Ontario

ONTARIO LABOUR RELATIONS BOARD

OLRB Case No.: **0568-15-U**

Care Partners, Applicant v. Service Employees' International Union, Local 1 Canada, Responding Party

BEFORE: Brian McLean, Alternate Chair, and Board Members P. LeMay and Edward Chudak

APPEARANCES: Melissa Nixon, Dwight Winfield and Jessica Beutler for the applicant; Denis Ellickson, Sharleen Stewart and Emmanuel Carvalho for the responding party

DECISION OF THE BOARD: June 29, 2016

1. This is an application under section 96 of the *Labour Relations Act, 1995*, S.O. 1995, c.1., as amended (the "Act"), in which the applicant, Care Partners (the "Employer"), alleges that the responding party, Service Employees' International Union, Local 1 Canada (the "Union") breached its duty to bargain in good faith contrary to section 17 of the Act.

2. This application arises out of the parties' round of collective bargaining beginning in 2013 and ending in 2014 during which the parties concluded a renewal collective agreement. As part of the negotiated amendments to the expired collective agreement the parties agreed that the Employer would resume administration of the employees' health and welfare benefits plan which the Union had agreed to administer in a previous round of bargaining. The Employer agreed to do this because it believed it could run the benefits plan more efficiently than the Union had, and these savings could be used to increase travel allowance benefits payable to employees, which increases were sought by the Union in bargaining. The Employer's decision was made in a context where it was seeking very limited, if any, increases to its costs in the renewal collective agreement. Unbeknownst to the Employer, the benefit plan, while operated by the

Union, had been running at a sizeable deficit and the Union was subsidizing it. The issue, in this application, therefore, is whether the Union's failure to advise the Employer that the benefit plan was running at a deficit and was being subsidized amounted to bad faith bargaining.

The Facts

3. Most of the facts in this application are not in dispute. However, as discussed below, some "facts" are not capable of being proven since part of the negotiations between the parties took place with the assistance of a mediator. The Employer's main witnesses were its Chief spokesperson at the bargaining table Robert Bass and its Vice President of Human Resources Dwight Winfield. The Union called its president Sharleen Stewart.

4. The Employer provides a variety of healthcare services to individuals in Ontario. These services are funded by the province, largely through Community Care Access Centres, which are in turn funded by Local Health Integration Networks. In 2012, Care Partners merged with a division of the Canadian Red Cross Society called Red Cross Community Health Services. At the time, the majority of the Red Cross employees that transferred to the merged entity were represented by the Union, and the new entity, which was initially named Red Cross Care Partners ("RCCP"), recognized the Union as bargaining agent. In 2012, the Union gave notice to bargain to both the RCCP and the Red Cross, and the parties entered into a Memorandum of Conditions for Joint Bargaining that was executed on January 31, 2013. In this decision I will refer to "the Employer" and "the collective agreement" even though there may be two employers and two collective agreements.

5. The parties bargained on a number of dates in the Spring of 2013 and a Conciliation Officer was appointed in April 2013. After an October 27, 2013 attempt at conciliation failed to result in an agreement, the Union requested that a no-board report be issued. The main source of the difficulty in negotiations appears to be that the Employer's finances were extremely tight, given that there was no new funding for its services from the province. The Union was seeking increases in wages, travel allowance and employee health and welfare benefit contributions. However, because the Employer had little money to offer, it did not ask the Union about its need for such welfare benefit contribution increases.

6. As noted above, it is the changes that were ultimately agreed to with respect to the benefit plan that give rise to the instant dispute. Prior to 2008, the Red Cross provided health and welfare benefits to employees through OASSIS, a third-party benefits administrator. The formula used required that the Employer contribute $70 for each eligible employee, and to the extent that the cost of the benefits exceeded $70, employees were responsible for paying the additional premium, by way of a payroll deduction. In 2008, the Union and the Employer agreed to change the manner in which benefits were provided. Under the collective agreement negotiated in 2008, the Union assumed administration of the benefits through the SEIU Trust, which in turn used Global Benefits as a third party administrator. The Employer agreed to contribute to the benefit plan 39 cents for every hour worked by all SEIU bargaining unit employees. Thereafter, in addition to making the employer contributions to the plan, the Employer received from Global a list of deductions for the employee premiums, which the Employer automatically deducted from employees and submitted to Global on behalf of the SEIU Trust. This was the state of affairs as the parties were attempting to reach the collective agreement which is presently at issue. [The Union's benefits proposal for the start was to double the employer contribution and it had not withdrawn or amended that proposal.]

7. At a certain point in late 2013, it became clear that unless the parties came up with a creative solution to the issues in bargaining which divided them there could well be a strike. The parties continued to bargain with the assistance of a mediator. In November 2013 there were still a number of outstanding issues, including: wage increases, the proposal by the union to increase the employer's contribution towards benefits, the union proposal to increase travel allowance and the pension plan proposal to double the employer contribution. During mediation and with a strike deadline looming, the employer considered whether it could find cost savings by bringing the benefits plan back to the employer. With the parties in separate rooms and the mediator acting as a go-between, the employer contacted OASSIS, which had administered the Benefits Plan when it was the employer's responsibility. The representative of OASSIS advised that it could run the benefits plan in a way that would reduce the employer's costs. The employer therefore believed it could save money by taking the benefits plan back, which money could be redirected to increasing the travel allowance. In addition, this would also render moot the union's request for a benefits contribution increase, and thereby resolve the issues that remained on the table.

8. I note that there had never been discussion about why the union was requesting the increase but this is not to say the Union was hiding the fact that its benefit plan was in financial difficulty. In a letter to its membership it advised them that the premiums they were paying was not really the full costs of the benefits. There is, however, no evidence the employer was aware of the letter.

9. The employer made the proposal to take back the benefit plan through the mediator. At this point, it is useful to pause to discuss an important procedural issue which was argued and determined by the Board during the hearing. When the employer attempted to lead evidence about what it had told the mediator when it provided its proposal to him, the union objected on the basis that the leading of such evidence would violate s.119(4) and 120(2) of the Act which, along with other related provisions, state:

> **119.** (4) Subject to subsection (6), no information or material furnished to or received by a labour relations officer, grievance mediator or other person appointed under this Act to effect the settlement of a dispute or the mediation of a matter shall be disclosed except to the Board or to the Director of Dispute Resolution Services.
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> (5) Subject to subsection (6), no report of a labour relations officer, grievance mediator or other person appointed under this Act to effect the settlement of a dispute or the mediation of a matter shall be disclosed except to the Board or to the Director of Dispute Resolution Services.
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> (6) The Board or the Director of Dispute Resolution Services, as the case may be, may authorize the disclosure of information, material or reports.
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> **120.** (2) The following persons are not competent or compellable witnesses before a court or tribunal respecting any information or material furnished to or received by them while acting within the scope of their employment under this Act:
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> 1. The Director of Dispute Resolution Services.
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> 2. A person appointed by the Minister under this Act or under a collective agreement to effect the

> settlement of a dispute or the mediation of a matter.

10. The Board determined that it would not give consent for either party to call evidence about what information they had given the mediator, William Kaplan. I note that this ruling affected both parties. It prevented the employer from calling evidence it wished to call about what it had told Mr. Kaplan about the reasons and basis of its benefits plan proposal, but it also prevented the Union from calling evidence in its defence about what it had told Mr. Kaplan about the benefits plan.

11. At no time during the negotiation process did the Union inform the Employer about the deficit in the benefit plan or that it had been subsidizing it. Similarly, at no time during the process did the Employer request information from the Union about the funding of the plan or advise the Union that its proposal to increase travel allowance benefits was tied to its assumption that it would also find cost savings in the benefits plan. On this latter point, we note that Mr. Winfield made it clear in his testimony that he had experience with transferring benefit plans, and based on that experience he understood that part of the process was to ask for information from the benefits administrator about claims history etc. Mr. Winfield testified that one of the questions that would be asked of the administrator is whether the plan was in a surplus or deficit position. It is also worth noting, as discussed above, that among the outstanding proposals which remained on the table until the end was a Union proposal to double the employer's contributions to the benefits plan from 39¢/hour to 78¢/hour. The employer did not ask the Union about this proposal or inquire as to why it remained on the table up until the eve of a strike. Mr. Bass testified that he did not wish to start a discussion when he knew the Employer would never increase its contributions due to its financial issues.

12. The parties signed Minutes of Settlement on November 12, 2013 which included the employer's take back of the benefit plan and a travel allowance increase. That agreement was not ratified, however, and a strike commenced soon after.

13. On December 2, 2013, the employer sent the Union a letter in which it requested a number of pieces of information about the benefits plan including financial reports, claims history etc. The employer requested that the Union authorize its administrator, Global Benefits, to provide representatives of the Employer with the information directly.

14. The Union did not respond to the Employer's request and Global did not provide information to the Employer. Nor did the Union call evidence about whether it had, at that time, authorized Global Benefits to provide the Employer with the information directly. However, by that time the Union was on strike in any event.

15. On December 24, 2013 the parties met in mediation at Mr. Kaplan's office. The parties were unsuccessful in reaching a resolution. After the mediation session was over, the representatives of the parties met for a lunch at a restaurant without Mr. Kaplan being present. Discussion turned to how the parties could end the strike. The parties came up with the idea of shuffling around the wages and lump sum payments which had been agreed to and then referring one matter, the pension plan, to Mr. Kaplan, in his capacity of arbitrator, to be resolved. Because the agreement was being settled by arbitration, it was not necessary for the employees to ratify the agreement and the strike would be over. The agreement was written down and then made into a formal agreement. Arbitrator Kaplan was to be seized of the pension issue and any implementation issues arising of the settlement. The settlement included the agreement to have the Employer take back the benefits plan and to increase the travel allowance in each year of the agreement.

16. On January 3, 2014 the parties convened before Mr. Kaplan who made a decision regarding the pension plan issue and settled the terms of the collective agreement, including the items that had been agreed to. Mr. Kaplan issued his award on January 6, 2014 and remained seized with respect to its implementation. The strike was over.

17. On January 29, 2014 the employer sent a letter, identical to its December 2, 2013 letter, seeking information from the Union about the benefits plan. The employer did not receive a response to this letter. The Union called no direct evidence about whether anything had been done about the employer's request. However, Ms. Stewart, SEIU's president, testified, and implicit in her evidence is that the Employer's request had been sent to Global its benefits administrator by the employer.

18. Since the Employer received no response, Mr. Bass was asked to contact the union and request the information. He did this by letter dated February 4, 2014 to Ms. Stewart. The conclusion of Mr. Bass's letter was somewhat different from the earlier letter and stated:

"Therefore, we request that you instruct the current provider of the benefits to forward the information to our clients in order to facilitate this transaction".

19. Ms. Stewart testified that she forwarded the request to Global and "reminded" them that a request had already been made. Consistent with this, Mr. Winfield testified that his concern was not with the SEIU, but with Global, which delayed in providing the information.

20. Only much later, in December 2014, did the Employer learn that the benefits plan was underfunded. It estimates that the cost to it of subsidizing the benefit plan is roughly $300,000.00 during the life of the collective agreement.

Decision

21. Section 17 of the Act states:

> **17.** The parties shall meet within 15 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.

22. The purpose behind and the scope of s.17 of the Act were recently reaffirmed in *Crown in Right of Ontario* 2012 CanLII 3597 (ONLRB) where the Board stated:

> 63. Trade unions acquired the right to file an unfair labour practice complaint on their own behalf in 1974. Immediately thereafter, a number of complaints were filed with the Board in which it was alleged that an employer had failed to comply with the duty to bargain in good faith. The first decision to issue was *United Electrical, Radio and Machine Workers of America v. DeVilbiss (Canada) Ltd*., [1976] OLRB Rep. March 49 in which the Board identified the functions served by the duty to bargain in good faith as follows:
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> > 14. … a very important function of section 14 [now section 17] is that of reinforcing an employer's obligation to recognize a trade union lawfully selected by employees as their bargaining agent. Certainly the freedom to join a trade union of one's choice declared in section 3 of the legislation would be but an edict

> "writ on water" if an employer could enter into negotiations with no intentions of ever signing a collective agreement. But we believe the duty to meet and make every reasonable effort to make a collective agreement has an even more important function in a modern society that for the most part accepts that trade unions have legitimate and important roles to play. That is to say that the duty assumes that when two parties are obligated to meet each other periodically and rationally discuss their mutual problems in a way that satisfies the phrase "make every reasonable effort", they are likely to arrive at a better understanding of each other's concerns thereby enhancing the potential for a resolution of their differences without recourse to economic sanctions - the impact of which is never confined to the immediate parties of an industrial dispute. At the very least rational discussion is likely to minimize the number of problems the parties are unable to resolve without the use of economic weapons thereby focusing the parties' attention in the eleventh hour on the "true" differences between them. …
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> 15. Hence it is our belief that the duty described in section 14 has at least two principal functions. **The duty reinforces the obligation of an employer to recognize the bargaining agent and, beyond this somewhat primitive though important purpose, it can be said that the duty is intended to foster rational, informed discussion thereby minimizing the potential for "unnecessary" industrial conflict.**
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> [emphasis added]

64. Later in the decision, the Board described the purposes served by the duty to bargain in good faith as censuring "efforts designed at avoiding collective agreements or unreasonable actions impeding rational discussion."

65. Two months later, in the case of *United Steelworkers of America on behalf of Local 13704 v. Canadian Industries Limited,* [1976] OLRB Rep. May 199, the Board ruled that "rational discussion" requires the parties to engage in full discussion with the other party lest dissatisfaction with the bargaining process and more frequent resort to economic sanctions result:

> 19. The requirement of rational discussion imposes upon the parties a duty to communicate with each other, recognizing that proper collective bargaining depends upon effective communication. Although a failure to communicate might not appear to be the same kind of wrong as an unwillingness to recognize the other party, it does, in fact, have a very serious effect on the collective bargaining process as a whole. The breakdown of established bargaining relationships, because of an unwillingness to engage in a full discussion with the other party, is likely to lead to more frequent resort to economic sanctions, and to greater dissatisfaction with the collective bargaining process. The obligation to bargain in good faith recognizes the importance of collective bargaining as a structure within which a full dialogue can be conducted between a trade union and the employer.

66. That same month, in *Graphic Arts International Union Local 12-L. v. Graphic Center (Ontario) Inc.,* [1976] OLRB Rep. May 221, the Board articulated why the obligation to engage in open and rational discussion is essential to the collective bargaining process:

> 19. The requirements for open and rational discussion of all the issues in dispute stems from the fact that collective bargaining is in essence an exercise in decision making. The parties make hard decisions as to the content and timing of their offers and counter offers as they attempt to conclude an agreement. Frequently the most difficult decision facing the parties and often a decision with far-reaching public ramifications, is the resort to economic sanctions. Decisions which determine terms and conditions of employment which may precipitate strike or lock-out obviously require, as a matter of public policy, open and full discussions. Conduct by one of the parties to the process which inhibits or undermines the decision-making capability of the other is conduct which is contrary to the requirement to bargain in good faith and make every effort to reach a collective agreement.

67. The foregoing three decisions of the Ontario Labour Relations Board in 1976 followed closely on the heels of a decision of the British Columbia Labour Relations Board in *Canadian Association of Industrial, Mechanical and Allied*

Workers v. Noranda Metal Industries Ltd., [1975] 1 Can L.R.B.R. 145, in which the Chair of the British Columbia Board stated as follows:

> It is a long-established principle of American labour law that a party commits an unfair labour practice if it withholds information relevant to collective bargaining without reasonable grounds....That principle does fit comfortably within the language of the [duty to bargain provision of the British Columbia *Labour Code*]. **One would hardly say that an employer who deliberately withheld factual data which a union needed to intelligently appraise a proposal on the bargaining table was making "every reasonable effort to conclude a collective agreement."** The policy behind the American rule has been summed up in this comment: "Negotiation nourished by full and informal discussion stands a better chance of bringing forth the fruit of collective bargaining agreement than negotiation based on ignorance and deception."
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> [emphasis added]

68. In *United Steelworkers of America, Local 4487 v. Inglis Limited*, [1977] OLRB Rep. March 128 the Board, for the first time, dealt with the situation where there was an allegation of a misrepresentation at the bargaining table. The Board provided the following explanation as to why, actions by one party which undermine the decision-making capability of the other, amount to a breach of the duty to bargain in good faith:

> 16. **Recent Board decisions dealing with Section 14 violations have stressed the decision-making aspect of collective bargaining and have found actions by one party which undermines [sic] the decision-making capability of the other to be conduct in breach of the duty imposed by Section 14 of the Act. Collective bargaining as an exercise which underpins the social and economic structures of our society demands a higher level of decision-making capability and it follows that conduct which weakens this process must be found to be in violation of the Act.** In the *Devilbiss Canada Limited* case [1976] OLRB Rep. March 49 refusal to supply the other side with information necessary to its decision-making capability was found

> to be contrary to Section 14. In the *Canadian Industries Limited* case [1976] OLRB Rep. May 199 the unwillingness of one party to engage in a full discussion with the other was likewise found contrary to Section 14. In the *Graphic Center* case [1976] OLRB Rep. May 221 the tabling of fresh demands during the concluding stage of bargaining was found to undermine the decision-making framework of collective bargaining. [See also the recently released *Board of Health of Haliburton, Kawartha, Pine Ridge District Health Unit and H.E. Good* case Board File No. 1066-76-U, decision dated February 15, 1977.] The Board has not previously dealt with alleged misrepresentation at the bargaining table. **It is self-evident, however, that misrepresentation, which is the antithesis of good faith, destroys the rational basis upon which informed collective-bargaining decisions are made. These decisions which are in respect of compensation, job security and other terms and conditions of employment must follow from full and honest discussion. Misrepresentation is alien to this process and is contrary to the duties set out in Section 14 of the Act.**
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> [emphasis added]
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> 69. Thus, the jurisprudence has long and consistently held that one of the functions served by the duty to bargain in good faith and make every reasonable effort to make a collective agreement is to foster rational and informed discussion. The duty requires parties to engage in full and honest discussion and censures parties for withholding information that the party opposite requires in order to intelligently appraise a proposal.

23. The Employer argues that the Union was, when presented with the Employer's proposal to take back the benefit plan, under an obligation to advise the Employer (presumably directly) that it had been subsidizing the benefit plan. It argues that these circumstances fall within the line of cases where the Board has found an obligation to disclose information to a party during bargaining even where the other party had not asked for information. The leading case on this point is probably *Consolidated Bathurst* where the Board found a violation of s.17 when the employer did not, during bargaining, advise the union that it planned to close the plant. The Board stated:

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

> Of additional concern is the respondent's failure to respond to the complainant's request at this first meeting for existing wage and classification information. Particularly in "first agreement" situations, it is little wonder that a complainant would have an incomplete monetary demand until it fully appreciated the current rate of wages paid by a respondent and the detailed nature of its job structure. Rational and informed discussion cannot easily take place until and assessing the disclosure requirements Canadian labour boards, such as this one, have begun to fashion through the action. As a general matter of policy, if parties are to engage in economic conflict their differences ought to be real and well-defined. It

> is patently silly to have a trade union "in the dark" with respect to the fairness of an employer's offer because it has insufficient information to appreciate ful1y the offer's significance to those in the bargaining unit. Moreover, a trade union has a duty to all of the employees in the bargaining unit and thus has to be concerned, in a large measure, with equality of treatment. (For the American experience in this area see *J. H. Allison & Co.* (1946) 70 NLRB 377; *Whitin Machine Works* (1954), 217 F. 2d 593 (4th Cir.); *Aluminum Ore Co.* (1942), 131 F. 2d 485 (7th Cir.); *Yanman & Erbe Manufacturing Co. (1951)* 181 F. 2d 947 (2nd Cir.); *Truitt Manufacturing Co.* (1954) 110 NLRB 856; and see generally Bortosic and Hartley, *supra.*)

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

[1980] OLRB Rep. April 577. In *Inglis Limited, supra,* the Board was asked to find that the employer's failure to reveal plans to relocate a part of its business when asked in bargaining constituted a breach of the duty to bargain in good faith. In effect, it was alleged the respondent company had committed a fundamental misrepresentation on which the trade union had relied to its detriment. In applying the bargaining duty to this allegation the Board stated:

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

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

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

45. A difficult issue raised again in this case is whether this should be the extent of a duty to disclose without a specific request from the trade union. In *Westinghouse Canada*

> *Limited,* [1980] OLRB Rep. April 477, which was the first decision by the Board to suggest that disclosure of certain matters was obligatory without a request, the Board considered a standard of unsolicited disclosure beyond that of disclosing firm decisions having a fundamental impact on employees …
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> The Board, therefore, was very reluctant to expand the scope of unsolicited disclosure given the difficulty of defining the duty and the potential for unproductive impact at the bargaining table of plans or incomplete decisions.
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> (emphasis added)

24. The Board accepts that the Employer was not aware of the subsidy, and that this would have been critical information for the Employer that would have altered its bargaining position. Had the Employer known about the subsidy, it in all likelihood would not have proposed taking back the benefit plan. Had the Employer requested the information, the general duty to disclose would have been engaged and it would have been entitled to receive it. But the Employer did not make such a request in making its proposal, or even (on the evidence before the Board) share with the Union the basis for its belief that it could save money by taking over the benefit plan. It did not, for example, share a costing with the Union that revealed that its assumptions were based on what it mistakenly believed to be the true cost of premiums under the plan, and demonstrating the quantum of anticipated savings that it was willing to transfer into the travel allowance benefit. It also did not tie the take back of the benefits plan to the increase in the travel allowance benefit. It may be that where a party makes a representation that demonstrates a clear misunderstanding of a fact that is within the unique knowledge of the other party, the duty to provide unsolicited disclosure is engaged, even where the matter is not one of such significance to undermine the entire bargaining relationship, such as a plant closure. The Board accepts that such silence could be, as the Board found in *Consolidated Bathurst*, "tantamount to a misrepresentation".

25. But that is not what happened here. In this case, in the absence of any communication by the Employer about the assumption underlying its proposal and in the absence of any request for information by the Employer or any misrepresentation by the Union upon which the Employer relied, the Board accepts that the Union was not obliged to volunteer information about the subsidy. The Union had

proposed increasing the employer premiums. The Employer proposed taking the plan back because it believed it could save money, but did not disclose to the Union this belief or the basis for this belief. The Union's silence in these circumstances does not demonstrate bad faith such that it could trigger the duty to provide unsolicited disclosure. To find otherwise would be tantamount to imposing on a bargaining party in receipt of a proposal that appears "too good to be true" an obligation to question the other party as to whether they appreciate the significance of their own proposal. Setting aside whether such an obligation would help or hinder bargaining, this standard would be exceedingly difficult to administer with any consistency, predictability or fairness. This uncertainty does not arise when the obligation to disclose is triggered by a specific request for information, and it is for that reason that the general duty to disclose is predicated on such a request, and that unrequested disclosure is the exception rather than the norm.

26. In our view, the concept of due diligence is present in the law of collective bargaining. When a party makes a proposal it ought to understand the consequences of that proposal. In part, it can do that by asking the other party for information or, perhaps, by explaining, the underlying rationale for its proposal. If the other party has information which undermines the rationale, it is possible it may be obligated to advise the proposing party about that fact. However, here, the Employer did not advise the Union of its rationale, ask for information about the financial circumstances of the plan or even ask the union why it was proposing to double employer benefit contributions. Moreover, although it did request information about the benefit plan, that was after the strike commenced, and it did not follow up on the issue and ensure it got answers to that request before agreeing to refer the pension issue to Mr. Kaplan. In doing so the Employer missed a second opportunity to engage in due diligence. This was not, as noted, a case where the union was obligated to advise the Employer without a specific request being made. In part, that is true because the possibility that the plan could be in deficit was a fact that the Employer was generally aware of, although obviously, the size of the deficit was a surprise.

27. For all of the foregoing reasons the application is dismissed.

"Brian McLean"
for the Board