0848-85-U Royal Conservatory of Music Faculty Association, Complainant, v. Governing Council of the University of Toronto (**Royal Conservatory of Music**), Respondent

BEFORE: *S. A. Tacon,* Vice-Chairman, and Board Members *R. J. Gallivan* and *S. 0 'Flynn.*

APPEARANCES*: H. Goldblatt, C. Michael Mitchell, S. Barrett* and *Irene McLellan* for the complainant; *B. W Binning* (on August 19, 1985, *M. Contini* (on September 11, 12) and *John Parker* for the respondent.

DECISION OF S. A. TACON, VICE-CHAIRMAN; AND BOARD MEMBER S. O'FLYNN; November 27, 1985

I

1. This is a complaint alleging violation of sections 15, 64 and 79 of the *Labour Relations Act.* The parties agreed that the alleged contravention of section 79 should be adjourned *sine die.* Having regard to that agreement, the Board hereby consents to adjourn this allegation *sine die* for a period not exceeding one year. Unless within that time the parties request that the Board proceed with the matter, it will be terminated. With respect to the other allegations, in brief, the complainant asserts that the refusal by the respondent to negotiate with respect to certain proposals, to disclose specific information as requested and to continue negotiations on other matters pending the resolution of this complaint contravenes sections 15 and 64 of the Act.

2. The parties also agreed that evidence before the Board would consist of documentary material only; no *viva voce* evidence was called. The documentation included two accounts of some five negotiating meetings, one set taken by the complainant and the other by the respondent. Counsel agreed that the minutes were substantially similar and that any discrepancy should be resolved by the Board without the benefit of *viva voce* testimony regarding those minutes and meetings. It is appropriate to note here that, in fact, counsel in argument generally referred to the minutes tendered by the other party..

3. The Board indicated, in response to the complainant's request for a decision with reasons to issue later, that the Board would reserve on that request. After review of the matter, the Board has determined that it would not be helpful to accede to the complainant's request and, accordingly, the Board's decision and reasons are set out herein.

4. The Board does not intend to detail the voluminous documentation entered as evidence. The material, as noted, was submitted on agreement of the parties. Nevertheless, it is necessary to sketch the factual background. More detailed references to the facts, as reflected in the documentation, are made throughout, as appropriate.

5. The respondent is the Governing Council of the University of Toronto, for convenience, referred to as the "university". While the precise organizational structure of the university was not placed in evidence, it is common ground that a number of committees report to the Governing Council and, further, there is what could be termed an "administrative" hierarchy, culminating with the president. The complainant is the Royal Conservatory of Music Faculty Association, again, for convenience referred to as "the union". The union was certified by the Board; the certificate is dated October 26, 1984. Notice to bargain was given by letter dated November 14, 1984. The instant complaint was filed July *5, 1985.*

6. The Royal Conservatory of Music, founded in 1886 and affiliated with the university in 1896, is recognized as a prestigious institution with a long tradition of offering instruction in music. The university assumed complete control of the Conservatory, including rights to the name, pursuant to the *Royal Conservatory of Music of Toronto Act, 1954*. The Faculty of Music at the University of Toronto was first established in 1918. In the context of an enormous simplification which is not intended to slight the quality, breadth or diversity of either body and its respective activities, the Conservatory may be described as an institution offering music as an avocation to children and adults while the Faculty offers music studies to students as a professional faculty within the university.

7. In January 1983, a committee was established to review the organization and operation of the two divisions with the objective of rationalizing resources and developing a general plan for the integration of the programs, services and resources of the Faculty of Music and the Royal Conservatory. Although the Board need not go into detail, it should be noted that this was the third official review of the relationship between the Faculty and the Conservatory since 1973.

8. The committee released a brief interim report in June 1983 which still spoke of the overall objective of integration. A summary for discussion, issued in December 1983, however, suggested formal separation of the Conservatory and the Faculty of Music in the context of a transitional period of, perhaps, ten years followed by negotiations between the university and the Conservatory with respect to matters such as the right to the name "Royal Conservatory of Music", the Frederick Harris Music Company, etc.

9. To describe the ensuing debate within the university and the faculty association as vigorous, wide-ranging and heated is an understatement. The summary for discussion is more appropriately characterized, to use a colloquialism, as a "bombshell". In the early months of 1984, written responses to the summary for discussion were produced by the faculty association and the Conservatory assembly (an academic council). Moreover, on March 13, 1984, the faculty association applied to the Board for certification. As noted, the formal certificate issued in October 1984.

10. The final report of the committee was released in June 1984. It is appropriate to set out the following excerpt from that report:

> Precis and Summary of Recommendations
>
> This report is the result of eighteen months of deliberations. In December 1983 we issued a "Summary for Discussion". Our position has evolved as a result of the reactions to that discussion paper. This report is the final report of the committee and supersedes all other documents.
>
> Our study of the history and present relationship of the Royal Conservatory of Music and the Faculty of Music of the University of Toronto has led us to believe that they should not be integrated. We have considered and rejected various models of integration including integration in the person of a single Dean. complete programmatic integration, and intermediate models that would achieve partial integration. We have concluded that the Conservatory should be separated from the University. It is our conviction that separation will be to the advantage of both units. We believe that apart they can flourish independently while remaining partners in music studies in Toronto.
>
> Before complete separation occurs, we are recommending that a series of specialized reviews beyond our competence be conducted. These reviews will assess the present situation and, in their reports, provide a more

detailed framework for the future of the two institutions.

Our recommendations concerning an independent Conservatory are based on the following premises:

1) The University will not sever the connection until it is satisfied that the Conservatory is able to function independently.

2) Accommodation will continue to be provided for the current programmes and level of activity either in McMaster Hall or in a new building.

3) The Conservatory will be governed by a strong, independent Board that will be responsible for all financial matters, be the employer of all staff associated with the Conservatory and be responsible for all its programme including the graded examination system.

4) The Conservatory will assume ownership of the Frederick Harris Music Co. Limited.

Our major recommendations are two:

1) That the Royal Conservatory of Music become independent of the University taking with it the name and all programmes and activities that are now under the direction of the Conservatory.

2) That early in the process of disengagement the following reviews be undertaken concurrently:

   i) Of the undergraduate programme of the Faculty with particular emphasis on the degree in performance, if possible in conjunction with the anticipated graduate review.

   ii) Of the teaching in the Conservatory.

   iii) Of the Graded Examination System.

   iv) Of the Branch Operation of the Conservatory.

   v) Of the organization of the Conservatory.

Our other recommendations flow from these:

3) That an implementation Committee be appointed immediately to oversee the interim period.

4) That immediate steps be taken to appoint a Principal for the Conservatory.

5) That the Governing Council of the University name an interim Board of the Conservatory as soon as possible.

11. It is also necessary to refer to another important issue during this period. A different university review committee had resulted in a Report on Campus Development Potential in March 1983. There was considerable concern amongst the faculty at the Conservatory, in particular, that the

university was actively considering relocating the Conservatory from its facilities at McMaster Hall. In June, 1983, a letter from President Ham to Principal Schabas stated that the development possibilities were not connected with the committee then reviewing the relationship between the Conservatory and the Faculty of Music. Further, the letter assured the Principal that any development scheme with respect to McMaster Hall should essentially ensure that any new facility for the Conservatory would satisfy the space requirements of the current programmes and enrolment, be near the Faculty of Music and accessible to Conservatory students. The Board notes that the Conservatory, in addition to the main building at McMaster Hall, operates through a number of branches located throughout the greater Metropolitan Toronto area.

12. Following the final report recommending separation of the Conservatory from the university, the debate intensified. The faculty association submitted a formal written response to the final report in September 1984 basically opposing separation. Acting Principal Dodson, in a letter to F. lacobucci (Vice-President and Provost) dated October 4, 1984, (and subsequently circulated to Conservatory faculty) concurred with the recommended separation, although disagreeing with two of the committee's premises. The letter, however, also outlined a number of asserted preconditions to separation dealing with the separation process, various reviews, the ownership of assets, location and a recommendation that a collective agreement first be negotiated with the newly certified union.

13. The university's position on the report may be summarized by reference to a letter of December 15, 1984 from R. N. Wolff (Vice-Provost Professional Faculties):

Stage I General Recommendations through Governing Council

Jan. and Feb. 1985	Draft recommendations prepared by the University administration and taken to the Planning Subcommittee, the Assembly of the RCMT and the Council of the Faculty of Music for discussion. These recommendations will request approval in principle for creation of an independent RCM by July 1, 1986.
March 1985	Recommendations to the Academic Affairs and Planning & Resources Committees, where appropriate.
May 1985	Recommendations to Governing Council and, if approved, a decision on the future structure of the Royal Conservatory.

Stage II Detailed Recommendations through Governing Council

June - Sept. 1985	Committee(s) to develop Presidential recommendations outlining the details of the legal organization, the resources committed and the nature of any future relationship with the University of Toronto.
Oct. - Dec. 1985	Recommendations through various committees of Governing Council, and a final decision by the Council.

Stage III Creation of the Legal Organization

Jan. - May 1986	Action by the Ontario Legislature and/or other appropriate bodies to create the new organization.

Stage IV "New" Royal Conservatory in place by July 1, 1986.

14. Concurrently with this process, the university and the union commenced negotiations for a first collective agreement. At the first such meeting on December 7, 1984, M. Mitchell, as chief negotiator for the union, asserted the union's position that it wished to bargain directly about the separation process itself and opposed a mere "consultative" role for the "faculty". (Although this bargaining session preceded the university's "position" just quoted, there had been written confirmation on December 1, 1984, of an earlier meeting wherein the university's stance had been outlined in more general terms.) J. Parker, chief negotiator for the university, responded that it was solely the university's responsibility to deal with divestment.

15. Pursuant to the timetable outlined in paragraph 13, several committees and subcommittees were struck to examine various aspects of divestment, including administration and finance, governance and curriculum. Members of the faculty and administrative staff were included on the ad-hoc committees. By late January, the administration's recommendations to the Planning Sub-committee were (in part) as follows:

> ... The Council of the Faculty of Music and the Assembly of the Royal Conservatory are being asked for their views on this administrative response as well. We also believe that interested individuals and groups outside the University of Toronto must play an active role in determining the future of the Conservatory. To this end we propose a three-stage decision-making process as follows:
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> 1) Approval in principle from the Governing Council for the creation of an independent Royal Conservatory of Music.
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> 2) Approval from the Governing Council for the corporate structure and resources made available to the Royal Conservatory of Music. Ii; will also be necessary to develop a long term affiliation agreement between the Royal Conservatory and the University which addresses the programmatic interaction between the Faculty of Music and the Royal Conservatory and provides the Royal Conservatory with appropriate physical facilities.
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> 3) Recommendation of Governing Council to the Ontario Legislature for the enactment of a special statute for the creation of the Royal Conservatory.
>
> The administration believes that the action in (3) is important to the future well being of the Conservatory but, if the Legislature fails to act on the recommendation, the University will create the new corporation.
>
> This three-stage decision-making process should provide the members of the Governing Council, the University administration, teachers and students of the Conservatory and the University community generally, as well as the public at large, the opportunity to ensure that the Royal Conservatory will have a strong and viable future. This process will also allow adequate time for consultation with appropriate individuals as detailed recommendations are developed....
>
> ... We believe that each of the reviews recommended for the Royal Conservatory should be undertaken, but they should be done under the direction of the Board of Directors of an independent Royal Conservatory of Music. To provide Governing Council and the administration with the

assurances that the Royal Conservatory is able to function independently, we will ask the current administration to develop a business plan for the Conservatory. The review recommended for the undergraduate programme in the Faculty of Music will be conducted within the context of a strategic planning exercise to be initiated by the Dean of the Faculty.

The committee also recommended the immediate appointment of a Principal for the Conservatory and the creation of an interim Board of the Conservatory. The appointment of a permanent Principal should be left to the Board of Directors of the new Royal Conservatory of Music. The administration must, however, ensure that the Conservatory docs have strong leadership during the period of decision. To this end the administration will recommend the appointment of an acting Principal with a term ending June 30, 1986. The President will also appoint an Advisory Board of the Royal Conservatory whose membership will be primarily drawn from outside the University.

Recommendations

The administration recommends the following motions for the approval of Governing Council:

(1) The University of Toronto will take action to create an independent Royal Conservatory of Music by July 1, 1986. This organization should take the form of a Corporation without Share Capital to be controlled by a Board of Trustees. The Corporation will have control over all programmes and diplomas presently offered by the University through the Royal Conservatory of Music.

It is understood that this recommendation will be referred to the Planning and Resources Committee of Governing Council with concurrence by the Academic Affairs Committee.

(2) The Corporation will have control of the following assets currently owned by the University of Toronto:

- the Frederick Harris Music Company Ltd.
- the physical facilities housing the branch operations of the Royal Conservatory
- the musical instruments and business equipment located in all branches of the Royal Conservatory
- all funds and assets held in trust for the Royal Conservatory.

(3) The University of Toronto will provide the Corporation access to McMaster Hall or equivalent facilities.

(4) The University will request an Act of the Legislature of Ontario to establish the new Corporation.

The implementation of these motions is subject to subsequent approval by the Governing Council of the following:

a) the details of the Corporate structure,

b) the detailed listing of all assets provided to the Corporation, and

c) an affiliation agreement between the University of Toronto and the Corporation outlining the nature of programmatic interaction and the provision of facilities for the Corporation.

16. No negotiating meetings were held in the period from January to March 1985. The union, though, was not unaware of developments. In response to a written request, Parker informed Mitchell that the following motion woul.d be placed before the Governing Council on April 18, 1985.

> THAT, in principle, the University of Toronto take action to create an independent Royal Conservatory of Music by July 1st, 1986. This organization should take the form of a Corporation without Share Capital to be controlled by a Board of Trustees. The Corporation should have control over all programmes and diplomas presently offered by the University through the Royal Conservatory of Music.
>
> In principle,
>
> 1. THAT the Corporation have control of the following assets currently owned by the University of Toronto:
>
> - the Frederick Harris Music Company Ltd.;
> - the physical facilities housing the branch operations of the Royal Conservatory;
> - the musical instruments and business equipment located in all branches of the Royal Conservatory;
> - all funds and assets held in trust for the Royal Conservatory.
>
> 2. THAT the University of Toronto provide the Corporation access to McMaster Hall or equivalent facilities.
>
> 3. THAT the University request an Act of the Legislature of Ontario to establish the new Corporation.

17. The union then contacted each member of the Governing Council in writing, outlining its objection to approval of divestment other than in principle at the April 18 meeting. Attached to this letter was the union's position on separation (herein after referred to as "the 9 point programme"), as follows:

> **THE FUTURE OF THE ROYAL CONSERVATORY OF MUSIC**
>
> **A PROGRAMME FOR SEPARATION**
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> The Faculty of the Royal Conservatory of Music are not opposed in principle to the separation of the Royal Conservatory of Music from the University of Toronto. However, before separation can be approved the financial integrity and future home of the Conservatory must be assured; otherwise, the University will simply cast out the Conservatory from the University community to survive as best it can, if it can! Accordingly, we will support the separation of the two institutions if, and only if, the following conditions are met:
>
> 1. The name "Royal Conservatory of Music" shall remain with the new

institution.

2. McMaster Hall shall remain as the home of the Royal Conservatory of Music.

3. All physical facilities housing the branch operations of the Conservatory shall remain with the Conservatory.

4. The musical instruments, business equipment and all other assets located in all the physical facilities now occupied by the Conservatory (including the bookstore) shall remain with the Conservatory. Satisfactory arrangements regarding access to the Edward Johnson Library shall be assured.

5. All rights to the examination system as it is currently administered by the Conservatory shall remain with the Conservatory.

6. All funds and assets held in trust for the Conservatory, including scholarships, etc. shall remain with the Conservatory.

7. The Frederick Harris Music Company Ltd. shall be transferred to the Conservatory following a financial review to ensure that this is in the best interests of the Conservatory.

5. Adequate financial arrangements to ensure the future of the Conservatory shall be in place prior to separation.

9. A satisfactory system of self-government for the new institution shall also be assured prior to separation.

18. At the second negotiating session of April 17, 1985, Mitchell formally tabled and reviewed the 9 point programme. That review included a number of requests for disclosure of information. Parker requested that the union table its entire package of proposals. Mitchell asserted that the other issues "paled" in comparison to divestment but indicated the remaining proposals would be forthcoming. Mitchell also objected to approval of separation, except in principle, by the Governing Council. Parker responded that the university was developing its position and, once developed, would communicate with the union. It should be noted that the union had agreed, through exchange of correspondence and without prejudice to its position overall in bargaining, that the university could negotiate individual contracts for 1985-86 academic year and that individual fees and subjects to be taught would not be renegotiated at the bargaining table.

19. By letter dated May 3, 1985, Parker informed Mitchell that the Governing Council had only approved separation in principle (paragraph 1 of the motion set out in para. 16 above); the remainder of the motion had been referred back to the executive committee. Parker reiterated his request for the remainder of the union's proposals. Mitchell's reply of May 7, 1985 rejected the postponement of negotiations on separation (and disclosure of the requested information) pending completion of the union's demands. By letter dated May 17, 1985, Parker confirmed the date for the next bargaining meeting and stated:

> For purposes of clarification, we would advise that our position is that divestment of the Royal Conservatory by the University of Toronto is not negotiable. However, we will continue to discuss and negotiate any issue relating to terms and conditions of employment for members of the Faculty Association at the Conservatory.

20. At the negotiating meeting of May 22, 1985, Parker reiterated the university's position that separation was non-negotiable and that information related to divestment (e.g., financial documents concerning the Frederick Harris Music Company) would not be disclosed. Parker, as a matter of information only, did respond to some matters raised in the 9 point programme, for example, by stating that the Conservatory would retain the name "Royal Conservatory of Music" subsequent to separation. Parker acknowledged that location could affect employment conditions but confirmed there would be no negotiations on McMaster Hall itself. Mitchell continued to press for direct negotiations on the union's proposals already tabled and raised the possibility of legal action. Although noting that the university intended to consult widely before reaching its decisions on separation and that the union would be kept informed of developments, Parker stated the university would not negotiate those matters with the union.

21. The next bargaining session was June 3, 1985. Both parties reaffirmed their respective positions and with specific reference to the issue of location. Parker stated he was not able, at that point, to discuss details of a proposed implementation committee. The union tabled and reviewed its remaining proposals and sought additional information. In response to Mitchell's request, Parker indicated the university was working on their proposals. Finally, Mitchell informed Parker that a legal complaint might be forthcoming but the union considered that the discussions on other matters should continue in any event. Parker replied that he intended to negotiate a collective agreement and discussions would continue, although he would need to take instructions from his principals.

22. At the June 25, 1985 negotiating meeting, Parker reviewed the university's process for implementing the recommended divestment of the Conservatory. An implementation committee, to which two *ad hoc* committees (resources; corporate structure and governance) would report, would be struck to produce an implementation plan. A representative of the union would sit on the implementation committee. Two advisory committees (one to the Provost; one to the Principal) would also be created. Faculty of the Conservatory would be represented on the Principal's Advisory Committee. The report of the implementation committee would be reviewed by the Provost's Advisory Committee and the Provost and, after approval of the President, would go to the Governing Council. The union would be notified of the recommendations and could make representations to Governing Council. Parker confirmed the university's position on the non-negotiability of divestment and, indeed, of the implementation plan. The union, too, reiterated its earlier position. Parker noted the interim agreement of the parties with respect to fees for the 1985-86 academic year. Parker also stated that the university's proposals were not yet prepared, nor would they be delivered before September, given vacation schedules. The Board notes that the union president, I. McLellan, was invited to serve as union representative on the implementation committee; the invitation was accepted without prejudice to the union's position on the negotiability of the nine point programme.

23. The instant complaint was filed on July 5, 1985, as noted. The university then took a position, best expressed in a letter from Parker dated August 12:

> Given the nature of the unfair labour practice complaint brought by your client, the nature of the collective bargaining process, involving as it inevitably does compromises and tradeoffs between the parties on positions sought to be achieved, and the obvious importance to your client of the 9 proposals in respect of divestment, it is our position that no further negotiations should take place until the Board has rendered its decision and we can be guided accordingly.

The union asserted that negotiations should continue regarding all terms and conditions of employment not directly related to divestment. The complaint was formally amended to include the

allegation that the university's refusal to bargain pending the outcome of Board proceedings also constituted a violation of section 15 of the Act.

II

24. Although the evidence put before the Board was by agreement of the parties, two days were devoted to argument. The submissions of both counsel were able and thorough. Both carefully reviewed the evidence and the caselaw in support of their respective positions. As both counsel, almost without exception, referred to the same jurisprudence in support of their respective positions, it is convenient to here set out those cases: *Canadian Industries Limited,* [1976] OLRB Rep. May 199, 76 CLLC 16,014; *DeVilbiss (Canada) Limited,* [1976] OLRB Rep. March 49, 76 CLLC 16,009; *Westinghouse Canada Limited,* [1980] OLRB Rep. Apr. 577; *Sunnycrest Nursing Homes Limited,* [1982] OLRB Rep. Feb. 261; *Consolidated Bathurst Packaging Ltd.,* [1983] OLRB Rep. Sept. 1411, 83 CLLC 16,066; *Pulp and Paper Industrial Relations Bureau,* [1978] Can. LRBR 60; *Four B Manufacturing Limited,* [1978] OLRB Rep. Aug. 741; *Cable Tech Wire Company Limited,* [1978] OLRB Rep. Oct. 895; *Fotomat Canada Limited,* [1980] OLRB Rep. Oct. 1397; *United Brotherhood of Carpenters & Joiners of America,* [1978] OLRB Rep. Aug. 776. Counsel for the applicant also placed before the Board the following article, *B. A. Langille* "Equal Partnership in Canadian Labour Law", (1983) 21 *OHLI* 496. In a very abbreviated form, then, arguments of the parties were as follows.

25. Counsel for the complainant asserted that there were no limitations on the scope of bargaining, other than subjects "illegal" by virtue of the Act (e.g., recognition, scope of bargaining unit) and, perhaps, items "totally lacking" in merit or relevance. Counsel submitted the Act imposed no restriction on the scope of bargaining (other than the restrictions already noted), and, indeed, the definition of a collective agreement in section 1(1)(e) was expansive. That is, a collective agreement contained provisions relating to terms and conditions of employment *and* rights, privileges and duties of an employer, union and employees. It was contended any distinction between "decision" bargaining and "impact" bargaining was inappropriate. Counsel referred to the alleged distinction between bargaining about "location" (which was acknowledged by Parker to be "negotiable") and the specific location of McMaster Hall (which the university regarded as non-negotiable) to illustrate his position that any attempted distinction was unworkable and irrelevant. Thus, counsel submitted that the respondent was required to bargain about the 9 point programme by virtue of section 15 of the Act and the respondent's refusal violated that obligation, including the duty subsumed in that section to recognize the union as the bargaining agent for the employees in the bargaining unit. In the alternative, if the scope of bargaining was limited to matters with a direct or indirect impact on the terms and conditions of employment, counsel argued that the items in the 9 point programme still fell within the proper scope of bargaining. (The Board has not summarized counsel's review of each of the 9 points in support of this assertion).

With respect to the allegation that the refusal of the requested information violated section 15 of the Act, counsel submitted that the information requested must only be reasonably related to issues at the bargaining table. In the instant facts, it was argued the information was reasonably related to separation and, thus, must be disclosed. Counsel stated that there were appropriate mechanisms for dealing with any question as to the confidentiality of information so requested. Moreover, counsel asserted requesting information about a "sale" of a business (i.e., "separation" in this case) was not different from situations where an employer has raised financial circumstances in negotiations and where disclosure of such information has been required.

With regard to the respondent's refusal to bargain pending the outcome of the bad faith bargaining complaint, counsel argued that there is an obligation under section 15 to continue negotiations

notwithstanding the filing of a complaint. In addition, counsel contended the university had indicated bargaining would continue. As well, it was submitted that the respondent had engaged in a pattern of delay, in effect, to take advantage of the July 1, 1986 deadline for separation. In this context, then, to permit the respondent to halt negotiations on items clearly acknowledged as related to terms and conditions of employment would place the complainant in a worse position for filing its bad faith bargaining complaint.

In conclusion, counsel asserted that the respondent had contravened the duty imposed by section 15 of the Act by refusing to negotiate with respect to the 9 point programme, by refusing to disclose the requested information, by engaging in a pattern of delay and by refusing to continue negotiations pending the outcome of the bad faith bargaining complaint.

26. Counsel for the respondent argued that, while the definition of a collective agreement was expansive, a union only had authority under the Act to bargain as agent for the employees in the bargaining unit. An employer could not refuse to recognize or seek to undermine a union as the sole bargaining agent for employees in the bargaining unit but need not deal with the union seeking to act on behalf of other groups or institutions and would not violate section 15 of the Act in refusing to do so. In the instant facts, it was asserted that the union had identified itself as the sole body entitled to speak on behalf of the Conservatory as an institution. Counsel contended the respondent was not required to deal with the union in that context. Thus, it was argued that, as the 9 point programme related to the Conservatory as an institution and was outside the employment relationship, the respondent was not obliged to bargain about those items. Counsel referred to the "sale" of a business as an illustration. That is, it was argued an employer need only bargain about the "impact" of a sale and not about the "decision" to sell, unless the sole cause of the sale decision related to employment conditions (e.g., wage costs, etc.). Moreover, counsel submitted there was no evidence as yet that there would be any impact on employment conditions as a result of divestment. Even assuming an impact, though, it was asserted the respondent need only bargain about that impact and not about the decision itself.

With respect to the information request, counsel first argued that the information related to the 9 point programme need not be disclosed as the 9 point programme itself need not be bargained. Even if the 9 point programme was negotiable, the information requested was too broad and not shown to be clearly relevant to the 9 point programme. In fact, it was contended that the request related to an alleged union intention to generate debate on the quality of management by the Governing Council and the use of funds rather than to matters relating to the employment relationship. Counsel submitted the combination of the complainant's positions that all matters were negotiable and all information reasonably related to proposals tabled must be disclosed meant that, in effect, everything was subject to disclosure. That the Board should supervise information requests and attach conditions to disclosure where the material was sensitive was characterized as unworkable.

Again, in the alternative, if the 9 point programme was negotiable, counsel submitted a violation of section 15 required either employer conduct amounting to a refusal to recognize the union as sole bargaining agent *or* conduct which suggested less than a full commitment to concluding a collective agreement. Here, it was argued the evidence did not support a finding that the respondent was not committed to a collective agreement or had failed to recognize the union as sole bargaining agent for employees in the bargaining unit. Rather, the refusal related only to the respondent's belief that the 9 point programme was not negotiable. In fact, counsel contended that, provided an employer intended to negotiate a collective agreement and particularly where (as here) the issue was unusual or peripheral to the employment relationship, the employer could refuse to negotiate that issue without contravening the duty imposed by section 15 of the Act.

With respect to the alleged delay, counsel submitted that the evidence did not disclose undue delay given the complexity of divestment and the agreement of the parties that the period from January to April 1985 should not be regarded as culpable delay by either party.

With regard to the refusal to bargain pending the outcome of the bad faith bargaining complaint, counsel asserted that, as the complainant regarded the 9 point programme as of greatest importance, as the 9 point programme and the "other" issues involved economic costs and as the respondent did not know whether it would be compelled to bargain about the 9 point programme, continued negotiations were unworkable. That is, in the circumstances, the respondent was justified in refusing to bargain until the complaint was resolved.

In summary, counsel argued there was no failure to recognize the union as sole bargaining agent for employees in the bargaining unit with respect to the employment relationship (as opposed to agent for the Conservatory as an institution) and no refusal to enter into a collective agreement. Hence, counsel submitted there was no contravention of the duty to bargain in good faith.

27. In reply, counsel for the complainant opposed any distinction between "decision" bargaining and "impact" bargaining as irrelevant to the duty imposed by section 15 of the Act. Further, counsel opposed differentiating between the union bargaining on behalf of employees in the bargaining unit and "acting on behalf' of the Conservatory as an institution, where there is an impact on the employment relationship. Counsel characterized this as an attempt to introduce a "mandatory-directory" approach to the duty to bargain, asserting that that approach had been rejected in Canadian labour relations. Counsel submitted, in any event, that the union need not wait until the impact of separation was known before seeking to bargain about the consequences of divestment, particularly since the union could not require such negotiations during the term of a collective agreement. It was argued the information requested was needed for full and frank discussions and the Board could deal with spurious requests for disclosure. Finally, counsel submitted the duty to bargain in good faith did not just require recognition of the union as sole bargaining agent and an intention to conclude a collective agreement but also obliged the parties to engage in full and rational discussions. That is, a party must state and explain its position on items tabled (as opposed to necessarily changing its position). Here, counsel asserted the respondent had not fulfilled this aspect of the duty imposed by section 15 of the Act.

III

28. Section 15 of the *Labour Relations Act* reads:

> 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.

29. The Board intends to deal with each of the four issues separately, namely, the scope of the duty to bargain, the duty to disclose information, delay, the refusal to negotiate pending the outcome of the instant complaint.

Scope of the Duty to Bargain

30. The scope of the duty to bargain imposed under section 15 of the Act is squarely raised on the instant facts and has not been dealt with quite so directly by the Board previously. It is useful to refer first to the classic exposition of the duty in *De Vilbiss (Canada) Limited*, *supra*, at paragraph 13:

> The section imposes an obligation upon both employers and trade unions to enter into serious, discussion with the shared intent to enter into a collective bargaining agreement. Once a trade union is certified as the exclusive bargaining agent of employees within an appropriate bargaining unit the employer of those employees must accept that status of the trade union. It cannot enter into negotiations with a view to ridding itself of the trade union. And thus it can be said that the parties are obligated to have at least one common objective—that of entering into a collective agreement and [then] section 14 is intended to convey this obligation. But this is not to say that they will or are obligated to have common objectives with respect to the contents of any collective agreement they might enter into. The legislation is based upon the premise that the parties are best able to fashion the law that is to govern the work place and that the terms of an agreement are most acceptable when the parties who live under them have played the primary roles in their enactment. In short, the legislation is based upon the notion of voluntarism and reflected in the many administrative and judicial pronouncements that neither trade union nor employer is, by virtue of the bargaining duty, obligated to agree to any particular provision or proposal. Therefore, while they must share the common objective to enter a collective agreement, the legislation envisages that they have differences with respect to just what the content of that agreement should be and those differences may force the parties to have recourse to economic sanctions.

31. Given that "voluntarism" is the touchstone, it is implicit that the Board's role pursuant to section 15 of the Act is one of monitoring the *process* of bargaining and not the *content* of the proposals tabled. This role stands in sharp contrast with the American approach embodied in the "mandatory-directory" classification of proposals and the different consequences for bargaining of classification as a "mandatory" or "directory" item. The mandatory-directory approach has been rejected in this jurisdiction as not consonant with the legislative scheme: see *Consolidated Bathurst, supra; Pulp and Paper Industries, supra; Westinghouse Canada Limited, supra.*

32. This does not mean that the Board is totally distanced from the *content* of the parties' proposals or that there are no limits whatsoever on the scope of bargaining. The Board may have regard to the *content* of items tabled in order to determine whether either party does not intend to enter into a collective agreement (e.g., is engaging in surface bargaining) or whether the employer, for example, is seeking to undermine the union as exclusive bargaining agent by tabling an offer "tailor-made for rejection": see *Radio Shack,* [1979] OLRB Rep. Dec. 1220; *Fotomat Canada Ltd., supra; Irwin Toy Ltd.,* [1983] OLRB Rep. July 1064. Further, the Board may review the content of proposals to assess whether any items are "illegal". For example, a strike for recognition or to resolve a jurisdictional dispute is contrary to the legislative scheme: see *United Brotherhood of Carpenters & Joiners of America, supra; Toronto Star Newspapers Ltd.,* [1979] OLRB Rep. May 451, [1979] OLRB Rep. Aug. 811. See also: *Croven Limited,* [1977] OLRB Rep. Mar. 162; *A.N. Shaw Restorations Ltd.,* [1976] OLRB Rep. Sept. 504; *T. Barlisen & Sons,* [1960] OLRB Rep. May 80; *Canada Cement LaFarge Ltd.,* [1980] OLRB Rep. Nov. 1583; *Treco Machine Tool Ltd.,* [1982] OLRB Rep. Dec. 1954. The Board notes that, although two examples of demands which have been found to be "illegal" are mentioned and other examples are contained in the cases referred to, the appropriate scope of the concept of "illegality" is not before the Board in this case.

33. However, subject to the comments outlined in paragraph 32 above, the Board will not evaluate or censure the content of proposals tabled by the parties. Again, apart from those comments, if the parties are free to *agree* that any matter may become part of their collective agreement, it is implicit that each party must be free to *table* that matter for discussion. While this is perhaps the

bluntest enunciation of this principle, the proposition is not novel: see *Westinghouse, supra; Sunnycrest Nursing Homes, supra; Consolidated Bathurst, supra; Canadian Industries Limited, supra.* In the instant case, then, the respondent may not refuse to discuss the "9 point programme". The respondent characterized the 9 point programme as intruding on areas reserved to management. Quite simply, the parties are bargaining about what is reserved to management; the 9 points are not subjects *a priori* "off-limits" for discussion. The definition of a collective agreement in section 1(1)(e) of the Act is expansive; apart from illegal matters, the Board should not seek to restrict the scope of clauses which may be incorporated by agreement of the parties in *their* collective agreement. For the Board to accept the respondent's arguments would inevitably draw the Board into the mandatory-directory analysis of the duty to bargain. This, the Board will not do. Nor does the Board accept the respondent's asserted distinction between the union acting on behalf of the employees in the bargaining unit and acting on behalf of the Conservatory as an institution' as relevant to the duty imposed by section 15 of the Act. The union is the exclusive bargaining agent for employees in the bargaining unit - no more and no less. But as exclusive bargaining agent, the union is entitled to present its proposals for a collective agreement. The union may be seeking to occupy the "high ground" in an attempt to broaden its support or to introduce novel clauses in a collective agreement or be acting from other motives. Provided the motive is not the avoidance of a collective agreement, the Board will not question the wisdom of the priorities established or proposals formulated by the parties.

34. The Board, then, finds that the respondent's refusal to discuss the 9 point programme constitutes a violation of the duty to bargain in good faith. It is important, though, to clarify the obligation imposed on the respondent by virtue of section 15 of the Act. The statutory scheme establishes a structure for bargaining, a framework to facilitate full and frank discussion against a backdrop of the right to resort to economic sanctions. Thus, the respondent must *discuss* the proposals tabled by the union, including the 9 point programme. This does not mean the university must *agree* to those proposals in the current form or at all. The university, however, must respond to those proposals by stating its position with its explanation of that position. It may well be that rational communication between the parties will enable an accommodation to be reached without recourse to economic sanctions. Or, resolution of the matters in dispute may require exercise of such sanctions. That is for the parties to determine. The Board's role, apart from the *caveats* already noted in paragraph 32, is to monitor the process of bargaining to ensure that both parties intend to conclude a collective agreement and are making every reasonable effort to do so.

Duty to Disclose

35. The information requested by the union is as follows:

(a) all documents concerning the future use of McMaster Hall (the main location of the Conservatory) including estimates for renovations, plans for future use for both the building and the land, correspondence and documents regarding the land and building, correspondence, offers from interested purchasers, etc;

(b) any plans to sell or dispose of any of the branches of the Conservatory or of any other assets prior to separation;

(c) all assets of the Conservatory at the time it joined the University, including evaluation and allocation of those assets, and all documents concerning the sale of the College Street building to Hydro, and full disclosure of the consideration for that sale;

(d) a list of all current assets of the Conservatory at the present time, including pianos, instruments, etc.;

(e) all documentation in connection with the current examination system;

(f) a list of all trust funds, endowment funds, bursaries and scholarships used for students at the Conservatory, including books, materials and musical documents left or willed to the Conservatory over the years by teachers;

(g) all documentation concerning the]Frederick Harris Music Company, including its financial statements for the past five years;

(h) all financial information concerning the present position of the Conservatory, including its current budget, income and expenditure figures;

(i) all documentation and correspondence between the University and the Provincial Government regarding the future of the Conservatory, and what, if any, financial commitments have been made or sought from the Provincial Government concerning the Conservatory;

(j) all planning documents and memoranda concerning the future of the Conservatory, including all documents regarding the future decision making process, including the timetable of that process.

36. Counsel for the complainant asserted that the duty to bargain in good faith included a duty to disclose, on request, information reasonably related to the proposals at the bargaining table. It is true that some statements in the jurisprudence appear to support the union's assertion. For example, in *Consolidated Bathurst, supra*, (at paragraph 43) the Board stated:

> A bargaining agent can claim entitlement to information necessary for it to reach informed decisions and thereby to perform effectively its statutory responsibilities.

However, the Board considers that that statement must not be wrenched from its context to form the basis of a broad duty of disclosure. One starts with one function of the duty to bargain in good faith, as enunciated in *DeVilbiss, supra*, namely, "to foster rational, informed discussion thereby minimizing the potential for 'unnecessary' industrial conflict." (at paragraph 15). The obligation to disclose which developed to further that "informed" discussion has two aspects. One, which is not of concern here, is the "unsolicited disclosure" branch. That is, in certain circumstances, the Board has imposed a positive duty to reveal information, such as, decisions to relocate, contract out, etc.: see *Consolidated Bathurst, supra; Westinghouse Canada Ltd., supra; Inglis Ltd.*, [1977] OLRB Rep. Mar. 128; *Sunnycrest Nursing Homes, supra.* The other branch concerns the "request" for information. As stated in *Consolidated Bathurst, supra* (also at paragraph 43):

> Although the 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 the specific request for the relevant information.... A request identifies the union's interest in specific information and thus permits a discussion by the parties on the relevance of the data. The requirement of a request also sharpens a disclosure obligation.

37. The cases in which the Board has upheld a duty to disclose, however, have dealt with information with respect to *existing* terms and conditions of employment, (such as, wages, benefit costs, classification structures). It is not difficult to understand that the absence of access to that sort of information, particularly in first contract negotiations, would entirely emasculate the duty to bargain in good faith: see *Radio Shack, supra; Globe Spring and Cushion Co. Ltd.*, [1982] OLRB Rep. Sept. 1303; *Northwest Merchants Ltd.*, 83 CLLC 16,055; *Windsor Star*, [1983] OLRB Rep. Dec. 2147; *DeVilbiss, supra.* The full and rational discussion aspect of the duty to bargain also may result in the imposition on one party of a duty to disclose information where that information is needed to adequately comprehend a proposal or response of that same party. (Although not precisely on point, see *Canadian Industries, supra; St. Joseph's Hospital*, 76 CLLC 16,207). What the case law does not support is the use of the virtually unlimited scope of bargaining to enable one party to use its *own* proposals as a springboard to a duty imposed on the *other* party to disclose information related to those proposals. Nor is the Board prepared to hold that the duty to disclose is co-extensive with the scope of the duty to bargain so that any request for information reasonably related to any proposal by the party initiating that proposal must be fulfilled. Information disclosure is one step removed from bargaining proposals. The Board's approach represents a balancing of *voluntarism* at the bargaining table (i.e., allowing a broad scope to parties wishing to address specific issues in a collective agreement) and of the *compulsion* to disclose information imposed on one party in negotiations. Apart from existing terms and conditions of employment (wages, benefits, classification structures, etc.), where a union has a *prima facie* right to information, the disclosure obligation is contingent upon the information being necessary for one party to adequately comprehend the position taken by the other. In other words, if one party maintains a position (whether in the form of a proposal or response) which is grounded on a rational explanation, that party may be subject to a duty to disclose information to demonstrate the *bona fides* of that rational bargaining position.

38. At present, then, the Board does not find that the university's refusal to disclose the information requested contravenes the duty imposed by section 15 of the Act. Once the university has complied with the directions of the Board in respect of the other violations of the duty to bargain, it may be that some of the information requests, as listed in paragraph 37, then fall within the categories to which the Board has stated an obligation to disclose attaches depending upon the university's response. The union would be free to raise the matter at that time.

Delay

39. The Board does not consider the delay prior to the filing of the instant complaint as constituting a violation of the duty to bargain in good faith. The parties agreed that the delay between January and April 1985, was not to be regarded as culpable. It may well be that the respondent is seeking some tactical advantage in proceeding less than expeditiously given the July 1, 1986 deadline for separation. However, it would be naive to think that negotiations do not involve both parties giving extensive consideration to the timing of proposals, counter-proposals etc. Nor is one party at the mercy of the other with respect to the pace of negotiations. In this instance, for example, the union could decide to hasten the progress through the statutory process leading to the point where economic sanctions are permitted. Delay in negotiations has been found in some circumstances to establish an anti-union motive (e.g. *Fotomat Canada Limited, supra).* In this case, however, the circumstances are not comparable and, hence, the Board does not find a contravention of section 15 on this aspect.

Refusal to Continue Negotiations once Complaint Filed

40. As noted in paragraph 23 above, the university refused to continue negotiations pending the outcome of the bad faith bargaining complaint. The respondent asserted the refusal was warranted as continued negotiations were unworkable given that the 9 point programme involved economic costs, that programme was regarded by the union as of utmost importance and it was not known whether the respondent would be compelled to bargain about that issue. In the Board's view, none of these factors justify a refusal to continue negotiations pending the resolution of the complaint. It was acknowledged that the union had tabled various other proposals which dealt with "terms and conditions of employment", read narrowly. There is no cogent reason precluding bargaining about those items. If either party wishes to preserve its flexibility pending the outcome of the Board proceedings, there are mechanisms, which the Board need not outline, for doing so.

41. Further, there are sound labour relations reasons for requiring parties to continue bargaining notwithstanding the filing of a complaint. As stated, the legislation establishes a structure to conduct full and frank discussions between the parties to resolve the matters in dispute between them and conclude a collective agreement. The parties have recourse through the filing of an unfair labour practice complaint to enforce that statutory obligation. To allow a party against whom allegations of bad faith bargaining have been raised to cease negotiations pending the disposition of the complaint rewards that party for violating the Act or, at the very least, interrupts the process of negotiations. Once interrupted, it is more difficult to restart bargaining and time is lost. Indeed, requiring the parties to continue negotiations may well enhance the likelihood of settlement of the original complaint. While it is theoretically conceivable that there might be circumstances where a refusal to continue negotiations might not violate the duty imposed by section 15, that is not the case here. The considerations which prompted the Board's refusal to grant a stay in Board proceedings pending determination of an application of judicial review are also applicable here: *Four B Manufacturing, supra; Cable Tech Wire, supra.*

42. Thus, for the policy reasons referred to, the Board finds that the respondent contravened the duty to bargain in good faith by refusing to continue negotiations pending the resolution of the complaint. The Board stresses that this obligation to continue negotiations does not depend upon the alleged agreement by Parker to continue bargaining notwithstanding the filing of a complaint but flows from the duty to bargain itself. To hold otherwise would result in the suspension of the duty to bargain wherever a complaint alleging breach of that very duty is filed. Such a consequence is not to be commended.

43. The union has also alleged contravention of section 64 of the Act. Given the findings with respect to violations of section 15, it is not necessary to consider further this aspect. Indeed, this allegation was not dealt with separately from the representations concerning the duty to bargain, and in the Board's view, is subsumed in the alleged violation of section 15 of the Act.

Remedy

44. The complainant requested the following relief: an order directing the respondent to bargain in good faith with respect to all of the union's proposals; that the Board establish a time frame for bargaining, including the tabling of the respondent's proposals; that the Board remain seized with respect to the process of bargaining so that a party could return to this panel with fresh complaints; disclosure of the information requested; a posting with a direction that copies be mailed directly to all employees. Counsel for the union stressed that this relief was necessary to prevent the duty to bargain being rendered impotent through the passage of time. Counsel for the respondent asserted that relief beyond the usual declaration and direction to resume bargaining was inappropriate.

45. As noted in *Canadian Industries, supra,* the focus of the remedial authority vested in the Board in these cases should be on repairing the bargaining relationship. The Board has found violations of the duty to bargain in the respondent's refusal to discuss the union's proposals with respect to the 9 point programme and refusal to continue negotiations pending resolution of the instant complaint. Some of the relief requested relates to allegations where the Board has not found a contravention of the Act. Further, the Board does not consider it appropriate to establish a rigid timetable for negotiations or to remain seized for the purpose of hearing fresh complaints related to the further conduct of negotiations. Rather, the Board is satisfied that the appropriate relief consists of a declaration that the respondent has contravened section 15 of the Act, as noted, and a direction to the respondent to begin to bargain in good faith and make all reasonable efforts to conclude a collective agreement. To this end, the Board also directs that the respondent table, within a reasonable period of time following the release of this decision, a full package of proposals on all issues, including a response to the union's 9 point programme. Any non-compliance with these directions may be pursued in the usual way. Finally, the Board notes that the university has dealt with the faculty association for some time, albeit prior to certification. The Board considers that both parties can adjust to the new status of the association as certified bargaining agent for the employees in the bargaining unit, within the context of the Board's findings and orders herein and, by engaging in full and frank dialogue, conclude a collective agreement.

DECISION OF BOARD MEMBER R.J. GALLIVAN;

1. Of the four matters raised by this complaint, the key issue for determination by the Board is that related to the scope of the duty to bargain. On the majority's decision on that issue and its related decision dealing with bargaining following filing of the complaint with the Board, I disagree.

2. Through the cooperation of the parties there was agreement on the multitude of key facts covering complex developments involving the University and Conservatory spanning a period of several years and involving numerous streams of events moving sometimes in parallel and sometimes on divergent courses. Among the agreed facts in evidence the Board had available to it very detailed minutes of every one of the negotiating meetings which took place between the parties from the date of the Union's certification in October 1984 to the date it filed this complaint in July 1985. In fact, two sets of minutes were submitted in evidence for each meeting: those kept by the University and those kept by the Union. As indicated by the majority, those two sets of minutes were substantially similar to each other and were referred to interchangeably by the parties in the proceedings before this Board. We can thus take it that they represent an accurate account of the bargaining meetings between the University and the Union.

3. The University has been found guilty by the majority of refusing even to discuss the 9 point programme. Yet the minutes of the negotiating meetings prove the very opposite. The 9 point programme was given wide publicity by the Union over the heads of the University's bargainers before being tabled as formal bargaining demands at the April 17th negotiating meeting. According to the minutes of that meeting, as might be expected, the dialogue consisted mainly of an explanation by the Union of the 9 points and questions raised by the University for clarification of them and of the Union's position. However, the next bargaining meeting, that of May 22nd, was devoted almost exclusively to a full and far-ranging discussion of the 9 points. Here in part is what the minutes of that meeting say:

> ... Parker said that he was prepared to comment upon the nine proposals presented by Mitchell at the last meeting. His comments are as follows:
>
> 1. Parker said it was obvious to all at the table that the institution

will continue to be called The Royal Conservatory of Music as long as the University of Toronto is involved. Afterwards it would depend on the Board of Directors or whatever group is formed.

2. McMaster Hall. He said Governing Council will consider this issue as will the University administration and it would not be appropriate to comment on this. Mitchell asked whether Parker was saying this was not negotiable. Parker made reference to President Ham's letter dated June 13, 1983 giving the University's position with respect to McMaster Hall. He showed Mitchell the letter and confirmed that Mitchell had a copy of the report. Mitchell asked whether this letter represented current policy. Parker said that it represents the University's position transmitted earlier. He noted that the letter said that the Conservatory would not be forced out of McMaster Hall without consultation. The letter expressed sensitivity and concern with respect to the location for students and teachers. Mitchell said he took it then that this was negotiable. Parker said he was not saying that. Mitchell asked if it was a matter for bargaining. Parker said that he could see that *location* might be a matter of concern for staff and that it could possibly be considered an employment condition if, for example, there were a move to Pape and Danforth he could see this as a possible issue. However, he said he did not see it as a specific matter regarding the specific property of McMaster Hall. He said the letter reflects all of this. Mitchell said that given that Governing Council passed the motion and that Parker was discussing it, he took it that the current plan was to proceed toward separation in July 1986. Parker said he had no information that would lead him to believe otherwise. Mitchell said then if that is the case, what is the present intention re the present location of the RCM as of 1986. Parker commented that Mitchell had a copy of the resolution not put to Governing Council but presumably it would be at some point. It says that McMaster Hall or other equivalent facilities. Parker said he knew of no plans to immediately move from McMaster Hall and added that furthermore Ham's letter spoke to this issue. Mitchell queried access arrangements. Parker referred to the uncertainty of any new governing body of the RCM but said that he knew of no university plans with respect to McMaster Hall.

3. & 4. Parker said that these two were answered in the resolution of Governing Council. He referred to the text of the proposal with respect to equipment and said the resolution answers the questions raised. Mitchell noted that #3 was explicitly covered and asked whether Parker was saying that those items in #4 were also covered by the motion. Parker said yes, these were an integral part of the employment relationship. Mitchell referred to ambiguity related to instruments in the main building as the resolution refers to branches. Mitchell asked specifically whether McMaster instruments in McMaster Hall such as pianos and also the bookstore would be covered. Parker said that he would get back to the Association on those two questions.

5. Parker said the University position is not finalized and won't be until divestment is resolved but that he had no reason to think other than that the exam system would go to the RCM, but that he was not able to be more specific at this time. Mitchell noted that one report indicated that the exam system would remain with the University and not the RCM and that this had resulted in a heated controversy. In the last report the University position had changed and it had been decided that the examination system would remain with the Conservatory. Parker said he would get clarification on this item. Mitchell noted that this question was not any detail but a major item as the union represents examiners. Parker acknowledged this and said that he would

respond at a later date.

6. & 7. Parker said that these were both covered in the proposed resolutions. Mitchell asked whether the University had documents for them with respect to Frederick Harris. Parker said he did not and it was not the intent to provide these as the University did not accede to the union's request. Mitchell asked why not. Parker said it was not a matter they were prepared to negotiate with the Faculty Association. Mitchell asked whether there was a reason for not disclosing. Parker said he supposed it was not considered a part of the business of negotiating a collective agreement.

8. Parker reported that he had hoped to give Mitchell information on this and had planned to convey details and discuss it. However, Roger Wolff had contracted [sic] pneumonia and had not been available. He said that immediately upon confirmation of the plans he will communicate to Mitchell. Mitchell asked when this might be. Parker said he was loathe to commit not knowing the state of health of Wolff but estimated a week. Mitchell asked what this material would cover. Parker said the mechanism for proceeding with divestment. Mitchell asked whether the University intended to proceed with legislation. Parker said that this would obviously be necessary in order to divest. Mitchell commented the Legislature would set up a new body statutorily. Parker said there would have to be a whole mechanism for developing a format and to formulate a plan. There would be a need for a detailed plan and there would be public exposure. Mitchell commented there would be the need to negotiate a plan but with whom. Parker said the University is responsible for the Conservatory and in order to divest it must set up a new form of administration. Mitchell said there would not be a new Board until there was legislation and that he was confused about how this was going to work. Mitchell commented with respect to Frederick Harris that Parker was saying that he would not negotiate with the union but with the new body. Parker said that he had not said it would be negotiated but that it would be dealt with. Mitchell said the conclusion is the University will do it by itself. Parker said the University thinks it has the right. He said at the table we were negotiating a collective agreement dealing with working conditions. Mitchell said that it directly affected their position if there was a unilateral transfer of the music company with a negative impact. Therefore it must be negotiated. Parker said that we were here to negotiate matters related to a collective agreement. He said that McMaster Hail had been raised as it had to do with security of employment, student relationships and relationships of the faculty of music and he understood their concern on this matter. However, he did not think the same concerns were expressed with respect to transfer of assets. Mitchell asked that the position be reconsidered. He said that the union's position was that the University intended to unilaterally sell the Conservatory with not an asset but a financial burden and that the faculty are the ones that will suffer. He said that he could answer that concern if it could be demonstrated through the disclosed information that it may not be a problem. Parker said it was a question of to whom it was disclosed and when, for example to the new governing body of the Conservatory. Mitchell said that that was circular and that it meant that the University was going to do it in its own way. Mitchell said that he did not accept that the University did not want to discuss the matter here and that he did not want to make an issue of it, and perhaps it was academic as it will at some time be public. He asked that the University tell the Association the story and get them onside as this creates suspicion. Parker said that at an appropriate time the University will need to report on all these matters and noted that it could not amend legislation without a full examination of these issues. Mitchell asked that

Parker relay to his principals two concerns: 1) express the union's view on what is negotiable and 2) if it is not a problem, there should be disclosure and therefore an issue would not be created. Parker said that these matters will be disclosed, however it was a matter of going through the Governing Council structure. Mitchell said he was not satisfied by the refusal to disclose (there was a little bit of discussion here that I did not catch). Parker said that matters of assets were not negotiable. He said the University has considered it and responded on those matters raised with respect to employment and working conditions and that more information will be transmitted at the appropriate times. Mitchell said the appropriate time is not now? Parker said we are not negotiating divestment but a collective labour agreement and that he had yet to see proposals with respect to a collective agreement. Mitchell said that he understood that Parker did not have any proposals. Parker said that he did not certify. Mitchell said that he was not prepared to wait while the University developed their proposals.

9. Parker said that this related to divestment and was not negotiable. Mitchell asked how this was seen as being funded. Parker said that this will need to be determined. Mitchell said and not negotiated with us. Parker said it is a matter for the Administration and Governing Council to work out and will go to Governing Council. Mitchell asked if there will be a process of discussion and consultation or whether everything would be done behind closed doors and in the fullness of time. Parker gave a general outline describing in general an Implementation Comittee [sic] and the Governing Council committees. I did not copy the details of this. Parker said he was trying to describe the process which was a difficult one. He said that some things were not available in the process of collective bargaining at this time and he was not trying to be awkward. Mitchell said that what was being said was that these items were not going to be negotiated, so what was the process of decision-making and what was the involvement of the University community and faculty going to be. He said he needed to know this. Parker said the matter was before the Governing Council and was not private. He said that the Faculty Association has communicated with Governing Council and the Chairman has communicated with the Association and that he was not at liberty to negotiate divestment. Mitchell said that he was hearing that Governing Council was going to decide matter. The Administration would recommend to Governing Council and its committees and that the Faculty Association could approach these. Parker said representations are allowed and encouraged. Mitchell asked prior to that if there would be any consultation. Parker said that is part of question #9 regarding implementation. He said that Mitchell also knew that Governing Council had heard representations from staff on issues and said that we would make the Association aware of developments. Mitchell asked whether the Administration would discuss before recommending. Parker said he could not answer that. Mitchell asked if there would be discussions with the Faculty Association. Parker said he could not answer, however he could say there would be an Implementation Committee and meetings held with respect to that. Mitchell asked when. Parker said he could not specifically tell Mitchell it was unfortunate that Roger Wolff was ill. He had hoped to have a better understanding of the earlier *process.* He said that he took it that the Association wanted to be informed of times, dates, meetings, etc. Mitchell said yes and he said they intended to negotiate at this table whether it was thought appropriate or not. Parker restated that divestment was a matter for the University. Mitchell again asked for documents....

4. Such extensive dialogue hardly denotes a refusal to discuss the 9 point programme. On the

contrary it shows that the 9 points were extensively discussed; it also shows quite clearly that the University simply was unwilling to concede to the Union's demands - which even the majority agrees it has a legal right to do. Note too that the University's spokesman Parker several times during the discussion identified where the issues raised could involve matters relating to security of and other conditions of employment, thus making it clear to the Union that in those aspects the University was prepared to come to some accommodation. Note too the several occasions where Parker agreed to obtain for the Union the answers to detailed questions raised in the discussion, answers which were not readily available at the time. The minutes of the next following meeting record Parker's answers to all of the Union's questions except those on which the University itself still had not worked out the details or on which the University was unwilling to supply the information requested.

5. Again, such wide-ranging dialogue and willingness to come back later with further information for the Union, is clear evidence of the fact that the University did discuss with the Union its 9 points - contrary to the assertion by the majority that the University refused such discussion. Not only did the University discuss those demands, it made a counter-proposal to include the Union's president on the Implementation Committee being established by the University to oversee the separation of the Conservatory from the University - a subtle end-run offer the Union accepted without prejudice. Thus there was a demand from the Union followed by a counter-offer from the employer - not an offer the Union liked but an offer nonetheless. It is difficult to understand how an objective observer could characterize such conduct as a refusal to bargain; proposal and counter-proposal are the essence of bargaining.

6. The flaw in the majority's position becomes even clearer if one considers the practical effect of its ordered remedy to the alleged violation - a direction to the University to bargain in good faith. Despite the innovativeness of most collective bargainers there are only so many ways an employer can say "no" to a union demand. In this case the University has made it very clear that its answer to the Union's demand for a veto over the divestment decision (the Union "... will support the separation of the two institutions if, and only if, the following conditions are met...") is "no". It has offered to keep the Union involved in the ongoing process, to communicate regularly with it and to seek its views, but it has refused to concede the management prerogatives demanded by the Union. Other bargainers might have used different words than were used here to convey the message, but the message was clear. Even silence can send a loud signal between experienced bargainers.

7. What more can the University say about the Union's 9 points than it has already said? Should it just go through the motions of more talk? Engage in "surface bargaining"? Prolong the discussion and risk misleading the Union into believing that it might yet win its demand if only it can get the University with the help of this Board to talk long enough? In this case both the Union's and the University's bargainers are experienced labor relations practitioners. They don't have to paint elaborate word pictures for each other in order to get their positions across. Their experience is such that they needn't engage in theoretical or academic exercises. Yet that is what the majority's decision will force them into. Instead of being a help to the parties to bring them closer to a collective agreement, this Board's decision will at best delay the real bargaining that will take place after the Union's 9 points are disposed of, and at worst may well prevent any peacefully arrived at agreement at all. Either result is a high price to make the parties pay for the sake of symmetry with Board precedents none of which, as argued by the Union itself and admitted by the majority, apply to the unique facts of this case: "The scope of the duty to bargain.., has not been dealt with quite so directly by the Board previously" (para. 30). It is thus unfortunate that the Board, when presented with an opportunity to be pragmatic and helpful, chooses instead to take an academic and theoretical approach to the key issue raised before it.

8. I agree with the majority that the parties are free to include in their collective agreement

whatever suits them, and therefore that each is free to table any matter for discussion. Where I disagree with the majority is in its conclusion that no matter how ludicrous a demand might be, or how far removed from terms and conditions of employment, it must be dignified by negotiations and lengthy discussion. Then, if the author of the demand isn't satisfied by the outcome of the discussion this Board will determine whether or not it was adequate! That role for the Board is inevitable given its reluctance to decide that certain demands are beyond the pale of good faith bargaining. So it concentrates upon the process rather than the content of bargaining and concludes that the latter must mean that everything is bargainable. If the Conservatory was seen in the industrial setting as being simply one branch plant of a multi-location enterprise which the employer had decided to divest, the Union's 9 point programme would amount to a demand for a veto over the sale. While the University could, if it wished, concede such a power to the Union it is under no legal obligation to do so. Once the University has said "no" to the demand, the Union has no legal right to enforce it (although it is free to attempt to do so by strike action). The Union's certification as bargaining agent for the employees does not give it ownership rights in the employer's property.

9. The issue for this Board then becomes one of determining whether or not the University's bargaining "process" in refusing the demand has been adequate to meet some unspecified criterion of the majority. On such a clear cut issue as whether or not the University should abdicate its management rights and concede a veto power to the Union over the divestment, how much more discussion is required?

10. If, as the majority claims, the demand is simply about the management rights clause eventually to be included in the collective agreement, the University has made its position clear - it is not going to bargain away its lawful, traditional and innate rights to manage. Instead, it has made a counter-proposal, short of what the Union wants - but it is not up to this Board to judge it in the absence of any claim that the University's position is designed to be destructive of the Union or to thwart achievement of a collective agreement. None of the evidence before this Board could support such a charge.

11. If the University had demanded a change in the Union's dues structure "without which there will be no agreement," or had demanded that the Union change its political affiliation or law firm, or that the University be granted the power to veto a Union decision to join the Ontario Federation of Labor or the C. L. C., how much time does one imagine the Union's bargainers would take in saying "no"? The Union's answer I expect would be curt and to the point, that it was not going to bargain about its internal affairs, and that would be the end of it. Except if the University were then to charge the Union before this Board with refusing to bargain those demands. Would this Board then order the Union to return to the bargaining table and, in good faith, bargain about such demands? For consistency with its decision here, the answer would have to be "yes", although clearly the correct answer should be "no".

12. The ethereal and impractical view of collective bargaining taken by the Majority in this case is further illustrated by its decision that the University also erred in bringing bargaining to a halt until the Union's complaint on the 9 points had been settled by this Board. An experienced bargainer would not, nor should he be expected to, make a substantive offer of settlement until he is sure he knows the parameters of the Union's position. That is why a typical offer is usually a "package offer" or "global response" designed to narrow the issues in dispute and form the basis of settlement. The offer has the effect of putting the employer's cards on the table, or at least of tipping his hand. No experienced bargainer does that until he is reasonably certain the other side has delineated its position. To expect the University to continue meaningful bargaining without knowing the parameters of the accommodations it might have to make on the 9 points is to force it into an unrealistic and untenable bargaining process in which form becomes more important than substance. The majority

argues that bargaining should continue at least on other items, presumably those of a non-monetary nature. Yet the Union itself argued during negotiations (when the University was pressing the Union to delineate its other demands beyond the 9 points) that it would be futile to bargain until the issue of the 9 points had been resolved. Here is an extract from the Union's own minutes of the April 17th bargaining meeting:

> ……..John Parker said that there was one question. He said that they were here to negotiate a collective agreement. He noted that the Faculty Association's agenda included details around separation. But he had questions about the rest of the proposals that would normally come. He said that before he could proceed, they would need the rest of the proposals. He requested the Faculty Association's total package of proposals and noted that this was not an unusual request.
>
> Michael [Mitchell, the Union's spokesman] asked: "Are you refusing to proceed?" Parker said, "No, but before we sit down to negotiate a collective agreement, we want to see the total proposals."
>
> Michael said that all other matters sort of pale in comparison to the importance of the issues raised here regarding separation. In the ordinary situation it might make sense to talk about the other issues, but it was more difficult to negotiate sensibly when, as here, we didn't know what the future would be of the institution. Michael gave, as an example, the grievance procedure. We didn't know whether it was going to be a grievance procedure for a university or for another kind of institution, and what was the point of negotiating a grievance procedure if you didn't know what kind of institution it was supposed to be suitable for. Michael said the University has said that "We're getting rid of you as of July 1, 1986" but you still want the rest of our proposals.
>
> Parker said that he was here to negotiate all facets of a collective agreement. He would raise the issues of separation with his principles [sic] and a policy would be developed which would be communicated to the Faculty Association, but obviously there were other demands that would have to be dealt with.
>
> Michael asked Parker to explain why the University was anxious to negotiate the other matters given that the ultimate responsibility could rest with a new and independent body.
>
> Parker said that he respected that the Faculty Association had these proposals but he wanted the Faculty Association to put its entire position forward and it was unusual if he didn't want that. Michael said, "You're asking for the rest of the proposals?" Parker said "yes". Michael said, "Why now?" Parker said "You're raising issues of the future, I must raise questions of the relationship between the Faculty Association and the Conservatory." Michael said, "But is this in the context of the University or another body?"
>
> Parker said that the Faculty Association was currently dealing with the body it was certified to deal with. He indicated that they 'would negotiate all of these proposals....

13. Almost two months later the Union changed its position and did submit the balance of its proposals to the University but by that time had already threatened that it was considering legal action

against the University. So the inference can be drawn that its change of position was prompted at least as much by its desire to tidy up its own house prior to charging the University with refusing to bargain and with delaying bargaining than by any desire to facilitate the collective bargaining process.

14. But the Union's position during that April bargaining meeting clearly illustrates the impracticality of expecting the parties to continue fruitful negotiations while the issue of the 9 points is hanging over the bargainers' heads. Even a non-monetary contract clause such as a grievance procedure can't be resolved. The 9 point program contains issues with such implications for the parties that no responsible negotiator on either side should be expected to continue bargaining until that Damocles sword has been removed from the bargaining table.

15. The argument of the majority, that allowing a party against whom allegations of bad faith bargaining have been raised to suspend negotiations until the charges have been dealt with risks rewarding a guilty party, is a position of this Board which is generally supportable but which like any policy must be rationally applied to the unique circumstances of each case. The Board's position has been developed primarily through cases where the Board had grounds to suspect an anti-union motive behind the suspension of bargaining. No such motive has even been alleged here. The suspension of bargaining was simply a pragmatic response by the University to the unwillingness of the Union to modify or drop its 9 point program demand until it could present its case to this Board. The Board's virtually automatic guilty verdict ignores the unique facts of this case. The University made the only practicable collective bargaining decision available to it in the circumstances. That should hardly be seen as a violation of section 15 of the Act.

16. I agree with the majority that the University acted quite properly in refusing the Union's fishing expedition demands for information, and that no violation of the Act can be inferred from the delays experienced in bargaining between these parties to date. At least on those two issues the majority hit the right note.

ADDENDUM (OF THE MAJORITY)

1. With respect to the scope of the duty to bargain, Board Member Gallivan concluded on the facts that the university had bargained about the 9 point programme but had said "no" to the union s proposals; the dissent sets out a lengthy excerpt from one negotiating meeting in support of this factual finding. With respect, the majority disagrees. The majority has concluded on the totality of the evidence, including the excerpt noted in the dissent and the submissions of the respondent, that the university's position was that the 9 points were "off limits" for discussion, i.e., the programme need not be bargained at all, in part, because the union was purportedly acting on behalf of the Conservatory as an "institution" and not behalf of the employees in the bargaining unit. The majority has already commented on those arguments in its decision. With respect to the dissent, however, the majority wishes to note that the majority found the *reason* for saying "no" was contrary to section 15 of the Act. This is not a subtle or academic difference but one which goes to the heart of collective bargaining. As the majority decision makes clear, the university is not required to *agree* to the union's proposals. But, the university is required to respond, to state its position with an explanation. One party cannot unilaterally declare some items (in this case, the 9 point programme) entirely "off-limits" for discussion. In the majority's opinion, the dissent has ignored the reasons given by the respondent for its refusal to bargain concerning the 9 point programme and ascribed other reasons. Moreover, the majority also strongly disagrees with the factual finding that the invitation to the union president to sit on the implementation committee was a "counter-offer". It is clear from the university's position that the invitation was entirely outside the realm of bargaining. Again, with respect, the dissent has ascribed a character to the invitation expressly denied by the university.

2. The majority also takes serious issue with the dissent's concept of good faith bargaining. In paragraph 7 of the dissent, it is stated that the Board's decision will "delay the real bargaining that will take place after the union's 9 points are disposed of . . .". And, in the next paragraph, it is asserted that an interventionist role for the Board is ensured "given its reluctance to decide that certain demands are beyond the pale of good faith bargaining". The majority is expressly *not* taking a interventionist role in bargaining by refusing to assess the *content* of the demands. It is not for the Board to comment on the wisdom of proposals or priorities of the parties, to characterize some as "ludicrous" or "beyond the pale" except where the demands are illegal or the content reveals an intention not to conclude a collective agreement. The Board is not proceeding down the American path and rejects the mandatory-directory analysis for the reasons stated earlier. The majority agrees with the comment in paragraph 8 of the dissent that the university has no legal obligation to concede to the union s requested "veto" over divestment. However, the dissent's recognition that the union has the right to resort to economic sanctions, in the majority's opinion, underscores the majority's position that, in the absence of improper motive, the disposition of the 9 point programme is for the *parties,* not the Board, to determine.

3. The majority also has some comments about the analysis in the dissent of the refusal to bargain pending the disposition of the complaint by the Board. It is true that the union stressed the importance of the 9 point programme. It is also true that the complete package of union proposals was delivered in June. The dissent recognizes that "allowing a party against whom allegations of bad faith bargaining have been raised to suspend negotiations until the charges have been dealt with risks rewarding a guilty party is a position of the Board which is generally supportable". The dissent, however, distinguishes between suspension of negotiations where an improper motive is suspected for the suspension and the suspension in the instant case which is characterized as a "pragmatic response by the university to the unwillingness of the union to modify or drop its 9 point programme demand until it could present its case to this Board". If the dissent is implying there should be allegations of unfair labour practices in addition to section 15 before suspension would be improper, the majority does not agree. With respect, such a position will only encourage multiple allegations of unfair labour practices. If the suspension of negotiations is to be characterized as improper or not only *after* the Board has disposed of the merits of the other allegations, this does nothing to encourage the parties to continue negotiations. If the implication is that an express finding of anti-union animus is required before suspending negotiations is improper, the majority rejects the imposition of that additional element which can only be determined *after* the entire matter is dealt with by the Board. It will *always* be "pragmatic" to stop negotiations until the Board issues its decision. The dissent ignores the facts of this case that the union's emphasis on the 9 point was *followed* by an express desire to continue negotiations on other matters and by Parker's stated position that discussions could continue. It is true that Parker's principals thought otherwise. The majority, for the reasons stated, rejects that stance. Again, as noted, the parties are represented by experienced negotiators whom the Board need not instruct on mechanisms to maintain flexibility pending the outcome of this complaint. The majority's position on this issue was stated as a matter of general principle for sound labour relations reasons, namely, that a party should not benefit from his or her wrongdoing regardless of the "degree" of that wrongdoing, or whether or not there is a finding of anti-union animus in addition to violations of "non-motive" sections of the Act.