect to a plant closure and to in turn recommend this course of action to him. He said it was left to operating people like Ted Haiplik to come up with an analysis on how to solve the over-capacity problem. He described the over-capacity situation as one where the availability of business the company could profitably obtain was insufficient to maintain an adequate level of operation. He pointed out that the activity of the company was very capital intensive resulting in the burden of overhead being too significant. He testified that the magnitude of losses was too great. He further concluded that the short and long term needs of the Ontario market could be handled by four plants and that the company could not see how it could create enough business to maintain five plants.

15. However, no decision to close a plant had been made prior to the strike in the corrugated industry in June of 1982 and after that point in time Consolidated-Bathurst began to operate at full capacity. After the conclusion of the strike, the respondent wanted to see the effects of the following resumption of operations throughout the industry. It wanted to know what its market share would be or, stated another way, what portion of the additional work it received during the strike it would retain. Mr. Souccar testified that the company was not in a position to determine to what extent the necessary support from the market to run operations at an acceptable level in all of its plants would be until after the strike and until after it had a collective agreement. With respect to this latter point he testified that until the company had a collective agreement it would not be in a position to go to its customers and profess to be a "reliable source". He said no decision could be made until the situation had become normalized "in every sense of the word".

16. Souccar testified that once the collective agreement was executed "a number of things happened quickly". First, the recession was still there and looming longer. Secondly, it became apparent that Canadian customers had made arrangements with U.S. suppliers of some duration which contributed to them "turning off the tap to Consolidated-Bathurst quickly". Thirdly, the result was that Consolidated-Bathurst lost market support within a few weeks of the strike. Souccar testified that it took four or five weeks before the company could make the decision to close. The Hamilton plant was selected because of "the logistics of the market"; the amount of investment required to modernize it; and the relationship of market to products of each of the Ontario plants.

17. Souccar, also in 1982, began to consider desirability of affecting a merger with another packaging company in response to the industry's over-capacity. Discussions were therefore commenced with MacMillan Bloedel prior to the industry strike but delayed indefinitely thereafter. Discussions resumed in January and a merger agreement with MacMillan Bloedel was entered into in June of 1983. However, Souccar stressed that the decision to close the Hamilton plant was not tied to its decision to enter into a joint venture with MacMillan Bloedel. Discussions with MacMillan Bloedel resumed in earnest on January 13th, 1983 but no information, Souccar stressed, was passed onto the operating groups because nothing at that time had been agreed to. Souccar testified that the company, between November 2nd, 1982 and January 13th, 1983 was not considering closing the Hamilton plant because it had no need to contemplate that action having regard to the benefits to Consolidated-Bathurst flowing from the industry-wide strike. By letter dated April 6th, 1982 Mr. Souccar wrote to The Honourable Russell H. Ramsay, Minister of Labour, explaining the company's decision to close the Hamilton plant in the following terms:

> Dear Mr. Minister:
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> This letter is further to our meeting of March 31, 1983 and the major points raised in connection with the closing of our Hamilton plant.

As we indicated during our meeting, the corrugated industry has been plagued by over-capacity, lagging productivity and unsatisfactory margins for several years. Our Hamilton plant has lost money consistently and, despite considerable capital investments, the plant simply could not attain acceptable contribution levels. Several factors contributed to this situation: lack of volume, high upkeep costs, proximity to markets, transportation costs and extremely competitive market conditions, to name a few. The recession in the 1981-82 period seriously aggravated this condition and we decided that the rationalization of our Ontario capacity was desperately needed in order to meet the new, strong competitive challenge facing our company and to contain further increasing losses.

The corrugated industry strike during the latter half of 1982 provided some temporary relief and we were able to substantially increase our market share and the Hamilton plant operated at full capacity during this period.

Following the settlement of the strike, we were no longer able to sustain proper operating levels and it became urgent to once again give consideration to close permanently one of our four Ontario facilities.

That decision was made completely independent of the potential joint venture with MacMillan-Bloedel.

Early during the course of the closure, we indicated that, following the recall of employees on layoff at our other corrugated plants, we would give consideration to any Hamilton employees who made application. Furthermore, we indicated that should any employees be hired at other locations, they would be given full recognition by the company for all past service at the Hamilton plant. We understand that this same consideration has not been extended to them by the Union as far as bargaining unit seniority is concerned. Also, we indicated to representatives of both the Federal government and your Ministry that we were anxious to participate fully in a relocation committee for the employees of the Hamilton plant. However, again, we understand that such participation has not yet been fully expressed by the Union.

The issue of differences between severance and pension provisions between salaried and union employees was also raised. As explained, insofar as unionized employees are concerned, the areas of wages, benefits and working conditions are subject to negotiations and contractual agreement. Quite frequently, wages have taken precedence over benefit improvements in negotiations.

Over the past three years, unionized employees have enjoyed higher wage increases and benefit improvements than salaried employees whose benefits have remained relatively static and who are currently under a total salary freeze for a minimum of six months. We have applied both our contractual and salaried company policies on a fair and defensible basis consistent with similar instances in the past.

Concerning benefit coverage, the company cannot be expected to provide continuing benefits to severed employees. Employees currently on weekly indemnity and long term disability will continue to be fully covered which, in the case of the latter, also includes full life insurance coverage until retirement age.

Also, all employees have the option to convert their full amount of current life insurance to whole life coverage at current rates provided they exercise their options within thirty days from the date of leaving our employ. Insofar as employees qualifying for special early retirement benefits are concerned, the company will continue to pay half of the premium cost for OHIP coverage to age sixty-five.

> As discussed, this matter has been under review for a considerable period of time and action was taken only after very careful examination of all alternatives possible. As a responsible corporate citizen, we have allocated both financial and managerial resources to try to avoid this drastic step. However, given the situations outlined earlier, we have concluded that the Hamilton plant is not viable, both in the short and the long term.
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> The decision to terminate operations at the Hamilton plant has been a difficult one, particularly as it affects the employees involved but, given current legislation and practices, we feel that our policies are a fair and equitable attempt to try to minimize the impact of this decision on our employees.
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> [emphasis added]

A subsequent telex from W. I. M. Turner, Chairman and Chief Executive Officer of the respondent company, was sent to the Minister of Labour on April 26th, 1983. It reads:

> In reply to your telex of April 25th this will advise and confirm earlier communications to you that the company is not prepared to delay the planned closing of the Hamilton packaging plant. *The industry as well as ourselves are facing considerable overcapacity in the corrugated container market in Ontario due to technical innovations and other reasons that have thoroughly been discussed with you. The problem is not solved by any programs that keep the most inefficient capacity alive. Thus the company is not prepared to consider the sale of the operation as a going concern.*
>
> Furthermore the corrugators has already been sold and the other equipment is committed for other use and/or sale. Under all the circumstances, we are declining attendance at your suggested meeting on Wednesday, April 27th, commencing at 3:30 p.m.
>
> [emphasis added]

18. A final letter was sent to the Minister of Labour dated June 2nd, 1983 over the signature of T. O. Stangeland, President and Chief Operating Officer of Consolidated-Bathurst Inc. It reads:

> Dear Mr. Minister:
>
> During the course of our meeting on April 28, 1983, we indicated that we would review our decision concerning first refusal rights for employees displaced as a result of the Hamilton container plant closure at our other container plant locations. I have thoroughly discussed this matter with our management who have indicated that they basically will be adhering to the following procedures which will protect on one hand the recall procedure for employees on layoff at these other container plants and also will recognize fully the background of employees from our Hamilton plant. In cases where any such former employees are hired, they will be given recognition for past service at the Hamilton plant for the purposes of calculating vacation entitlement and service awards at the new locations. All other matters, including probationary period and seniority will continue to be governed by the terms of the appropriate collective agreement.
>
> As you may be aware, we are currently participating in a Joint Manpower Adjustment Committee that has been established to assist employees locate other employment. Furthermore, the Company has also agreed, on the recommendation of your Ministry, to incorporate the Mohawk Occupational and Educational Readjustment Program into this Committee.

19. On cross-examination, Mr. Souccar admitted that the company recognized the industry-wide strike was not going to last forever. He testified that the plans for rationalization took the form of "discussions and reviews" but "not necessarily in writing". More specifically he testified that "nothing was in writing before February 25th, 1983 concerning the Hamilton closure". Mr. Souccar admitted that he saw Mr. Haiplik on a regular basis and that Haiplik was monitoring the situation in early 1983 but it took three or four weeks to analyze matters. He said business dried up very quickly and that by January 19th it was "clear business was not forthcoming". He said it was apparent that business was in a dramatic downturn. Both union witnesses disagreed with this observation and testified that substantial lay offs began in mid-December and continued throughout. He testified that Mr. Haiplik gave him the $2 million figure for the price tag of closing and that Haiplik would have been receiving or preparing weekly reports and having daily discussions on the situation. Souccar testified that it was not possible for him to advise the union of a decision that had not been made yet or about which approval had not been obtained from the Board of Directors. He said one didn't speculate on matters of plant closing and that the complexity of alternatives had not been assessed prior to the conclusion of negotiations. He said that Mr. Gruber found out about the decision when everyone else found out. Souccar also advised the Board that an additional problem facing the industry was a price drop in the U.S. in 1982 from $300 a ton to $235 a ton. This increased the attractiveness of the American containers. He said the company had a healthy backlog of orders in December but by early in January cancellations had begun.

20. Donald Beettam has responsibility for the St. Thomas and Hamilton plants. He testified that from 1978 to September of 1981 productivity in the Hamilton plant had dropped by 25 to 30%. There was also the problem in the market place. He was asked about rumors of plant closings in December of 1981 and responded, as indicated above, that it was his purpose to try and turn the plant around. By January of 1982 the plant was facing a steep recession; a four-day work week was instituted; one shift was in operation; and directions came from Montreal to "tighten belts". Nevertheless productivity had increased and waste was declining. However, the company was still running 25% off budget and by May of 1982 had incurred a $500,000 loss. The industry-wide strike affected 75% of the market. Before the strike Consolidated-Bathurst had 19 to 20% of the market and during the strike this market share climbed to 27 or 28%. However, the company did not take on new customers but increased its share of common customers, a feature of the industry described in a recent case of this Board dealing with picketing. See *Consolidated-Bathurst,* [1982] OLRB Rep. Sept. 1274. Beettam testified that the industry-wide strike established just what the total capacity of the Ontario plants were and demonstrated to the company that running "full out" in its plants was very viable. The result was longer and more consistent runs and a dramatic rise in productivity. Beettam testified that it was the company's "hope" to maintain some of the increase in market share. However, in early December it became apparent that a great deal of business had been committed to U.S. suppliers. By mid-November the Hamilton plant was running a lot of inventory and orders started to decline as December commenced. He testified that there was "some concern by our customers that our contract was due on December 31st, 1982". A significant lay off was effected December 23rd and a number of dies went to other plants after Christmas. He testified that the impact of the settlement was felt by the tail end of December. Orders were cancelled and customers began to work off their heavy inventories. The inventories apparently were built up as an insurance policy against a continued industry-wide strike together with the involvement of Consolidated-Bathurst when its contract expired. Beet-tam testified that the decision to lay off communicated January 19th was made the week before. He advised that the industry was seasonal and that orders fluctuated even on a daily basis. The industry was highly competitive and price levels had been falling since 1981 due to a volume of supply available in the U.S. at considerably lower prices. He testified that by January 17th the company was booking less than a million square feet per day, the minimum booking to man a one shift operation.

21. Mr. Beettam reports to Mr. Haiplik but said he was not aware of any decision to close the

plant prior to January 17th. He said that on February 3rd or 4th he had a discussion with Mr. Haiplik about "his feelings on the western Ontario market". He advised or they decided that the company should take "a hard look at the Ontario market with a possibility and directions came from Montreal to "tighten belts". Nevertheless productivity had increased and waste was dehe did not recommend which plant should go down. He said he did not find out which plant until February 11th when he learned a recommendation to close the Hamilton plant was going to the Board of Directors. He stated that in meeting with the union in early March to discuss the plant closing he would have said that "had it not been for the strike the plant might have been closed last year". On cross-examination he testified that at the end of December the company still had "some hope of retaining some of the work". However, by January 6th the "figures were bad". By January 13th he knew that if the decline continued lay offs would be necessary and such a decision was made on January 17th. When asked to produce his daily production reports he testified that these reports are not retained.

22. Beettam testified that the budget for the Hamilton plant was approved in mid-November of 1982. He testified that the company's planning people establishing three to five year plans which are revised on an annual basis. He can make a decision to expend up to $10,000 within his budget. Decisions requiring funds in excess of this up to $50,000 require the approval of Mr. Haiplik. Decisions requiring the expenditure of funds in excess of $100,000 are approved by the Board of Directors. He agreed that justification for these expenditures was typically well documented.

23. Mr. Ken Gills, Production Manager at the Hamilton plant, was a member of the company's negotiating team and testified he was not aware of any proposal to close the Hamilton plant during negotiations. He said he became aware of the decision to close February 11th, 1983 when he was so advised by Beettam and Gruber. He testified that "things were clearly deteriorating" in December of 1982 necessitating notices of lay off. The company was facing the likely end of the industry strike and Christmas is a traditionally slow period. Lay off notices were again given January 19th, 1983, the decision having been made to lay off January 17th, 1983. The witness testified that he was looking at backlog figures on a daily and weekly basis. He testified that the company did not tell the union things were returning to the way they were prior to the strike but, he supposed, the situation had not reached that point yet.

24. Mr. Gruber, at the time of negotiations, was Manager of Labour Relations for Consolidated-Bathurst Inc. He is now Vice-President, Human Resources for MacMillan-Bathurst Limited, the new company formed by the merger of the packaging operations of MacMilland Bloedel and Consolidated-Bathurst. He was advised by Ted Haiplik in mid or late November of 1982 that the company was desirous to conclude negotiations as quickly as possible. It was the thinking that if the respondent settled quickly it "might" maintain the competitive edge. The strike deadline was set by the union for January 8th and he testified that he did not have any knowledge that the Hamilton plant was to close. He said Mr. Haiplik told him on February 9th or 10th that there was going to be a recommendation to that effect made to the Board of Directors. It was explained to him that the short and long term situation was not good and that the orders had dropped off. On February 11th he met with Mr. Gills and Mr. Beettam. It was his recollection that at the March meeting Beettam advised the union committee that "the Hamilton plant likely had a reprieve" because of the strike and that he recalled saying that "if it had not been for the strike, the plant probably would have closed last year". He testified that he was aware of the *Westinghouse* decision rendered by this Board which obligates companies to reveal firm decisions. He also thought the company's statutory obligation to disclose would have been "a little firmer" by February 11th but by that time a collective agreement had been entered into. He testified that the union did not raise anything about plant closure during negotiations; indeed, no question was raised by the union with respect to lay offs. By late December the customers were jittery; the industry had settled; and Consolidated-Bathurst was faced with a strike deadline. The company was also experiencing a sagging market and December lay offs had been necessary. On

cross-examination he admitted that the company did not get legal advice with respect to its disclosure responsibilities prior to negotiations. He also was not surprised it was the Hamilton plant selected because of its past record. He agreed that he advised the union that customers were impatient and that the company needed an agreement as soon as possible. He testified that industry settlements began a week or two before Christmas. He was not aware of the rationalization planning going on in 1982 in the company. He was also not aware of anything in writing about the closing of the Hamilton plant. He was not aware of any study conducted by Haiplik although he ventured the opinion that Mr. Al Ross, Director of Manufacturing for the company, may have been consulted. He testified that he contacted Denise Dellaire referred to in various newspaper reports. He gave her the severance cost, and capital investment figures would have come from accounting people. He never asked her where she got her information that a study had been underway for a number of months. While Mr. Gruber appears to have taken notes for all labour-management meetings up until March of 1983, he testified that no notes were taken for the March 1st and March 4th meetings with the trade union. He described the March 1st meeting as "not much of a meeting".

Argument

25. There are three branches to the complainant trade union's argument. It argues first that the respondent's conduct clearly violated the bargaining duty as set out in *Westinghouse Canada Ltd.*. [1980] O.L.R.B. Rep. April 577 in that the respondent knew it was going to close the Hamilton plant and failed to disclose this fact. Secondly, the complainant submits that even if a firm decision to close the Hamilton plant had not been made prior to executing the collective agreement, the respondent breached section 15 of the Act by failing to disclose a decision it was "seriously contemplating". Thirdly, and finally, it is submitted that the respondent had a duty to bargain with the complainant to impasse even after the execution of the collective agreement. With respect to its first argument, counsel emphasized that the person who effectively made the decision, Mr. Haiplik, was not called upon to testify. It was clear from Mr. Souccar's evidence that the company was considering rationalization due to overcapacity in the industry and the recession itself in April of 1982. At that time the Hamilton plant was on short hours and experiencing a large lay off. The respondent was also involved in merger discussions with MacMillan Bloedel Packaging as another response to the industry's overcapacity. Counsel emphasized that at the conclusion of the industry-wide strike all of the problems facing the company in April of 1982 had continued or returned. The problem of overcapacity was still there. The recession was continuing and there were a number of new adverse factors. The U.S. competition had managed to obtain long term commitments during the strike. Customers were running on inventory they had built up during the latter stages of the strike. Price levels had fallen to the 1981 level. By the end of December orders were being cancelled and merger discussions were recommenced in early January. The complainant submitted that some time in 1982 a decision had been made that one of the plants in Ontario would be closed and based on prior performance "it was crystal clear which plant it would be". However, the strike intervened and the company decided to take full advantage of the situation. When the pre-strike problems began to re-emerge, the company activated its earlier decision. Mr. Souccar had been subpoenaed before this Board by the complainant on a subpoena duces tecum and counsel submitted that this Board should not accept his assertion that the only documentation of the plant closure was the Board minute of February 1983. It was contended that all of the circumstantial evidence pointed to a much earlier decision. Counsel emphasized the statements made by Mr. Gills, Beettam and Gruber in March of 1983. Reference was also made to the public comments attributed to Denise Dellaire that the plant closing had been under study for a number of months and the press release of the company indicating the decision to close was inevitable. Counsel urged this Board not to put undue emphasis on the timing of the Board of Directors purported decision-making. It was submitted that the *de fucto* decision was made by the operating management of Consolidated-Bathurst. In this respect counsel urged the Board to look at the realities of running a major corporation like Consolidated-Bathurst. For

example, he pointed to the fact that its subsidiary Bathurst Packaging Limited was really only a holding company of various physical assets. Mr. Souccar was even unclear whether he was a member of the Board of Directors of Bathurst Packaging and it is clear that Bathurst Packaging has not had a Board of Directors' meeting to affirm the sale of its various assets. Rather, it was submitted, Consolidated-Bathurst is really the operating entity and made the effective decisions with respect to how the assets of Bathurst Packaging were to be deployed or utilized. Alternatively, counsel for the complainant submitted that given the dramatic impact on employees who are now locked into a collective agreement for a number of years, the onus was the respondent to prove precisely when the decision to close was made. The absence of compelling documentation ought to weigh against the Board finding this onus was met.

26. The complainant's second major alternative argument requested this Board to reconsider its holding in *Westinghouse* that an employer does not have to reveal on his own initiative plans which have not become at least *de fucto* decisions. The complainant asserted that the test ought to be disclosure where an employer is "seriously considering an action which if carried out will have a serious impact on employees". The complainant asserted that an employer's obligation in such circumstances should be either to discuss and bargain the problem with the trade union or defer the signing of any collective agreement until the actual decision is made. Reference was made to two articles which have questioned the Board's requirement of firm decisions. See B. A. Langille, *Equal Partnership in Canadian Labour Law* 1983 (as yet unpublished); M. J. MacNeil, *Plant Closing and Workers' Rights* (1982), 14 Ottawa L.Rev. p.1 at p.24. In support of the "thinking seriously" test the Board was referred to *Ozark Trailers Inc. et al* (1967), CCH NLRB 26,871 and Notes, *Enforcing The NLRA: The Need for a Duty to Bargain Over Partial Plant Closings* (1982), 60 Texas L.Rev. 279 at p.307 et seq. Counsel emphasized that the absence of any authoritative analysis going to the corporate Board demonstrated that the real decision was made by the operating people of Consolidated-Bathurst and that the Board of directors, in effect, rubber stamped the earlier decision. The complainant contended that the *Westinghouse* approach created an incentive for employers not to make major decisions until a union was locked into an agreement and that it encouraged companies to act without written memoranda. Counsel argued that the bargaining duty was designed to achieve informed and rational discussions in order to maximize the joint decision-making provided by the collective bargaining process. Reliance was also placed upon the approach taken in *Sunnycrest Nursing Homes Ltd.* (1981), OLRB Rep. Feb. 261 where the Board stated it would be tantamount to a misrepresentation if a union were induced to enter an irrevocable agreement for a fixed term without being advised of matters which could fundamentally alter the content of that bargain.

27. In its third and final major submission the complainant urged this Board to find the existence of a statutory duty to bargain with a union over major and unexpected changes introduced or intended to be introduced during the term of a collective agreement. Counsel submitted that the *Labour Relations Act* balanced the employees' right to participate in decision-making with the employer's interest in economic stabilization in the form of a fixed and binding contract. Counsel pointed out that during the term of any collective agreement, all differences are required by statute to be resolved by grievance arbitration and yet a collective agreement may be silent on the matter of a major change. Instead of this silence enuring to the sole benefit of either management or labour, counsel for the complainant proposed that the parties should be obligated to consult and bargain with each other to impasse. If and when an impasse was arrived at, the employer would be free to act but, counsel suggested, the very process of consultation would be of value and supportive of the collective bargaining process. Counsel urged the Board not to analogize this problem to that of subcontracting during an agreement's term and pointed out that many of the subcontracting cases did not impact significantly on existing jobs. In any event, counsel urged that there exists "no climate of collective bargaining" in the area of plant closings. It was submitted that statutory authority for the ongoing duty to bargain could be found in sections 40, 41, 50, 64 and 77. It was submitted that the respondent has

in effect unilaterally terminated the collective agreement and with it the bargaining rights of this particular local. As a party to the collective agreement the complainant trade union has a real interest in this matter and the failure of the respondent to bargain with it over the serious issues arising because of the decision to close, it was submitted, clearly violated section 64 by constituting "an interference with the formation, selection and administration of the trade union". It was submitted that section 15 was not exhaustive of a collective bargaining relationship between employers and trade unions and that section 64 had a very similar function to section 15 during the term of any collective agreement with respect to major change the parties have not contemplated. It was further submitted that the existence of Article 18.26 should not be construed as a waiver of the mid-term duty to consult and bargain. The provision had been negotiated in the abstract and had not been changed in the most recent round of bargaining. For authority for this submission, the complainant relied upon *New York Mirror* (1965), CCH NLRB 9200; *Inglis Limited,* [1977] OLRB Rep. Mar. 128; *Kennedy Lodge,* [1980] OLRB Rep. Oct. 1454; *Sunnycrest Nursing Home,* [1981] OLRB Rep. Feb. 261; and *Pacific Press Ltd.,* 83 CLLC ¶16,024. Reference was also made to T. J. Heinsz, *The Partial-Closing Conundrum: The Duly of Employers and Unions to Bargain in Good Faith* (1981), 71 Duke L.J. 71.

28. On the issue of remedy, counsel submitted that there should be a back pay order running from the time at which the respondent should have commenced to bargain with the trade union over the closing until an impasse was actually arrived at or until an agreement was achieved. Counsel submitted that it must be presumed that the grievors would have retained their jobs at least until the respondent had fulfilled its bargaining obligation. The complainant requested, on this basis, that the terminated employees be made whole for any loss of pay they may have suffered as a result of the respondent's unfair labour practice. More specifically, the liability for such back pay should, it was contended, cease only upon the occurrence of any of the following conditions: (1) reaching mutual agreement with the union relating to the subjects which the respondent is required to bargain about; (2) bargaining to a bona fide impasse; (3) the failure of the union to commence negotiations within five days of the receipt of the respondent's notice of its desire to bargain with the union; or (4) the failure of the union to bargain thereafter in good faith. For this type of order, the complainant relied upon *Winn-Dixie Stores* 56 LRRM 1266; *National Family Opinion Inc.* 102 LRRM 1641; *Marriott Corp.* 111 LRRM 1354; *Brockway Motor Trucks* 104 LRRM 1514; and *Brooks-Scanlin* 102 LRRM 1607.

29. On behalf of the respondent company it was submitted that the extent of its bargaining duty was to disclose any decisions the company had made about the closing of the plant during the course of negotiations. Counsel submitted that on the evidence before the Board one could only conclude that a definitive decision had not been made and that the respondent was not obligated to engage in speculation about a possible plant closing during bargaining. Counsel emphasized that the complainant had asked for and obtained a no-board report and had set a strike deadline. Parties negotiated a collective agreement in the face of this deadline and the trade union asked no questions with respect to possible plant closing or any other matter which could pertain to the job security of the employees it represented. While there were rumors and speculation about a plant closing since 1978, the matter of plant rationalization had been put aside during the period of the industry-wide strike. During bargaining the complainant trade union initially proposed an amendment to Article 18.26 which eventually was dropped. Counsel to the respondent submitted that Article 18.26 dealt entirely with the argument of any mid-contract duty to bargain and that in any event, the parties met at the time of closing, and held discussions with respect to the closing. It was submitted that the company was not obligated to sit down with the trade union and political personalities without an agenda and with the press in attendance. Counsel submitted that there was no obligation on the respondent company to call Mr. Haiplik because it was Mr. Souccar who ultimately made the recommendation to Mr. Stangeland and Mr. Souccar did present himself as a witness and testified. Counsel urged this Board to find that from November 2nd until

January 13th the respondent was not considering the closing of the Hamilton plant in that it was still running that facility at capacity. Under these circumstances, there was no need to consider a closing. Counsel contended that the respondent company needed to know how its own customers were going to respond and what was going to happen in the market place in general. Neither of these factors could be properly assessed until the respondent had a collective agreement with the complainant. With respect to the respondent company's obligation to call Mr. Haiplik, the Board was referred to Sopinka and Lederman, *The Law of Evidence,* Chapter 7, pgs. 536-7. Counsel contended that no prima facie case had been made out by the complainant or, in the alternative, Mr. Souccar's evidence was sufficient in the circumstances. Counsel suggested that it would have been easy for the company to engineer a strike on the issue of the plant closing and then to close the plant during bargaining thereby eliminating the need to pay severance pay either under the collective agreement or the *Employment Standards Act* (see section 40A of the *Employment Standards Act).* Counsel argued that the respondent company was entitled to wait and assess the reaction of its customers after a collective agreement had been negotiated. In his view, the industry-wide strike had been a long one and the respondent could reasonably have anticipated greater gratitude from its customers than it actually received. In this respect reliance was placed on *Amoco Fabrics,* [1982] OLRB Rep. Mar. 314. It was submited that the respondent company simply did not expect the bottom to fall out of the market in the way that it did. Had the matter been raised during bargaining, counsel contended, that the respondent would not have been believed or the information would have been perceived as a threat thereby attracting an unfair labour practice charge.

30. lt was further contended on behalf of the respondent company that by the management right's clause of the collective agreement the parties had conceded the responsibility to management to make decisions on such matters as plant closings subject, of course, to Article 18.26. Reference was also made to section 77 of the *Labour Relations Act* providing that nothing in the Act prohibits an employer from suspending or discontinuing its activities for cause. Counsel argued that there was clearly cause in the circumstances before the Board. On the issue of remedy, counsel for the company argued that at the very least no remedy could run until the complaint was actually brought forward. Counsel also referred to the newspaper article wherein Mr. Lapata admitted that the complainant did not believe the respondent had bargained in bad faith and that the complaint was filed just to receive more money.

Decision

31. One of the most difficult problems faced by collective bargaining is the impact of changing economic, technological and social conditions. How ought it to deal with the necessary management initiatives occasioned by these changes? Where change occurs while parties are bargaining a collective agreement, there is usually ample opportunity for them to review the need for the decision involving change and the impact of that decision. Where change arises during the term of a collective agreement and the agreement does not deal explicitly with that change, different considerations arise. In the facts at hand, for example, the respondent takes the position that the change (i.e. an eroding market) occurred after the collective agreement was negotiated and that management had a unilateral right, therefore, to close the plant without any further dealings with the complainant trade union. Counsel points to the management rights clause; to Article 18.26 dealing specifically with a plant closure; and to the arbitral jurisprudence which generally consigns to management the right and responsibility to initiate change subject to the explicit provisions of a collective agreement providing otherwise. In cases of this kind there are, of course, significant conflicting values at stake. There is the desirability of stability in collective bargaining relationships as evidenced by the statutory policy requiring a collective agreement for a minimum term of one year and the twin statutory requirements of "no strike and no lockout". All differences during the term of an agreement are to be funnelled through grievance arbitration. It is also widely understood that

management must have the ability to take initiatives in responding to the new demands posed by changing circumstances. The market place seldom awaits labour and management consensus. On the other hand, unilateral management initiatives can adversely affect significant interests of employees and unions who, in the absence of change, may have built up certain expectations and attitudes concerning the status quo. The plight of the middle aged and older worker suddenly without a job is very real for that person and his immediate family. See Adams, *Bell Canada and the Older Worker: Who Will Review the Judges?* (1974), 12 Osgoode Hall L.J. 389. The impact of the related unemployment on the community and its resources also poses significant social and economic problems not confined to the parties. Unfortunately, it is not possible to foresee in advance all the labour relations problems inherent in changing industrial conditions. It is also not possible nor, arguably, desirable "to delay agreement in order to pin down, by specific language, the contractual consequences of change foreseen from afar and only in the abstract". See Weiler, *Labour Arbitration and Industrial Change* (1969), p.[2].

32. The arbitral jurisprudence is replete with examples of a similar tension in values over the issue of subcontracting. A review of the literature and the cases also points out major philosophic differences which arose out of the industrial relations system's efforts to sort out the rights of the parties where the contract was, for all useful purposes, silent. And, like many policy initiatives made in the context of a conflict between major and compelling values~ public policy was and continues to be incremental, fragmented and ambivalent. Nor has it been very explicit. Without going into a detailed review of the evolutionary response of arbitrators, passing reference can be made to the early debate between those who saw the collective agreement as essentially taking away or limiting the pre-existing right of management to institute change and those who saw a collective bargaining relationship as a new point of departure wherein neither party came to the bargaining table with pre-existing rights. The "reserved or residual rights" school of thought saw management beginning with certain functions and prerogatives that pre-existed collective bargaining. From this perspective, the purpose of a union bargaining was to obtain contractual limitations on these rights. The "status quo" school of thought, on the other hand, argued that the parties began negotiating as equals. Each was permitted to enjoy those explicit rights conferred by the collective agreement on one side or the other. To the extent there was no explicit mention in a contract about a certain matter, then the status quo at the beginning of the agreement modified by practices that had been accepted during the administration of the agreement should be the criterion for evaluating the legality of proposed employer action. A variation on this theme was known as "the implied obligation" philosophy wherein it was thought that arbitrators should develop a new common law of the collective agreement when the agreement was silent. An arbitrator's conclusions would be based on "such implications as were necessary to give practical or business efficacy to the collective agreement". See *Peterboro Lock* (1953), 4 L.A.C. 1499. Whatever the intrinsic merits of these various approaches, over the last 30 years both arbitral and judicial doctrine in Ontario have come to accept, with some reservations, the residual rights theory as justifying a management prerogative to change, unilaterally, working conditions for business reasons during the term of a collective agreement unless the agreement provides otherwise. See *Russelsteel Ltd.* (1967), 17 L.A.C. 253 (Arthurs); *Kennedy Lodge Nursing Home (1981),* 28 L.A.C. (2d) 388 (Brunner); Weiler, *Labour Arbitration and Industrial Change, supra,* page 6. The limited, although significant, reservations relate to a growing body of arbitral jurisprudence dealing with implied standards of conduct when management exercises such a unilateral right. See *Metro Police* (1981), 33 O.R. (2d) 476; *Council of Printing Industries* Ont. C.A. June 15, 1983 as yet unreported; and *Re CN/CP Telecommunications,* (1982) 4 L.A.C.(3d) 205 (Beatty).

33. Understanding the approach of arbitrators to industrial change where an agreement is silent is a necessary prelude to appreciating another and important legal perspective on change — the bargaining duty. This statutory duty of an employer is to bargain with a certified trade union

"respecting terms or conditions of employment or the rights, privileges or duties of the employer. ..." In the United States this duty continues even after the execution of a collective agreement to the extent that the agreement is silent on the management initiative in question. This is not the case in Ontario where the duty is described in much more temporal and specific terms. For example, section 8(d) of the *National Labour Relations Act* is very general in nature as to when it applies and provides:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder and the execution of a written contract incorporating any agreement reached if requested by either party, such obligation does not compel either party to agree to a proposal or require the making of a concession....

34. In Ontario the *Labour Relations Act* provides:

> 14. *Following certification,* the trade union shall give the employer written notice of its desire to bargain with a view to making a collective agreement.
>
> 15. The parties shall meet within fifteen days from *the giving of the notice* or within such further period as the parties agree upon and they shall bargain in good faith and make every reasonable effort *to make a collective agreement.*
>
> 16.-(l) *Where notice has been given under section 14 or 53,* the Minister, upon the request of either party, shall appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.
>
> (2) Notwithstanding the failure of a trade union to give written notice under section 14 or the failure of either party to give written notice under sections 53 and 122, where the parties have met and bargained, the Minister, upon the request of either party, may appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement.
>
> (3) Where an employer and a trade union agree that the employer recognizes the trade union as the exclusive bargaining agent of the employees in a defined bargaining unit and the agreement is in writing signed by the parties, the Minister may, upon the request of either party, appoint a conciliation officer to confer with the parties and endeavour *to effect a collective agreement.*
>
> (4) Notwithstanding anything in this Act, where the Minister has appointed a conciliation officer or a mediator and the parties have failed to enter into a collective agreement within fifteen months from the date of such appointment, the Minister may, upon the joint request of the parties, again appoint a conciliation officer to confer with the parties and endeavour to effect a collective agreement, and, upon such appointment being made, sections 17 to 34 and 72 to 79 apply, but such appointment is not a bar to an application for certification or for a declaration that the trade union no longer represents the employees in the bargaining unit.
>
> 18.-(l) Where a conciliation officer is appointed, he shall confer with the parties and endeavour to effect a collective agreement and he shall, within fourteen days from his appointment, report the result of his endeavour to the Minister.
>
> (2) The period mentioned in subsection (1) may be extended by agreement of the parties or by the Minister upon the advice of the conciliation officer that a collective agreement may be made within a reasonable time if the period is extended.

(3) Where the conciliation officer reports to the Minister that the differences between the parties concerning the terms of a collective agreement have been settled, the Minister shall forthwith by notice in writing inform the parties of the report.

53.-(l) Either party to a collective agreement may, *within the period of ninety days before the agreement ceases to operate,* give notice in writing to the other party of its desire to bargain with a view to the renewal with or without modifications, of the agreement then in operation or to the making of a new agreement.

(2) A notice given by a party to a collective agreement in accordance with provisions in the agreement relating to its termination or renewal shall be deemed to comply with subsection (1).

(3) Where notice is given by or to an employers' organization that has a collective agreement with a trade union or council of trade unions, it shall be deemed to be a notice given by or to each member of the employers' organization who is bound by the agreement or who has c eased to be a member of the employers' organization but has not notified the trade union or council of trde unions in writing that he has ceased to be a member.

(4) Where notice is given by or to a council of trade unions, other than a certified council of trade unions, that has a collective agreement with an employer or employers' organization, it shall be deemed to be a notice given by or to each member or affiliate of the council of trade unions that is bound by the agreement or that has ceased to be a member of affiliate of the council of trade unions but has not notified the employer or employers' organization in writing that it has ceased to be a member or affiliate.

54. *Sections 15 to 34 apply to the bargaining that follows the giving of a notice under section 53.*

[emphasis added]

35. The only section explicitly dealing with mid-contract dispute resolution is section 36 which provides:

36.-(l) Where, *at any time during the operation of a collective agreement,* the Minister considers that it will promote more harmonious industrial relations between the parties, he may appoint a special officer to confer with the parties and assist them in an examination and discussion of their current relationship or the resolution of anticipated bargaining problems.

(2) A special officer appointed under subsection (1) shall confer with the parties and shall report to the Minister within thirty days of his appointment and upon the filing of his report his appointment shall terminate unless it is extended by the Minister.

(3) Any person knowledgeable in industrial relations may be appointed a special officer, whether or not he is an employee of the Crown.

[emphasis added]

36. Against the backdrop of these provisions, it would be stretching legislative language and intent to the point of breaking for this Board to infer along American lines a full blown continuing duty "to bargain in good faith and make every reasonable effort to make a collective agreement". The complainant has submitted that such a duty lurks beneath the surface of the language found in section

64 but reading the Act as a whole we cannot agree. Nor have other panels of the Board accepted this proposition. See *Westinghouse Canada Ltd.,* [1980] OLRB Rep. Apr. 577; *Sunnycrest Nursing Homes Ltd.,* [1981] OLRB Rep. Feb. 261. However, this is not to say that an employer can refuse to meet with a certified bargaining agent where change has been introduced, particularly where the change and its impact were not contemplated by the parties on entering into the agreement. Not to meet and discuss a matter of such fundamental importance would constitute a rejection of a trade union's statutory status and amount to an interference with the formation, selection or administration of a trade union contrary to section 64. This duty to consult and deal with a certified bargaining agent on an ongoing basis, however, is many shades lighter in content than the bargaining duty and does not require an elaboration in this case. In the facts at hand, it is sufficient to note that the respondent employer met with the trade union concerning the closure on a number of occasions in March. In our view, it was not obligated by the *Labour Relations Act* to meet with the trade union and interested politicians in a public setting. This novel leg of the complainant s argument is therefore of no avail.

37. It therefore remains for us to analyze the more fundamental statutory duty to meet and bargain in "good faith" in an effort to achieve a collective agreement and "to make every reasonable effort to make a collective agreement". Because an employer has the benefit of the arbitral jurisprudence described above once a collective agreement is executed, the bargaining duty's contribution to the regulation of industrial change, arguably, takes on added meaning. This case is about the shape of that duty in the context of a plant closing announced approximately six weeks after the signing of the collective agreement.

38. Clearly, collective bargaining is an appropriate tool for dealing with the impact of industrial change in a work environment although it is by no means a complete answer to the difficulties thrown up for both labour and management. It enables solutions to be tailored to the needs of the individual participants; trade-offs can be made; and, at the very least, there is the sense of participation in the eventual outcome. Of course, the difficulty with the legal background in Ontario is that the requirement of compulsory no strike clauses together with the absence of a continuing duty to bargain during the term of the agreement, minimizes the likelihood that parties will engage in collective bargaining about these issues. Indeed, it has been pointed out that against the backdrop of the arbitral and collective bargaining framework discussed to this point, there is a real incentive for employers not to make decisions with respect to major change until a union is locked into a collective agreement. See Weiler, *supra;* Langille, *supra;* and MacNeil, *supra;* pp. 19-25. Other jurisdictions such as British Columbia, Manitoba, Saskatchewan and the Federal Government have enacted specific provisions to permit bargaining over various types of mid-contract change. See *Saskatchewan Trade Union Act* s.43 (R.S.S. 1978 c.T-17); *Manitoba Labour Relations Act* ss.72-75 (R.S.M. 1972 c.75); *British Columbia Labour Code* ss.74-78 (R.S.B.C. 1979 c.2 12); *Canada Labour Code* ss. 149-153 (R.S.C. 1970 c.L-l as amended by S.C. 1972 c.18 s.l). For example, section 43(1) of the Saskatchewan's *Trade Union Act* uses a very broad definition of technological change, defining the term to include "the removal by an employer of any part of his work, undertaking or business". An employer proposing to implement such change affecting terms, conditions or tenure of a significant number of employees is required by section 43(2) of the Act to give at least 90 days' notice to the trade union before implementing such change. The union, under section 43(8) is then entitled to serve a demand on the employer to bargain to revise the collective agreement concerning terms, conditions or tenure or to include new provisions relating to such matters to assist the employees affected by the technological change to adjust to the effects. Section 43(9) exempts the employer from the duty to bargain where he has given notice of proposed changes before the collective agreement was signed or where the collective agreement contains provisions by which these issues can be negotiated and finally settled during the term of the agreement. Otherwise, section 43(10) denies the introduction of change until an agreement is reached or an impasse has been reached and the Minister of Labour given notice. What is promoted by this type of legislation is "a continuing duty to bargain" along the

lines that until recently existed in the United States although the emphasis appears to be on "impact bargaining" as opposed to "decision bargaining".

39. We have reviewed this background in some detail to set out the complexity of the problem before us and the historical underpinnings of current policies. In considering the application of the bargaining duty in this context the Board needs to be sensitive to the limited time span of the duty and the potential for unilateral employer action once the duty ends and a collective agreement is signed. The incentive for non-disclosure or manipulation of decision-making should also be kept in mind when assessing evidence and an employer's stated justification. On the other hand, this Board must be sensitive to the limits of adjudicating policy responses to the general problem of industrial change. The history and complexity of the problem together with the competing values at stake has attracted legislated solutions in other jurisdictions after considerable debate and reflection. An isolated fact situation arising in the context of an unfair labour practice complaint is not a comparable format for fashioning a meaningful policy contribution. The Board must also be sensitive to the statutory purpose of the bargaining duty, the language describing that duty, and the industrial relations implications of one approach over another. A single-minded pursuit of disclosure is inconsistent with the scheme of the Act and sound collective bargaining practices. The same can be said of the opposite direction. The experience before the NLRB does little to dispel this caution.

40. In the United States there has been considerable labour board experience in this area which is worthy of a brief review. In fact, a recent decision of the United States Supreme Court has dramatically changed the reach of the continuing duty to bargain in the United States in the very context of plant closures. In that jurisdiction an employer is forbidden from making unilateral changes in the terms and conditions of employment of his employees who are represented by a union with which he is under a duty to bargain. Such action raises a rebuttable presumption of a failure to bargain in good faith. See Schatzki, "The Employer's Unilateral Act" (1965-66), 44 Texas L.Rev. 470 and Note, "Unilateral Action as a Legitimate Economic Weapon" (1962), 37 N.Y.U.L. Rev. 666. However, in giving meaning to the phrase "terms and conditions of employment" contained in section 8(d) of the *National Labor Relations Act* it has been held that there are certain management decisions which fall outside the ambit of this phrase and that therefore are subject only to permissive bargaining and thus, unilateral employer control. These "non-mandatory" issues are said to be subject to the final decision of management and centre on core managerial responsibilities such as "type of product, financing, etc.". But in *Fibreboard v. NLRB* (1964), 379 U.S. 203 the United States Supreme Court decided that at least some subcontracting decisions could be construed to come within the phrase "conditions of employment". In effect, it was held that some managerial decisions, even when taken for purely economic reasons, are to be subject to bargaining when there is an effect on employment or job security. However, the Court noted that management decisions in this area extend along a continuum from choice of product to price policies, to location of plants, to choice of production processes, etc. The suggestion was that with respect to many of these matters an employer would have a decisive interest in exclusive and flexible discretion. Mr. Justice Stewart suggested:

> An enterprise may decide to invest in labour saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the court holds today should be understood as imposing a duty to bargain collective regarding such managerial decisions, which lie at the core of entrepreneurial control. ... This kind of subcontracting falls short of such larger entrepreneurial questions as what shall be produced~ how capital shall be invested in fixed assets, or what the basic scope of the enterprise shall be. In my view, the courts decision in this case has nothing to do with whether any aspects of those larger issues could under any circumstances be considered subjects of compulsory collective bargaining under the present law.

Subsequently, the Court approved that an employer could not be penalized for going totally out of

business for any reason. See *Textile Workers Union v. Darlington Manufacturing Co. (1965)*, 380 U.S. 263. Nevertheless, the NLRB adopted an expansive interpretation of *Fibre-board* with respect to partial plant closings holding a duty to bargain on employers existed whenever a management decision had an impact on employment conditions. This per se rule achieved its fullest expression in *Ozark Trailers Inc.* (1966), 161 NLRB 561 in which the Board required a manufacturer of refrigerated truck bodies to bargain before deciding to close one of its plants. In this respect the Board wrote:

> ….We do not believe that the question whether a particular management decision must be bargained about should turn on whether the decision involves the commitment of investment capital, or on whether it may be characterized as involving "major" or "basic" change in the nature of the employer's business...
>
> Initially, congress made the basic policy determination, in enacting the *National Labor Relations Act*, that, despite management's interest in absolute freedom to run the business as it sees fit, the interests of employees are of sufficient importance that their representatives ought be consulted in matters affecting them, and that the public interest, which includes the interest of both employers and employees, is best served by subjecting problems between labour and management to the mediating influence of collective bargaining....
>
> Accordingly, we think it no significant intrusion on management freedom to run the business to require that an employer — once he has reached the point of thinking seriously about taking such an extraordinary step as relocating or terminating a portion of the business — discuss that step with the bargaining representative of the employees who will be affected by his decision....

However, in *First National Maintenance Corp. v. NLRB* (1981), 452 U.S. 666 the United States Supreme Court returned to the caveat of Mr. Justice Stewart in *Fibreboard, supra,* and reversed this gradual evolution of doctrine by putting partial closings and other decisions involving the termination of a bargaining unit beyond the reach of the duty to bargain. It held that while section 8(d) left the Board with power to define "terms and conditions of employment", the Board's discretion was not unlimited. Management decisions only indirectly affecting the employment relation were to remain unregulated, while decisions "almost exclusively" part of the work relation fell within the Board's authority. A difficult and third problem area, in the Court's view, was where decisions directly affected employment but "had as their focus ..... . economic profitability" like the economically motivated partial closing decision. It held that in this third area bargaining was to be ordered "only if the benefit, for labour-management relations and the collective bargaining process, outweighed the burden placed on the conduct of business". In engaging in this calculus, the Court defined the union's interest as the "largely uniform" goal of seeking "to delay or halt the closing". The majority feared that bargaining "could afford a union a powerful tool for achieving delay, a power that might be used to thwart management's intentions in a manner unrelated to any feasible solution the union might propose". After then listing the management need for speed, flexibility and secrecy in meeting business opportunities the Court concluded that:

> The harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision and we hold that the decision itself is not part of section 8(d)'s "terms and conditions'... .over which Congress has mandated bargaining.

41. Canadian labour law has not followed the "mandatory/permissive" distinction. Labour boards have not construed terms and conditions of employment in a narrow manner but rather have

seen a collective agreement as a constitutional document embodying such terms as the parties wish to insert. The reasons for rejecting a field of employer interest which cannot be encroached upon by collective bargaining are clear. A system of unilateral imposition of terms and conditions of employment is more associated with the law of master and servant. Collective bargaining arose in response to that regime. A limited scope for bargaining is also inconsistent with the view of collective bargaining as a vehicle by which some participation to employees in formulating their own destiny is assured. With few limitations, terms and conditions of employment are what labour and management agree to include within a collective agreement. See *Pulp and Paper Industrial Relations Bureau,* [1978] 1 Can. LRBR 60 (BC LRB).

42. On the other hand, as we have seen, this rationale competes in Canada with industrial stability and contractualism once a collective agreement is executed. We have seen that collective bargaining in Canada has significant temporal as opposed to substantive limitations. These temporal limitations become important in considering and assessing the disclosure requirements Canadian labour boards, such as this one, have begun to fashion through the bargaining duty.

43. Forced disclosure is not a self-evident principle in the context of bargaining. In contractual negotiations at common law, one quickly becomes familiar with the notion of *caveat emptor.* In fact, good negotiators are analogized to good "card players" and, in the playing of cards, it is essential that players *not* be aware of the cards dealt to other participants. But collective bargaining is a matter of statutory policy and is aimed at achieving industrial peace. Therefore, it is *not* a game and involves ongoing economic relationships vital to the well-being of our economy. It is a process in which labour, management and the public have a vital interest. This is why the *Labour Relations Act* requires the parties to "bargain in good faith and make every reasonable effort to make a collective agreement". Disclosure arises out of this phrase in two quite different ways and based upon two quite different purposes of the bargaining duty. In *DeVilbiss (Canada) Limited,* [1976] OLRB Rep. Mar. 49 the Board pointed out that the duty reinforced an employer's obligation to recognize a bargaining agent (the "good faith" component) but stated that beyond this important purpose it was also "intended to foster rational, informed discussion..." (the "reasonable effort" aspect). While *DeVilbiss* dealt with both aspects of the duty in considering the refusal of the employer to provide the union with existing wage rate and classification data about the bargaining unit in a first agreement bargaining context, the Board emphasized the rational and informed discussion perspective in ordering disclosure. The trade union had *asked* for the information; the employer refused; and, on complaint, the Board required that the information requested be disclosed. In so deciding the Board stated:

> Of additional concern is the respondent's failure to respond to the complainant's request at this first meeting for existing wage and classification information. Particularly in "first agreement" situations, it is little wonder that a complainant would have an incomplete monetary demand until it fully appreciated the current rate of wages paid by a respondent and the detailed nature of its job structure. Rational and informed discussion cannot easily take place until and assessing the disclosure requirements Canadian labour boards, such as this one, have begun to fashion through the ction. As a general matter of policy, if parties are to engage in economic conflict their differences ought to be real and well-defined. It is patently silly to have a trade union "in the dark" with respect to the fairness of an employer's offer because it has insufficient information to appreciate ful1y the offer's significance to those in the bargaining unit. Moreover, a trade union has a duty to all of the employees in the bargaining unit and thus has to be concerned, in a large measure, with equality of treatment. (For the American experience in this area see *J. H. Allison & Co.* (1946) 70 NLRB 377; *Whitin Machine Works* (1954), 217 F. 2d 593 (4th Cir.); *Aluminum Ore Co.* (1942), 131 F. 2d 485 (7th Cir.); *Yanman & Erbe Manufacturing Co. (1951)* 181

> F. 2d 947 (2nd Cir.); *Truitt Manufacturing Co.* (1954) 110 NLRB 856; and see generally Bortosic and Hartley, *supra.)*

A bargaining agent can claim entitlement to information necessary for it to reach informed decisions and thereby to perform effectively its statutory responsibilities. Disclosure encourages the parties to focus on the real positions of both the employees and the employer. And hopefully with greater sharing of information will come greater understanding and less industrial conflict. Although Canadian experience is limited, the American cases reveal that the employer is under no duty, as a general matter, to provide information until the union makes a specific request for the relevant information. See J. T. O'Reilly and G. P. Simon, *Unions' Rights to Company Information,* Labor Relations and Public Policy Series No. 21, The Wharton School, Industrial Research Unit (1980) at p.11 and Bartosic and Hartley, *The Employer's Duty to Supply Information to the Union,* [1972-73] 58 Cornell L. Rev. 23. A request identifies a union's interest in specific information and then permits a discussion by the parties on the relevance of the data. The requirement of a request also sharpens a disclosure obligation. Without a request, an employer will be unclear what is needed and why. Indeed, a request is a basic method for receiving information particularly in an adversarial context. A general duty of unsolicited disclosure would be costly, unclear and potentially counter-productive. However, a second and more limited way the bargaining duty requires disclosure arises out of its good faith purpose and does not require a specific request. This approach was developed by the Board in two decisions rendered in *Inglis Limited,* [1977] OLRB Rep. Mar. 128 and *Westinghouse Canada Ltd.,* [1980] OLRB Rep. April 577. In *Inglis Limited, supra,* the Board was asked to find that the employer's failure to reveal plans to relocate a part of its business when asked in bargaining constituted a breach of the duty to bargain in good faith. In effect, it was alleged the respondent company had committed a fundamental misrepresentation on which the trade union had relied to its detriment. In applying the bargaining duty to this allegation the Board stated:

> It is self-evident however, that misrepresentation, which is the antithesis of good faith, destroys the rational basis upon which informed collective bargaining decisions are made. These decisions which are in respect of compensation, job security and the other terms and conditions of employment must follow from full and honest discussion. Misrepresentation is alien to this process and is contrary to the duty set out in section 14 of the Act.

44. One does not have to expand this principle significantly to conclude further that it is "tantamount to a misrepresentation" for an employer not to reveal during bargaining a decision it has already made which will have a significant impact on terms and conditions of employment such as a plant closing and which the union could not have anticipated. Indeed, this is what the Board held in *Westinghouse Canada Limited* in stating:

> Similarly can there be any doubt that an employer is under a section 14 obligation to reveal to the union on his own initiative those decisions already made which may have a major impact on the bargaining unit. Without this information a trade union is effectively put in the dark. The union cannot realistically assess its priorities or formulate a meaningful bargaining response to matters of fundamental importance to the employees its represents. Failure to inform in these circumstances may properly be characterized as an attempt to secure the agreement of the trade union for a fixed term on the basis of a misrepresentation in respect of matters which could fundamentally alter the content of the bargain.

45. A difficult issue raised again in this case is whether this should be the extent of a duty to disclose without a specific request from the trade union. In *Westinghouse Canada Limited,* [1980] OLRB Rep. April 477, which was the first decision by the Board to suggest that disclosure of certain

matters was obligatory without a request, the Board considered a standard of unsolicited disclosure beyond that of disclosing firm decisions having a fundamental impact on employees in the following passage:

> On one side the Board must be concerned with potential distortion of the bargaining process by the imposition of an obligation which requires the employer to advise the union on his own initiative of plans which may never become decisions. On the other side, however, the Board must be sensitive to the purpose of the collective bargaining process and to the role of the trade union as exclusive bargaining representative of the employees who might be affected if these plans resulted in decisions being made by the company.
>
> The competitive nature of our economy and the ongoing requirement of competent management to be responsive to the forces at play in the marketplace result in ongoing management consideration of a spectrum of initiatives which may impact on the bargaining unit. More often than not, however, these considerations do not manifest themselves in hard decisions. For one reason or another, plans are often discarded in the conceptual stage or are late abandoned because of changing environmental factors. The company's initiation of an open-ended discussion of such imprecise matters at the bargaining table could have serious industrial relations consequences. The employer would be required to decide in every bargaining situation at which point in his planning process he must make an announcement to the trade union in order to comply with section 14. Because the announcement would be employer initiated and because plans are often not transformed into decisions~ the possibility of the union viewing the employer's announcement as a threat (with attendant litigation) would be created. If not seen as a threat the possibility of employee overreaction to a company initiated announcement would exist. A company initiated announcement, as distinct from a company response to a union inquiry may carry with it an unjustified perception of certainty. The collective bargaining process thrusts the parties into a delicate and often difficult interface. Given the requirement upon the company to re-spond honestly at the bargaining table to union inquiries with respect to company plans which may have a significant impact on the bargaining unit, the effect of requiring the employer to initiate discussion on matters which are not yet decided within his organization would be of marginal benefit to the trade union and could serve to distort the bargaining process and create the potential for additional litigation between the parties. The section 14 duty, therefore, does not require an employer to reveal on his own initiative plans which have not become at least de facto decisions.

In that case the collective agreement was concluded September 15, 1978; operating management proposed a relocation plan as early as July 21, 1978; but an appropriations request for eleven million dollars was not prepared until October 27, 1978 and not approved by senior management until November 15, 1978. The parent board of directors approved on November 29, 1978 and on December 12, 1978 50 did the board of the Canadian subsidiary. In applying the above statement of principle to these facts the Board arrived at this conclusion:

> The signed memorandum of agreement between the parties dated September 12, 1978 was ratified on September 15th and constituted a collective agreement within the meaning of section 1(1) of the Act as of that date. (See *Graphic Centre* [1976] OLRB Rep. May 221.) The funds necessary to implement the plan to decentralize were not approved until November *15,* 1978 at the earliest. The Major Product Review Committee of the parent company gave approval to the $11 million appropriation on that date. The matter went on to the parent company's Board of Directors about two weeks later. In our view a decision requiring the investment of approximately $11 million of capital is not a viable decision until those responsible for allocating the necessary funds have considered the arguments for and against and have decided one

> way or the other. In this case the necessary funds were not approved until the middle of November; some two months following the completion of bargaining. Although the timing is convenient from the company's point of view, there is no evidence to support the conclusion that the company manipulated the timing of its presentation to the parent. Indeed Mr. Tyaack in his letter of June 15, 1979 to Mr. MacNeil speaks of a compressed evaluation and decision time because of the strike. The inference to be drawn is that Mr. MacNeil should proceed with haste. There is no evidence to suggest that the company manipulated an end to the strike so as it could go forward with its plans to decentralize during a period when the union could not bargain in response. No evidence directed at the particular nature of the bargaining moves which led to the September 12th memorandum of settlement was introduced. In the result we have come to the conclusion on the balance of probabilities that the company had not made a hard decision to relocate during the course of bargaining as would have required it to reveal its decision to the trade union.
>
> The complainant trade union, which represented the company's Hamilton employees since 1945, has seen the company move parts of its operation from Hamilton on a number of occasions. Indeed, the evidence establishes that the union has responded to the relocation of work by unsuccessfully attempting to negotiate an expanded recognition on two occasions. While the company has negotiated with the union concerning the employee-related effects of some of its relocation decisions in the past, it has not done so on all occasions and this union may be seen to have recognized that future bona fide dislocations were a distinct possibility and that if they occurred the employees would not be protected other than for the exercise of city-wide seniority. The decision announced by the company in 1975 and rescinded shortly thereafter, to move the Switch-gear and Control Division from Aberdeen Avenue to Burlington, underscores the extent to which this union should have been sensitive to the possibility of relocation. The trade union, however, failed to raise the matter and did not propose altering article 3.01(b) of the expired agreement which gives the company the unilateral right to determine the number and location of its plants. In these circumstances the union's position may properly have been seen by the employer as an acknowledgment of the status quo vis-a-vis the employer's right to locate its plants. The company had not reached a decision to relocate during bargaining as would have required it to reveal the content of that decision to the trade union. The union, although aware of the past history of this company with respect to relocations from Hamilton, chose not to inquire of the company whether it was planning any major reorganization as would have required the company to reveal the extent of its planning. We find, therefore, that the conduct of the company during bargaining did not violate the section 14 duty. The allegations as they relate to a breach of section 14 of the Act are hereby dismissed.

The Board, therefore, was very reluctant to expand the scope of unsolicited disclosure given the difficulty of defining the duty and the potential for unproductive impact at the bargaining table of plans or incomplete decisions.

46. More was said on this area in *Amoco Fabrics Ltd., supra.* A collective agreement in that case was concluded in September of 1980 at Hawkesbury. However, during negotiations the company opened another plant elsewhere and subsequently rationalized its production. By November of 1980, the economic downturn required substantial indefinite lay-offs although the existence of the new facility removed whatever economic cushion the Hawkesbury facility might have had. It held that the company did not fail to disclose material information to the union. See also *Sunnycrest Nursing Home, supra,* where it was held that the employer should have revealed a decision taken during bargaining and where the Board directed that decision to be reversed.

47. Against the backdrop of these cases some further reflection is merited. Corporate planning, it is argued, is necessarily complex and dynamic while collective bargaining is an adversarial and tactical process. Typically, unions bargain out provisions on the basis of a work force's experience. For example, as technological change becomes apparent, provisions are sought to cushion the effect. Day to day layoffs are expected and general seniority, recall and severance provisions are negotiated. It is also argued that the parties usually have enough real roadblocks to reaching an agreement without taking to impasse issues which "may" need a collective bargaining response. This may explain why in the *Westinghouse, Sunnycrest* and *Amoco* cases questions about possible management changes in the future were not asked by *the unions* themselves. Indeed, no request for information was made in the facts at hand. Another disincentive to revealing other than firm decisions without solicitation, it is pointed out, is the uncertainty over when the disclosure obligation arises. At what stage in an employer's thinking about major change is he obligated to reveal "this thinking" to the trade union? Is a recommendation from a corporate planning division sufficient grounds? What if those with the ultimate say have not seen the proposal or have deferred its consideration? What if the planning document contains sensitive information which, on disclosure to the union, might be learned by competitors, customers or suppliers? Premature disclosure may force an adverse decision to be taken that might have been avoided if events had been left to take their course. Corporate thinking about possible closings or relocations may also not be in direct response to labour related costs but rather potential loss of customers, need for expansion or a more advantageous market location. Until a decision is made, is the matter sufficiently ripe for collective bargaining discussions? Another problem relates to the potential severity of labour board remedies. For example the NLRB ' s usual backpay order from the date when disclosure should have been made until an actual impasse is arrived at under a Board bargaining order frequently puts employees in a better position than if the company had met its bargaining obligations, particularly if the plant would have closed anyway. In fact, with this type of order, a trade union might be encouraged not to ask questions about future planning and simply rely on the subsequent assistance of a labour board remedy. It could be reasonably suggested that these types of problems may have contributed to the United States Supreme Court eventually taking plant closure decisions off the bargaining table altogether. What policy justification then supports greater unsolicited disclosure and merits the Board's intervention in the face of these potential difficulties?

48. Those who argue for unsolicited disclosure beyond firm decisions marshal their arguments along the following lines. They point out that collective bargaining is valuable because of the "say" it gives employees in the decisions which affect them. When an employer fails to disclose changes which are being contemplated, employees are not put on notice of problems which may arise during the term of the agreement. The trade union will, in the usual case, enter into a collective agreement silent on the point which has the effect of providing for unilateral employer initiatives. Secondly, they point out unsolicited disclosure based only on firm decisions is a standard too subject to manipulation. Planning, proposals and decisions can be easily arranged around collective bargaining schedules particularly with the legal onus of proof in an unfair labour practice case involving section 15 residing with the complainant trade union. In response to claimed inherent uncertainty of proposals or plans, they submit that many decisions should not be made without first getting the trade union's response. They argue that in the face of cost-related problems, employees have frequently played a pivotal role in keeping a business functioning or a plant open. They further submit that if such plans are sufficiently concrete to be disclosed when an employer is asked about his intentions by a trade union, as the *Westinghouse* case suggested, then why is it a factor in the context of disclosure without being asked? In any event, it is submitted that an employee' s commitment to a company usually involves years of training, the development of specialized skills and the ordering of his entire life around the employer's business. A decision to shut a plant destroys these human investments in as real a manner as shareholders are affected. It is submitted that some disruption at the bargaining table is a small price to pay for trying to provide workers with a meaningful opportunity to participate in

such a fundamental decision. They further point to the fact that from 1966 until just recently the United States labour relations system operated under the *Ozark Thailers Inc., supra* standard of disclosure which required disclosure once management had "reached the point of thinking seriously about taking such an extraordinary step as relocating or terminating a portion of the business...." It is also pointed out that disclosure of only firm decisions is not likely to set the stage for productive "decision" bargaining. While bargaining does not demand that management ignore its own interests, bargaining is likely to be less productive if management already has its mind made up. It is further emphasized that the bargaining duty only imposes a duty on management to meet and discuss matters with a union. After that, it is free to do as it wishes. Finally, it is submitted that the very unusual and unexpected nature of major business decisions affecting employees explains why trade unions often fail to ask questions about such matters. It is asserted that the failure to ask should be treated, at most, as a technical oversight.

49. To be accurate, this Board has not said that unsolicited disclosure is only obligated after a board of directors has given its approval. In *Westinghouse,* the Board used the term *de facto* decision and, we might add, in the context of a decision that was not primarily cost related. In the same decision it also pointed out the supplementary obligation of a company to respond honestly to questions. In this respect we would observe that the bulk of solicited disclosure cases in the United States and the few in Canada that exist have related to factual information or data — wage rates, wage surveys, time studies, insurance costs and other employment related activity. (We point out that this Board has not yet had to set the ground rules to such requests. See Bartosic and Hartley, *supra,* for example.) Accordingly, it is not at all clear what a company's obligation is, if any, with respect to requests over plans. In *Westinghouse* the Board's reference to requests for such material emphasized the employer's duty to respond "honestly" thereby pointing out that a request could well trigger a misrepresentation which may later be relied upon. Moreover, questions by a trade union on specific plans for significant changes permit the trade union to assess the employer's response and decide whether the issue should be pursued. An equivocal employer response may encourage a bargaining proposal which will not be removed until an acceptable assurance is forthcoming. In short, requests and answers provide a self-regulatory mechanism and permit collective bargaining to resolve these problems, minimizing the need for labour board intervention. A failure to request information of this kind may also, in certain circumstances, suggest the union is satisfied with the appropriateness of a collective agreement (as it will stand) or that it believes it can do little about such significant change — a "What will come, will come" type of attitude. There is also an inherent uncertainty in defining the extent of an unsolicited disclosure duty beyond firm decisions. There is the problem of confidentiality surrounding such plans. And there is the collective bargaining impact of dropping such "incomplete thinking" on a bargaining table. These problems cannot be denied or minimized.

50. On the other hand, plans and decisions to close a plant can effectively extinguish a bargaining unit and the relevance of the usual terms of a collective agreement. In this context, where a decision to close is announced "on the heels" of the signing of a collective agreement, the timing of such a significant event may raise a rebuttable presumption that the decision-making was sufficiently ripe during bargaining to have required disclosure or that it was intentionally delayed until the completion of bargaining. It can be persuasively argued that the more fundamental the decision on the workplace, the less likely this Board should be willing to accept fine distinctions in timing between "proposals" and "decisions" at face value and particularly when strong confirmatory evidence that the decision-making was not manipulated is lacking. This approach is sensitive to the positive incentive not to disclose now built into our system, and the potential for manipulation. Indeed, a strong argument can be made that the *de fucto* decision doctrine should be expanded to include "highly probable decisions" or "effective recommendations" when so fundamental an issue as a plant closing is at stake. Having regard to the facts in each case the failure to disclose such matters may also be tantamount to a misrepresentation. We might also point out that there are decisions taken because of

costs which really ought not to be made until the underlying problem is discussed with the union to see if adjustments can be made and the decision avoided. However, for the reasons discussed above, we are not willing to adopt the *Ozark Trailers* test of "thinking seriously" for unsolicited disclosures as urged upon us by the complainant. The failure to reveal such "possibilities" as a general matter is not tantamount to a misrepresentation and therefore lacks the bad faith rationale developed in *Westinghouse* justifying unsolicited disclosure. The purpose of such information would be investigative and to facilitate the rational discussion purpose of the bargaining duty. Accordingly, the purpose of the information and the difficulties detailed above with unsolicited disclosure militate against any substantial expansion of the unsolicited disclosure obligation as elaborated to date. The interests of employees are real but the Board is not ignoring these interests by requiring a questioning approach to disclosure as a general matter. The position urged upon us by the complainant has too much potential for "greater heat than light" at the bargaining table. There is already enough uncertainty over precisely how significant and what nature a decision must be to trigger the unsolicited disclosure duty. Unsolicited disclosure must be understood to be exceptional and centered essentially on a bad faith rationale.

51. We now turn to the facts of this case. Mr. Gruber, Mr. Beettam and Mr. Gills testified they knew nothing about the plant closing during bargaining. Mr. Souccar testified that Mr. Haiplik came to him in early February and recommended the plant be closed. The company acted swiftly thereafter. The company's position is that it needed to await the signing of a collective agreement to assess how firm its market support would be. We have serious concerns with the evidence supporting this position. There was no documentary evidence adduced by the respondent confirming the close but unmanipulated timing of the decision to close and the signing of the collective agreement. Mr. Haiplik never took the witness stand to justify in his own words why he waited until he did before before coming forward to Mr. Souccar. The respondent company was clearly considering rationalization (i.e. plant closures) as early as April of 1982 and the Hamilton plant was the prime candidate. The reasons for the needed rationalization were not short-term market considerations but a fundamental excess capacity in the entire industry coupled with a deep recession. These problems were so extreme as to cause the company to seek out merger discussions with MacMillan Bloedel in early 1982 and to recommence these discussions on the very day the collective agreement was ratified. Accordingly, the basic problems requiring rationalization were present during and at the completion of bargaining. The claimed sudden erosion of the market in the short term just on the conclusion of bargaining is also not supported by any documentation and the surrounding facts. This was not the first time the respondent had benefited from an industry-wide strike. It was well familiar with the practice of its customers to share patronage between the respondent and its competitors. Moreover, not one customer was called to testify that it was even considering leaving more than its usual allocation with the company. Furthermore, the evidence does not support the claim of sudden market erosion after January 13th. Lay-offs began in November and continued in December. The lay-off decided upon on January 17 was part of this trend. There is absolutely no documented market analysis before this Board to support the respondent's assertion on the timing of this market erosion and yet the company claims to have been monitoring the situation day by day. We also point out that there was nothing new or sudden about the commitment of customers to U.S. sources and nothing new about the U.S. price structure, both contributing problems to the overall picture. Indeed, during the strike the company came to realize just how great a capacity each plant possessed. We also have the un-rebutted statements of Denise Dellaire that the possibility of closing the plant was under study "for a number of months"; the information releases of the company to the union and the public confirming the long term justification for the closing; and the statements by Gruber and Beettam that the plant probably would have closed earlier had it not been for the strike. We also find it difficult to accept on the evidence before us that this company would make such a major decision as the closing of the Hamilton plant at an expenditure in excess of $2 million without considerable formal analysis and documentation to support such a move in light of alternatives. Expenditures of nowhere close to

this order appear to receive multiple reviews and analysis and are well documented. In fact, some form of formal analysis would appear to have been undertaken under Mr. Souccar's direction with the assistance of Corporate Planning personnel prior to the strike.

52. At the very least, the evidence before us raises a rebuttable presumption which went unrebutted that the company either manipulated the timing of its decision to avoid bargaining on the matter or withheld from the union a *de fucto* decision which was simply awaiting the conclusion of the collective agreement for formal adoption and implementation. We are not satisfied that the timing of the closing related to short term market considerations as stated above and, therefore, on the evidence before us, infer that it related instead to the collective bargaining timetable. Given the closeness in timing between the end of bargaining and the announcement of the decision, and having regard to the fundamental impact of the decision on employees, the respondent was, on the evidence before us, obligated to call Mr. Haiplik to reveal and testify as to why he waited until he did. It is a "well-recognized rule that the failure of a party or a witness to give evidence, which it was in the power of the party or witness to give and by which the facts might have been elucidated, justifies an inference that the evidence of the party or witness would have been unfavourable to the party to whom the failure is attributed". See Sopinka and Lederman, *The Law of Evidence in Civil Cases,* 1974, at pp. 535-536; *Royal Trust v. Toronto Transportation Commission,* [1935] S.C.R. 671 at pp. 675-677; and *Murray v. Saskatoon,* [1952] 2 D.L.R. 499 (Sask.C.A.) at pp.505-506. As Vice-President and General Manager of the Container Division, Mr. Haiplik was, in the words of Mr. Souccar, "monitoring the situation". He was also one of the "operating people left to come up with an analysis on how to solve the over-capacity problem", and "responsible for making the decision with respect to a plant closure and in turn recommending a course of action". Certainly Mr. Haiplik's activities and duties in this regard must have put him in possession of information the disclosure of which would have elucidated the facts relating to the plant closure decision and its timing. The law of evidence clearly permits the drawing of adverse inferences against a corporation for the failure to call an officer or employee in the best position to testify on a matter in question: see *Lynch & Co. v. United States Fidelity & Guaramy Co.,* [1971] 1 O.R. 28 (H.C.) and *Keelan v. Norray Distributing Ltd.* (1967), 62 D.L.R. (2d) 466 (Man. Q. B.). In all of the circumstances~ absent a convincing explanation from the respondent as to why Mr. Haiplik could not be produced as a witness, the Board is entitled to draw the adverse inference of intentional delay. The absence of any authoritative documentation indicating timing also contributes to the conclusion of intentional delay. The Board believes it can take notice that a decision of this magnitude normally involves extensive discussions at several corporate levels, studies, and the solicitation of external advice. It is simply not credible that the respondent arrived at its decision, putting 180 employees, many with long service, out of work at a cost to itself in excess of two million dollars, in the cursory manner it claims. See Rabin, *Fibreboard and the Termination of Bargaining Unit Work: The Search for Standards in Defining the Duty to Bargain* (1971), 71 Colum.L.Rev. 803 at 833; and Goldman, *Partial Terminations - A Choice Between Bargaining Equality and Economic Efficiency* (1967), 14 U.C.L.A. L.Rev. 1089 at 1097.

53. In any event, we find that the matter of the impending closing was so concrete and highly probable in early January and dealt with by the board of directors in such a perfunctory manner (in that there was no documentation or apparent consideration of alternatives), the company had a minimum obligation to say that unless a certain percentage of the new business was retained or unless there was a dramatic turn in the operation a recommendation to close would be made within the next few weeks. Having regard to the Christmas letter to employees; the productive second half of 1982; and to the then state of dialogue between local labour and management on the future of the plant, the company's silence at the bargaining table was tantamount to a misrepresentation within the meaning of the *de facto* decision doctrine established in *Westinghouse.* It may well be that the union could have contributed little to whether the plant had to be closed, i.e. "decision bargaining"~ but it had a vital interest in the "impact" of that closing on the employees it represented. As it turned out, the

entirety of the actual collective bargaining between the parties was academic and the real issue between the parties (i.e. the closing) was never discussed. By remaining silent, the company converted a major bargaining issue into a thirty minute discussion and announcement on March 1, 1983. Further, it is no answer that the company's negotiators knew nothing about the impending closing. The company has a statutory responsibility to send informed representatives to the bargaining table.

54. This then brings us to the issue of remedy. We have already expressed the view that the typical back pay order and bargaining direction previously issued by the NLRB in similar cases had a considerable propensity for over-compensation and therefore punishment. This the Ontario Labour Relations Board cannot and should not do. See *Radio Shack, infra.* Furthermore, the failure of the union to ask questions during the bargaining given the overall history of this plant and the market conditions all plants involved in the bargaining were then experiencing may well be relevant in assessing the likelihood of a different collective bargaining outcome had the closing been raised and in fashioning a remedy. The union's actual proposal on the topic may be germane in this connection as well. On the other hand, the actual extent to which employees would have been cushioned from the closing over and above Article 18.26 having particular regard to the bargaining structure, is a matter of some uncertainty primarily because the respondent employer failed in its statutory obligation. As the Board stated in relation to a similar problem in *United Steelworkers of America and Radio Shack,* [1979] OLRB Rep. Dec. 1220 at 1261 upheld *Re Tandy Electronics Ltd. and United Steelworkers of America* (1980), 30 OR (2d) 29:

> A general damage award to all of the employees in the bargaining unit of the kind we have in mind, would not amount to the dictation of contract terms. Rather, it acknowledges that the wrong the Board is addressing is not the denial of a right to a particular agreement, but rather the right to bargain collectively in pursuit of such a contract. Thus, it is the prospects of the employees of increased earnings from the exercise of the trade union's bargaining capacity in negotiations which have been impaired by the employer's wrongful acts and refusal to engage in collective bargaining. It is therefore this "loss" — the bargaining expectancy — that must be assessed. Never having tried to value this loss, we are unable and unwilling to conclude that such losses cannot be established from relevant and statistically meaningful material available to the parties. The law of damages has recognized as probative the experience of others similarly employed and, with the plethora of collective bargaining data available to the parties~ it would not seem rash to think that reasoned argument can be made on this issue too.

55. The Board therefore finds and declares that the respondent contravened section 15 of the *Labour Relations Act.* The Board will therefore reschedule this matter for hearing to provide the complainant with an opportunity to establish by reasonable proof those losses sustained by the union and bargaining unit employees, if any, arising from the loss of opportunity to negotiate on the matter of the plant closing together with interest as appropriate. The Board will also make a labour relations officer available to the parties should they wish to have discussions before this matter returns for hearing. A board order directing a reopening of the plant is not practical (in that the property and machinery have been disposed of) and, on our view of the evidence, is not justified in the circumstances. This aspect of the claim is therefore denied. The Registrar is directed to reschedule this matter for hearing and determination on the issue of damages on the application of the complainant and the Board remains seized of this case for such purposes.

DISSENT OF BOARD MEMBER W. H. WIGHTMAN;

1. I must dissent from the majority decision based not only on my interpretation of the evidence before us but, as well, out of a deep concern for the future implications of so detailed a

scrutiny of the collective bargaining process which can only add to the difficulties of engaging in business in this Province. It seems to me that a policy based on greater disclosure in bargaining is so fundamental a matter that the initiative is best left to the Legislature and not this tribunal responsible only for the ad hoc resolution of individual disputes.

2. Whereas a corporate decision to make a capital commitment can reasonably be expected to be based on documentation to support anticipated return on investment, (e.g. "cost/ benefit analysis" and "market projections") a decision to minimize losses is more likely to be a judgment call based, in this case, on the performance of the plant over the preceding several years. It was the unrefuted evidence that, apart from those occasions when competitors were on strike, the Hamilton plant showed a dismal record. The 1981 strike was virtually industry-wide and by far the longest in the history of the industry. I do not find it difficult to accept the evidence of the Company that they entertained some hope of residual customer loyalty as a result of the extraordinary efforts on the part of the management and employees at Hamilton to meet the increased needs of their customers during that period. Nor do I have difficulty in accepting their proposition that, had such customer loyalty manifested itself in larger orders and thus greater use of plant capacity, the decision to close might not have been made.

3. However, even if I were to join the majority in not accepting the evidence of company witnesses, in favour of a conclusion that the decision to close had merely been postponed, I would not join in a conclusion that Section 15 of the *Labour Relations Act* had been contravened.

4. I accept the evidence of Mr. Gruber when he tells us he conducted negotiations on behalf of the company with an awareness of case law which would have obliged him to disclose such a decision had it already been made but that he felt no obligation to disclose a decision which at that point was still tentative. Quite apart from the impact such a 'disclosure" could have had on the negotiations, the subsequent evidence that customer loyalty in the industry is not existent can lead one to infer that such premature disclosure would have resulted in an even more rapid cancellation of orders and more precipitous closing of the plant.

5. While I can understand Gruber's reluctance to volunteer information or speculation which might be expected to work against this "last gasp" effort to save the plant, I find it much more difficult to understand the failure of the union to raise questions as to the future prospects of the plant in light of the testimony of their own witnesses to the effect that they recognized the tenuous position the company faced.

6. Had the union raised such questions as a minimum we could have expected Gruber to refer back to senior-most management as to precisely how he should respond in light of his awareness of the disclosure obligation.

7. A further concern as to the union's handling of its responsibilities to its members at Hamilton arises from an examination of the union demand (see para.2 of the majority decision) and the contrasting approaches taken by the company and the union as reflected in Mr. Souccar's letter of April 6, 1982. (see para. 17 of the majority decision). Whereas the Company proposes to give employees hired at other locations full recognition for all past company service (with all that implies in matters such as pensions, vacation entitlement, etc.), the union "demand", which was unilaterally dropped without ever having been spoken to, would have benefited Hamilton employees only in the event the Company were to open a new plant. It specifically precluded their absorption with seniority into "any Consolidated Bathurst operation currently under agreement with the International Woodworkers of America". Since overcapacity had been the problem for several years the probability of a new facility being opened seems unlikely in the extreme and gives an extremely hollow ring to

this effort on the part of the union to protect its members.

8. I make these observations but no recommendations with respect to the conduct of the union in its representation of its members because I am loathe for this tribunal to delve into the internal affairs and judgment decisions of a labour union. I could only wish that we would exercise equivalent restraint in passing judgment on corporate decision-making.

9. It is in this latter connection that I fear the majority decision will prove harmful. The perception among the business community will be that, while Gruber negotiated in good conscience with respect to his understanding as to the onus of disclosure of decisions already made, the effect of at least paragraph 53 of this decision is, in my view, to change the general rules of disclosure retroactively such that his company may be severely penalized. Moreover, companies may perceive themselves to be in a "no-win" position regardless of the stage to which corporate planning may have progressed short of a final decision.

10. Given the existence of a possible decision which may affect employment, this decision has the potential for creating greater confusion over the nature and timing of unsolicited disclosure. Moreover, the decision appears to ignore the following business considerations which must be kept in mind:

a) disclosure in advance of the event and during negotiations may lead to;

— a charge of bargaining in bad faith on the grounds that the "disclosure" was merely a "threat" by a company "crying wolf';

— the possible loss of new orders or cancellation of existing orders such as to force an even earlier closure;

— the disclosure to competitors of collateral information which may put them at a competitive disadvantage in other parts of their operations;

— the creation of a climate in which a negotiated settlement may be impossible of attainment;

or

b) disclosure following ratification which may lead to;

— an award such as in the instant case with penalties of an indeterminate amount from the point of view of the company.

11. One fears that in a similar situation, if in fact the decision to close has been made, companies may be inclined to consider as an alternative the forcing of a strike so that the plant may be closed during the period when there is no operative collective agreement.

12. Even if one accepts the Board's interpretation of the Act as requiring the disclosure of decisions which have been made as good social and/or economic policy, I firmly believe we should go no further. Even then I would wonder what damage we are doing to the accommodative notion of collective bargaining and the right of the parties of interest to decide what priority they shall attach to each of the variety of issues the process has been expected to resolve?

13. In the final analysis I see no evidence offered by the union to meet its onus as complainant. I prefer both the evidence and the argument as presented by the Company and would have so found in dismissing the complaint.

PARTIAL DISSENT OF BOARD MEMBER B. K. LEE;

1. I am in concurrence with the Chairman's reasoning up to paragraphs 54 and 55. I do not consider the trade union's failure to ask the company in bargaining if it had any plans which would significantly impact on the bargaining unit during the term of the collective agreement under negotiation, relevant to the issue of remedy. I believe that an order directing the reopening of the plant would have been appropriate and, at the very least, substantial damages are merited. Accordingly, I disassociate myself from the phrase "if any" in paragraph 55.