PALIARE ROLAND
BARRISTERS

Richard P. Stephenson
T 416.646.4325 Asst 416.646.7419
F 416.646.4301
E richard.stephenson@paliareroland.com
www.paliareroland.com

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VIA COURIER AND *RESS* FILING

Chris G. Paliare
Ian J. Roland
Ken Rosenberg
Linda R. Rothstein
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Lindsay Scott
Alysha Shore
Denise Cooney
Paul J. Davis
Lauren Pearce
Elizabeth Rathbone
Daniel Rosenbluth
Glynnis Hawe
Emily Home

COUNSEL
Stephen Goudge, Q.C.

COUNSEL
Ian G. Scott, Q.C., O.C.
(1934 - 2006)

Ms. Kirsten Walli
Board Secretary
Ontario Energy Board
P.O. Box 2319
2300 Yonge Street, 27th Floor
Toronto, ON M4P 1E4

Dear Ms. Walli,

Re: Alectra Utilities Corporation and Guelph Hydro Electric Systems Inc.
Ontario Energy Board File No. EB-2018-0014

I am writing in response to the Board's Decision on Confidentiality and Procedural Order No. 2, issued July 12, 2018. Specifically, I am writing to object to the Board proposed restriction on access to certain information declared confidential by the Board to PWU counsel.

It is submitted that the proposed restriction on access is unnecessary, and unwarranted. The PWU has two main reasons for this submission.

Firstly, it appears that the Board is operating under a misapprehension regarding the Applicant's legal obligations regarding the information in question. As explained by the Applicant, it is of the view that the information regarding job reductions in specific functional areas, "could interfere with ongoing and future collective bargaining with their labour unions". This submission ignores the relevant law which requires disclosure to affected unions of this type of information during collective bargaining.

Under the *Labour Relations Act*, the employer has an obligation during collective bargaining (particularly when asked by the union) to disclose plans which are likely to have a significant impact on the bargaining unit. This includes information regarding increases or decreases to the size of the bargaining unit.[1]

This information in this case rises above the mere status of "plans" or something the employer is "seriously considering". The forecast staff reductions constitute the vast majority of the costs savings which is the basis upon which the Applicant

[1] See *Ontario Public Service Employees Union, Applicant v. The Crown in Right of Ontario (Management Board Secretariat)* 2005 CanLII 8247 (ONLRB) at para. 37-47 (Copy attached)

proposes to justify the transaction. As a consequence, far from "interfering" with collective bargaining, disclosure of the information in question is required by the laws governing the applicable labour relations scheme. Not only is such information not confidential (to the affected unions), it would be unlawful for the employer to treat it as such during collective bargaining.

As a consequence, insofar as there is any justification for declaring the information in question to be confidential, that justification does not apply to the affected unions.

Even assuming the Board accepts that the information in question is truly confidential, the proposed restriction on access to union counsel should not be imposed because it is unnecessary. The Board mandated Confidentiality Declaration and Undertaking (the "Undertaking") provides the Applicant with complete protection of all its legitimate interests. Note that amongst the requirements of the Undertaking are the following:

1. I will use Confidential Information exclusively for duties performed in respect of this proceeding.

2. I will not divulge Confidential Information except to a person granted access to such Confidential Information or to the Board.

So long as these obligations (together with the other obligations contained in the Undertaking) are fulfilled there is no risk to the Applicant of misuse of this information. For the Board to deny access to information to PWU counsel, notwithstanding the fact that the Undertaking has been executed, can only suggest one thing – the Board is satisfied that there is a real risk that PWU counsel will not fulfill its undertaking.

Such a conclusion is harmful, and unwarranted. It is a conclusion that is made in the complete absence of any evidence that PWU counsel's undertaking is unworthy of credit. Moreover, it ignores the fact that (in addition to Board ordered sanctions) it is an act of professional misconduct for a solicitor to breach his or her undertaking.

What is even more problematic is the fact that the Board has singled out union counsel for this unique treatment. I understand that the rationale for the Board's position is not that union counsel are unworthy of its trust, but rather that union counsel may have an ongoing role in representing his or her client in other matters, including labour relations. The potential existence of that future role may (or may not) be true, but it does not justify this unique treatment.

It assumes that this future role could not be performed without breaching the Undertaking. Again, an assumption that anyone, and particularly a solicitor would breach his or her undertaking is an unwarranted and unjustified assumption. Second, it ignores the fact that solicitors regularly "compartmentalize" information. One simple example of this is the "deemed

undertaking" rule contained in the Rules of Civil Procedure. The Rule provides as follows:

> *Deemed Undertaking*
>
> **30.1.01 (3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained. O. Reg. 61/96, s. 2; O. Reg. 575/07, s. 4.**

Critically, the Rule (a) does not preclude counsel of access to the information in the first instance; and (b) does not preclude that counsel from acting in subsequent matter where the same information may be relevant. Rather, the Rule imposes an obligation on the solicitor not to <u>use</u> that information in the subsequent proceeding. That is precisely what the Board's undertaking requires. The difference between the Rules of Civil Procedure and Board's proposed action is that the Rules recognize and accept that a solicitor is able to fulfill those obligations. The Board should do likewise.

For these reasons, it is submitted that PWU counsel should be permitted access to all of the confidential information, upon execution of the undertaking.

Yours very truly,
PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

Richard P. Stephenson
RPS:pb

ONTARIO LABOUR RELATIONS BOARD

3038-04-U Ontario Public Service Employees Union, Applicant v. **The Crown in Right of Ontario (Management Board Secretariat)**, Responding Party.

2005 CanLII 8247 (ON LRB)

BEFORE: Brian McLean, Vice-Chair and Board Members J. A. Ronson and R. R. Montague.

APPEARANCES: Craig Flood, Ron Lebi, Terry Baxter and Margaret Simmons for the applicant; Mary Gersht, Elizabeth McKnight and Fateh Salim for the responding party.

DECISION OF THE BOARD; March 18, 2005

1. This is an application under section 96 of the *Labour Relations Act, 1995* (the "Act") which alleges that the responding party violated sections 17 and 70 of the Act.

2. This application arises while these parties are in collective bargaining. The dispute began when the employer offered to provide certain information to senior members of the trade union, but only on the condition that they keep the information confidential. If the union had accepted the information on that basis, which it did not, it would have meant the information could not have been shared with the union's entire bargaining committee or with the union's membership. The Board held a hearing over three days in early 2005 to receive the evidence and arguments of the parties.

The Facts

3. Many of the facts in this case are not in dispute. Each party called one witness. OPSEU called Terry Baxter, it's chief negotiator in bargaining with the employer and the employer called Elizabeth McKnight, its Director of Bargaining with OPSEU for the 2004/05 round of bargaining. In our view both witnesses testified truthfully and candidly in all respects. They testified to the following.

4. The applicant is the bargaining agent for public sector employees employed by the government. The applicant and the responding party are currently engaged in negotiations on a renewal collective agreement. The predecessor collective agreements expired on December 31, 2004. The applicant give notice to bargain by letter dated October 2, 2004.

5. This dispute had its genesis prior to October 2004. It appears that for some number of years the employer, once per year, has been giving the applicant, and the other trade unions which represent government employees, information about the government's "plans". (We note that the case revolves in part around the meaning of the word "plan", but it is not necessary to discuss this issue here). In order to receive that information, an OPSEU official (like officials from the other unions) was required to, and did on at least some occasions, sign a confidentiality agreement. The unions did not object to this requirement. However, none of the confidentiality agreements put into evidence, were signed in a year in which collective bargaining was taking place.

6. Some of the confidentiality agreements may have been required as a result of a draft policy regarding "Confidential Disclosure to Bargaining Agents" formulated by the Management Board Secretariat ("MBS") in 2003. There is no requirement in the collective agreement between OPSEU and the employer for disclosure of business plans during the life of the collective agreement. However, the policy, which provides for disclosure in certain circumstances, was sent to OPSEU for its comments. OPSEU provided comments on one part of the policy, but did not raise broad objections about it. In particular, OPSEU did not object to the fact that under the policy information would be provided to it on a confidential basis. The policy was amended and implemented in January 2004 as the "Interim Directive- Confidential Disclosure to Bargaining Agents" (the "Interim Directive"). The Interim Directive states in part:

> **Mandatory Requirements**
>
> Confidential disclosure to bargaining agents shall be provided in all cases where business decisions are made which materially affect the working terms and conditions of employees represented by the bargaining agents. Examples of situations in which early disclosure applies include but are not limited to re-organizations, transfers, corporate initiatives, and corporate employment policy changes.
>
> Confidential disclosure to bargaining agents shall be provided as follows:
>
> - Confidential disclosure shall be provided a minimum of 10 days (excluding Saturdays, Sundays and statutory holidays) before a business decision is announced to employees and to the public.
>
> ...
>
> **Information that is Disclosed**
>
> To the extent possible, the information that is disclosed shall include:
> - The reasons, to the extent they are known, for the business decision
> - The number and locations of bargaining unit employees affected
> - The impact, if any, on bargaining unit employees.
>
> ...
>
> **Confidentiality**
>
> In order to maintain the integrity of the disclosure process and to ensure ongoing open communication between the employer and the bargaining agents, all information that is disclosed shall be kept confidential. This means that the bargaining agents must not share the information with their members, the public, the media, or any other person, except for the purpose of consulting internally on the matter.
>
> Where necessary, bargaining agents may be required to sign a confidentiality agreement before a business decision is disclosed.
>
> This directive will cease to apply to a bargaining agent that breaches confidentiality.

7. Under the Interim Directive (and previously) OPSEU has been provided with confidential advance notice of significant government decisions that may have an effect on the bargaining unit despite the absence of any such requirement in the collective agreement. The information at issue in this case concerns government plans which are not at the public

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announcement stage. In this regard in each of the past several years the various Ministries of the government have engaged in a planning exercise. The employer's most recent planning exercise is called the "Results Based Planning Initiative" ("RBPI"). It is a process undertaken by the Ministries to look forward over the next 4 to 5 years to determine what they will do to advance the government's business agenda. Broadly speaking, it can work like this: first, a Ministry comes up with ideas which they might undertake over the next several years. The Ministry submits the ideas to the MBS. Those plans are then approved (or not) by MBS and then put before the Management Board of Cabinet for its approval. If approved, the Ministry then works on the plan further. It then goes to Management Board of Cabinet for approval in principle. It then returns to the Ministry to determine whether it is feasible and finally to Cabinet for ultimate approval.

8. In August 2004 the employer, as it had done in past years, gave information to its unions about its RBPI. The RBPI documents reflect plans that have at a minimum been approved by the MBS. The RBPI documents are essentially composed of the same kind of information that was provided to OPSEU in previous years when the process was called "business planning". Most of the information contained in the RBPI documents provided to the unions is about the impact on employee complement levels, broken down by Ministry, if the plans are actually implemented. The documents identify the numbers of employees (or full time equivalents ["FTEs"]) who may be hired and released as a result of the employer's plans.

9. The figures representing FTE gains and losses are calculated by totalling the projected gains/losses of each of the initiatives and then combining them to create one overall figure for each Ministry. According to Ms. McKnight these figures were given to the unions so they could get a "sense of where the impact would be across government for that four year cycle".

10. The employer was unable to produce a confidentiality agreement signed by OPSEU (or any other union) with respect to the August 2004 disclosure of the RBPI. We think it likely that the unions were not asked to sign a confidentiality agreement. Moreover, the Interim Directive appears only to apply to business *decisions* which are made. It appears not to apply to "plans", no matter how close they are to being made into an actual decision.

11. The RBPI documents which were provided to the unions were put into evidence. As noted, much of the documents are taken up with a discussion of the numbers of FTE positions that will be increased or decreased by the various Ministries under their plans. The text portions of the documents state, in part:

> Purpose of this Presentation
>
> ---
>
> To provide information on planned staffing increases and decreases in the OPS.
>
> To provide an indication of staffing impacts:
>
> I) by ministry,
> II) by type, and
> III) by bargaining group.
>
> As initiated in 2000, data is being provided for increases (temporary and permanent hires) and reductions.

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> Staffing impacts are based on best available information and may vary with implementation.
>
> Some of these decisions may have already been implemented and/or disclosed.

12. On October 7, 2004 OPSEU and the employer had their first meeting in connection with bargaining for a renewal collective agreement. Although not a formal bargaining session (it was described as a "meet and greet"), Mr. Baxter took the opportunity to give what he termed "a state of the union address". By that he meant an opening statement which described in the most general terms what the union hoped for in bargaining. During the "state of the union address" the union requested that the employer advise it of any plans or intentions that might have an effect on the bargaining unit that the employer might embark on during the life of the collective agreement. Ms. McKnight's response to the state of the union address was that it was the employer's intention to have a full and complete discussion of all issues relevant to the bargaining. There was no discussion at the meeting about confidentiality issues. The parties agreed they wished to have a different approach to bargaining in this round.

13. On November 8, 2004 Ms. McKnight approached Mr. Baxter during a bargaining related process. She advised Mr. Baxter that she had a package of materials ("the Planning Detail Documents") to provide to him. She advised him, however, that he was required to sign a confidentiality agreement before she would provide the Planning Detail Documents. The documents, which were not put into evidence, apparently give the details of the plans disclosed as part of the RBPI. Mr. Baxter expressed surprise that he would be asked to sign a confidentiality agreement for information provided during bargaining. He told Ms. McKnight that he did not think that the information would be kept confidential if it was given to the entire bargaining team, but that they were entitled to receive it. He declined to sign the agreement and was accordingly not provided with the Planning Detail Documents. However, he was provided with a letter dated November 8, 2004 addressed to the President of OPSEU, Leah Casselman, (which did not have attached the Planning Detail Documents) as follows:

> Dear Ms Casselman:
>
> In accordance with Cabinet Office's decision to provide bargaining agents with an increased level of detail related to Results Based Planning for 2004 – 2005 only, we are providing to you, on a confidential basis, information regarding initiatives contained in the approved 2004 – 2005 Results-Based Plans that have implications for OPSEU-represented employees. **You will be required to sign the attached confidentiality agreement.**
>
> Please find enclosed the template reports "2004 – 2005 Approved Results-Based Planning Proposals Affecting OPSEU Bargaining Unit Members" as provided by ministries to the Employee Relations Division. The following ministries have a nil report:
>
> - Ministry of Citizenship Ministry of Tourism and Recreation
> - Ministry of Francophone Affairs
> - Ministry of Northern Development and Mines
> - Ministry of Municipal Affairs and Housing
> - Ministry of Intergovernmental Affairs

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Please note that the attached template reports reflect planned staffing increases and decreases only. Accordingly, with the implementation, there may be some variance between this information and the actual impact on staff members.

For follow-up questions or concerns regarding the template reports, please contact the Human Resources of each ministry directly.

14. The Confidentiality Agreement which the employer asked the union to sign stated:

"CONFIDENTIALITY AGREEMENT

I _____ (name) agree that I will keep the information/documents disclosed to me on _____ ____ (date) confidential until the employer specifies that the information/documents need no longer be kept in confidence. I _____ ____ (name) further undertake not to discuss the information or contents of the documents with anyone except individuals who have signed confidential agreements in respect of same information/documents."

15. On November 25, 2004 the union advised the employer that it viewed the employer's requirement that it sign a confidentiality agreement in order to receive information as a breach of the duty to bargain in good faith.

16. On December 2, 2004 the employer responded as follows:

Further to our discussion and your letter of November 25, I am writing to confirm the employer's position regarding the above issue. You have requested that the employer provide you with the detailed information regarding specific Ministry Results Based Plans.

As I have advised, we are prepared to do this subject to your agreeing to sign a confidentiality Agreement, a copy of which I have attached. This agreement is similar to that which OPSEU has signed on prior occasions, dealing with sensitive information. It is identical to that which the other OPS bargaining agents have signed in order to have access to the information you have requested. The employer takes the position that it is not in any way unreasonable to require that you sign a Confidentiality Agreement in this circumstance.

You have advised that you will be proceeding to file a complaint with the OLRB regarding the employer's position. Please be advised that the employer will be taking the position at the Board that these materials should be subject to confidential treatment and will be asking the Board to either order the union to sign the proposed agreement, or alternatively, to impose similar conditions through a Board order.

17. The other unions, which represent the employer's employees, did sign the confidentiality agreement and were provided with the Planning Detail Documents.

18. The Union filed this application on December 3, 2004.

19. Mr. Baxter testified about why he believed that it would be inappropriate to accept the planning details on a confidential basis. He gave several reasons which would apply, if for

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example, the employer's plans (as it appeared) might result in the lay off of employees. Included among these reasons were: so the union could attempt to convince the employer at the bargaining table to do otherwise; to put political pressure on the employer to do otherwise; to see if employees wish to take early retirement packages; to negotiate collective agreement protections; and to negotiate enhanced severance packages.

20. Mr. Baxter also testified that OPSEU's bargaining committee is composed of 30 people. Although he is the spokesperson, the reality is that he is, at best, first among equals. It would not be appropriate for him to know confidential information and not be permitted to share it with the bargaining committee. The Board agrees it is difficult to retain confidentiality among any group of that size.

21. Mr. Baxter also testified that he could not understand the employer's calculations of the number of employees who might be affected by the August 2004 RBPI documents. The documents showed that, under the plans, some employees (or FTEs) would be laid off and some would be hired. The union had already been told of employer plans that would affect 3-4000 of the union's members. However, these did not appear to be included in the employer's calculations. Moreover, the document describes the effect on FTEs. He knew this could mean a certain number of full time employees or could mean an equivalent number of part time employees or, more likely, a combination thereof. He had no way to know from the documents how many actual employees would be affected. He understood that the figures had been approved by Management Board of Cabinet. Without clarification, he testified, it would be difficult, if not impossible, to bargain about these issues.

22. Under cross-examination Mr. Baxter acknowledged that the employer had in fact provided disclosure of some of its plans during bargaining. For example, OPSEU was told in advance of the public announcement of the employer's decision to transfer tax auditors to the Federal government. OPSEU was given 10 days' advance notice of this announcement. While the government has made a decision to proceed with this initiative it is possible it will not ultimately occur for a variety of reasons.

23. Ms. McKnight testified that it was the employer's policy to advise the union of a decision made that affected 20 or more bargaining unit positions. (Decisions that involved fewer employees were handled locally). She testified that the union was told when plans were reasonably likely to occur. In her view the plans reflected in the RBPI were not reasonably likely to occur. She was of that view because the plans looked forward up to four years. It is impossible to predict what will happen during that four-year period. The financial position of the government might change, new priorities might emerge or there could be restructuring. All of these things make it likely that the government's plans will also change and the current plans will not be implemented.

24. Ms. McKnight also explained the employer's requirement that the business planning information it gives to the unions be kept confidential. There are essentially three reasons: first, the information may make employees feel anxious about plans that may never be implemented; second, it may create anxiety for the unions; and third, some ideas involve outsourcing which may require a tender and if the information leaked out it may give an unfair advantage to bidders.

25. In cross examination, Ms. McKnight agreed that the employer decided pursuant to the Interim Directive when to release information to the unions and that it treated the release of information during bargaining the same as any other time. In other words, even during bargaining, it would release information to the unions concerning decisions generally 10 days in

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advance of the public announcement. In addition, the employer would require confidentiality agreements to be signed regarding the release of planning information whether the parties were in bargaining or not. However, no agreement would be signed if the employer was advising the unions of a decision (as opposed to a plan); the union would just be asked to keep it confidential. She testified that she would not give plans to the union because "plans may not become decisions".

26. Ms. McKnight also testified about her knowledge of the RBPI documents which were provided to the union. She said that some of the calculation of the employees (FTEs) set out in the documents "may have" a degree of likelihood of implementation. She said it was "not my job" to determine the degree of likelihood of the plans being implemented. She did not ask anyone in any of the Ministries to assess the plans to determine which were likely to be implemented.

27. She acknowledged that her overall assessment that the plans would not likely be implemented is based on her experience rather than any actual knowledge of the plans themselves. There are far too many plans for her to know about each of them and she does not know the likelihood of any of them being implemented.

The Law

28. Sections 17 and 70 of the Act are as follows:

> **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.
>
> **70.** No employer or employers' organization and no person acting on behalf of an employer or an employers' organization shall participate in or interfere with the formation, selection or administration of a trade union or the representation of employees by a trade union or contribute financial or other support to a trade union, but nothing in this section shall be deemed to deprive an employer of the employer's freedom to express views so long as the employer does not use coercion, intimidation, threats, promises or undue influence.

29. There is no dispute between the parties as to the nature of the general duty of disclosure which arises in the context of collective bargaining. The Board has recognized that under section 17 of the Act employers have a duty of disclosure to the trade union during bargaining. The purpose of that duty is to create an environment which encourages informed and meaningful bargaining. Section 17 also requires the parties to be truthful. Therefore, there is no doubt that some information (employee information, for example) must be disclosed during bargaining. However, employers need not provide all information requested by the union. Employer disclosure of plans has been a particularly thorny problem. The Board recognizes that significant plans not disclosed can in the end make bargaining meaningless. The difficulty is in determining at what stage of planning, from mere ideas to on the verge of implementation, is disclosure required. The jurisprudence distinguishes between two situations: first, where the union has, in bargaining, asked the employer for information regarding the employer's plans ("solicited disclosure"); and second where the union has not requested such information

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("unsolicited disclosure"). The Board discussed the employer's obligations including that regarding "unsolicited disclosure" in *Westinghouse Canada Limited,* [1980] OLRB Rep. April 577:

> 39. ... Once an agreement is reached, however, the parties are bound to it for its stipulated term and are prohibited from engaging in economic sanctions during its term regardless of changing economic conditions or management initiatives. The restrictions placed upon a trade union in this regard are to be contrasted with the freedom allowed under section 152 of the *Canada Labour Code*, c. L-1 which permits a trade union to bargain to impasse about the effects of technological change occurring during the term of a collective agreement. **Having regard to the importance of the exercise, the requirement for full and open discussion, the scope of matters open to bargaining and the statutory framework which binds the parties to the terms of their agreement for its full term, can there be any doubt that the section 14 [now section 17] duty requires an employer to respond honestly when asked in bargaining if he is contemplating initiatives of the type which have a real likelihood of significantly impacting on the bargaining unit. 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 it 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**.
>
> 40. The more difficult question is whether there is an obligation on an employer to reveal on his own initiative plans which are not finalized at the time of bargaining but which, if implemented during the term of the collective agreement, would have a significant impact on the economic lives of bargaining unit employees. On one side the Board must be concerned with potential distortion of the bargaining process by the imposition of an obligation which requires the employer to advise the union on his own initiative of plans which may never become decisions. On the other side, however, the Board must be sensitive to the purpose of the collective bargaining process and to the role of the trade union as exclusive bargaining representative of the employees who might be affected if these plans resulted in decisions being made by the company.
>
> 41. The competitive nature of our economy and the ongoing requirement of competent management to be responsive to the forces at play in the marketplace result in ongoing management consideration of a spectrum of initiatives which may impact on the bargaining unit. More often than not, however, these considerations do not manifest themselves in hard decisions. For one reason or another, plans are often discarded in the conceptual stage or are later abandoned because of changing environmental factors. The company's initiation of an open-ended discussion of such imprecise matters at the bargaining table could have serious industrial relations consequences. The employer would be required to decide in every bargaining situation at what point in his planning process he must make an announcement to the trade union in order to comply with section 14. Because the announcement would be employer initiated and because plans are often not transformed into decisions, the possibility of the union viewing the employer's announcement as a threat (with attendant litigation) would be created. If not seen as a threat the possibility of

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> employee overreaction to a company initiated announcement would exist. A company initiated announcement, as distinct from a company response to a union inquiry may carry with it an unjustified perception of certainty. The collective bargaining process thrusts the parties into a delicate and often difficult interface. Given the requirement upon the company to respond honestly at the bargaining table to union inquiries, with respect to company plans which may have a significant impact on the bargaining unit, the effect of requiring the employer to initiate discussion on matters which are not yet decided within his organization would be of marginal benefit to the trade union and could serve to distort the bargaining process and create the potential for additional litigation between the parties. The section 14 duty, therefore, does not require an employer to reveal on his own initiative plans which have not become at least *de facto* decisions.
>
> [emphasis added]

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30. The employer's obligation where the union asks for information is less easily defined. The Board in *Ontario (Management Board),* [1998] OLRB Rep. Nov./Dec. 923 described it this way, which we accept:

> 23. Westinghouse Canada Limited, [1980] OLRB Rep. April 577; application for judicial review dismissed [1980] CLLC para. 14,062 (Divisional Court) and Consolidated Bathurst Packaging Ltd., [1983] OLRB Rep. Sept. 1411, are perhaps the two most notorious decisions dealing with an issue which can be as delicate as it is thorny. For the reasons given in those decisions (and also in others) an employer's obligation comes down to this:
>
> (a) on its own initiative, an employer must reveal to a trade union any actual (including de facto) decision which is likely to have a significant impact on the bargaining unit;
>
> (b) when asked by the union in bargaining whether it is seriously contemplating initiatives which are likely to have a significant impact on the bargaining unit, an employer must answer honestly.

31. Before applying these principles to the facts of this case, it is worth noting that, for presumably tactical reasons, neither side chose to introduce the documents which the employer was prepared to give to OPSEU (if its officials signed confidentiality agreements) or elicit evidence of the details of the "plans" that are at issue in this case. While the Board understands these decisions, there is little doubt that these decisions make the Board's task more difficult.

32. It also must be said that it appears, based on the evidence put in by the employer, that there exists a misapprehension about the obligation concerning disclosure which arises out of the duty to bargain in good faith in these circumstances. The Alberta Labour Relations Board in *United Nurses of Alberta,* [1994] ALTA. L.R.B.R. 250 discussed the duty in circumstances which are similar to the ones in this case:

> The A.H.A. says it need only disclose plans that are made known to it by the hospitals involved. They argue that, by the time they, as an organization, find out about some of these plans, the plans will be public knowledge. On this point, we think they misconceive their role and duty as authorized bargaining agent. If asked, Mr. Buda, COTHA and the A.H.A. have a duty to find out, and the hospitals have a duty to

> advise them, of any plans that have reached that stage of likelihood of implementation. For the reasons given above, the agents' duties in this are the same as the duties of the hospitals they represent. It is not appropriate to say" we cannot answer the Union frankly because the hospitals will not tell us." Bargaining agents, once they accept that role, have a duty to ask, and the hospitals have a similar duty to keep their bargaining agents informed.

33. Similar duties apply to these parties. Prior to bargaining the Crown must advise its bargaining team whether there are any significant plans which have been decided (or that a *de facto* decision has been made) to be implemented during the life of the renewal collective agreement and the Crown has an ongoing duty to inform the bargaining team if such plans exist, or if such plans arise during bargaining. The bargaining team then has a duty, in the face of the union's request made of it during bargaining, to make a further inquiry of the Crown. It must ask whether it is seriously contemplating initiatives, which are likely to have a significant impact on the bargaining unit. The bargaining team must advise the union of any such initiatives. During bargaining the employer's regular disclosure policies do not necessarily apply.

34. It appeared during the hearing that these questions were not asked by the employer bargaining team, and led the union, in closing argument, to seek the Board's leave to permit it to amend its pleadings to include these allegations. We decline to do so. The employer did not present full evidence regarding this issue because it did not know it was an issue until too late. It would be prejudicial to permit the applicant to amend its pleading in final argument as it requested. In any event, we trust that this will not be an issue in the future.

35. Although OPSEU's request for information may, as the employer suggests, have been overly broad, there is little dispute that it made a request of the employer of the kind that brings the employer into the solicited disclosure obligation. Therefore, the employer was (and is) obligated to advise the union whether it is seriously contemplating initiatives which are likely to have a significant impact on the bargaining unit. The quite narrow issue in this case is whether the Planning Detail Documents ought to have been disclosed to OPSEU and whether the employer's disclosure obligation, grounded in section 17 of the Act, was violated when the employer insisted that the Planning Detail Documents be kept confidential to a small group of the union's bargaining committee and executive.

36. The employer has three grounds for its argument that OPSEU has not proved a violation of the obligation under section 17 of the Act. The first is that OPSEU did not establish, as was its onus, that there are actually plans that meet the disclosure criteria and which were not disclosed. The second reason is that the employer did offer to disclose the details of the plans but that OPSEU did not do what was necessary (i.e. sign the confidentiality agreement) to receive the information. Finally, the employer argues that even if the Board does order disclosure it ought to be on the condition that the information disclosed remains confidential.

37. We agree with the employer that the onus is on OPSEU to demonstrate on a balance of probabilities that it has not been provided with information regarding initiatives which the employer is seriously contemplating and which are likely to have a significant impact on the bargaining unit.

38. The employer's position that OPSEU did not meet its onus is based on the fact that the union did not call witnesses with knowledge that the plans are significant and likely to be implemented, and it did not introduce the planning documents into evidence. Moreover, the

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employer asserts that its evidence was uncontradicted, that the plans set out in the RBPI are "unlikely to occur".

39. We disagree that OPSEU has not met its onus. The applicant must demonstrate on a balance of probabilities that at least one of the plans described in the RBPI documents are likely to be implemented and will have a significant impact on the bargaining unit. In our view the applicant has done so.

40. In our view there is ample evidence contained in the RBPI documents which were put into evidence by the parties to conclude that the employer is seriously considering the implementation of the plans during the term of the new collective agreement. The language in the document entitled "purpose of the presentation" is one example. It describes "planned" staffing increases and decreases. It provides data about those increases and reductions, including apparently precise calculations of numbers of FTEs affected. It states: "Staffing impacts are based on best available [information] and may vary with implementation. Currently, some of these decisions may have already been implemented and/or disclosed". This is highly suggestive that implementation is likely to occur but the effects of implementation on employees may vary.

41. Moreover, it is clear that some considerable thought has been given to the calculation of the number of employees (FTE's) affected. The numbers are not rounded up or down, suggesting that the plans calculate employee losses/gains to the individual FTE. These calculations are followed by this note: "In the 2004-05 results based plans, MBC [Management Board of Cabinet] has approved approximately 3,110 new reductions as well as 3,000 new positions (including 600 announced in the budget speech), with 570 of the new positions being temporary". Again, in the absence of some explanation by the employer, these notes are evidence that at least some of the employee additions and reductions are seriously contemplated.

42. Other evidence is contained in the November 8, 2004 letter. It describes "information regarding initiatives" in the "approved" plans that "have implications" for the applicant. The letter goes on to say "Please note that the attached template reports reflect planned staffing increases and decreases only. Accordingly, with the implementation, there may be some variance between this information and the actual impact on staff members". These sentences create the impression that the plans will proceed, it is just the impact on staff which is variable. Moreover, nowhere do any of the documents introduced as exhibits reflect the minimal likelihood of implementation suggested by the employer. The overall message conveyed by the documents is quite the opposite. It is difficult to understand why the employer would go through the disclosure process at all if the likelihood of the plans being implemented is as low as was suggested.

43. The evidence given by Ms. McKnight does not alter our conclusion on the issue. There is no dispute that she testified that the plans, which formed the basis of the RBPI, were unlikely to be implemented. In fact, her testimony appeared to be that they had almost no chance at all of being implemented. However, it was apparent that Ms. McKnight's evidence was based solely on her experience in such matters rather than on any knowledge that she had about the present initiatives or the government's intentions with respect to the plans at issue. Her testimony was that in her experience government plans are rarely implemented. However, as discussed above, she has no knowledge about the actual state of Ministry planning because in her view that is not her job. So, in fact, it is possible that there are plans that are soon to be implemented. Indeed it is possible, as the RBPI documents provided to the union indicate, that some of the plans may well have been implemented already. In short, Ms. McKnight's evidence on this issue was little more than opinion evidence and we disregard it.

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44. Therefore the only evidence we have before us with respect to this issue is contained in the documents introduced into evidence by the union. We also note that the employer could have led evidence about each of the plans, which form the basis of RBPI documents after requesting that such evidence be kept confidential to the litigation. Such evidence could have conclusively established whether the plans were near implementation or were "pie in the sky". However, it chose not to do so. The union made a similar decision.

45. Furthermore, there was no dispute that at least some of the plans, if implemented, would have a significant impact on the bargaining unit. It is therefore, unnecessary in this decision to attempt to draw the line regarding what is a significant impact and which is not.

46. There was also a suggestion by the employer that the union did not need this information in order to conduct its bargaining because it would not affect OPSEU's bargaining stance. We also disagree with that submission. While in the absence of specific information about the plans it is difficult to come to any conclusions about this issue, we are satisfied that in general the union has a right to make that determination for itself. It is not difficult to imagine, depending on what the plans are, that the union may bargain differently with that knowledge.

47. For all of these reasons we conclude, based on the evidence before us, that the information contained in the documents is information which the employer is obligated to provide to OPSEU.

48. The employer argues that regardless of the Board's decision on the likelihood of implementation, it in fact complied with its obligation by making the Planning Detail Documents available to senior members of the union and is in any event entitled to an order that would keep the information confidential to Mr. Baxter and other senior members of the union.

49. It is not difficult to imagine circumstances where it might be appropriate for an employer to require confidentiality at least to the point of the strike/ ratification vote. For example, full disclosure might put a corporation in conflict with securities laws or cause other serious business problems for the employer. This problem is discussed in *Consolidated Bathurst Packaging Ltd.*, [1983] OLRB Rep. Sept. 1411 at the bottom of paragraph 49 of that decision where the Board stated:

> ... There is also an inherent uncertainty in defining the extent of an unsolicited disclosure duty beyond firm decisions. There is the problem of confidentiality surrounding such plans. And there is the collective bargaining impact of dropping such "incomplete thinking" on a bargaining table. These problems cannot be denied or minimized.

50. On the other hand there appears to be a problem with a requirement by an employer that during bargaining a union be required to keep information from its members until a collective agreement is settled and after. At first glance this seems inconsistent with the duty of fair representation and the rights of employees to know the basis on which they are voting for either a strike or lock-out as they ultimately will have to do.

51. In any event, it is not necessary for the Board to decide these difficult issues in this case. The employer's rationale and evidence in support of that rationale for its confidentiality requirement was, again, largely hypothetical. The employer speculated that the information "would" cause employees' concern. Even assuming that, within the content of collective bargaining, this is a legitimate employer concern, (as opposed to the union, as the employees'

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bargaining agent), the employer did not lead specific evidence that the disclosure of any of the plans could have a specific detrimental effect. Similarly, while the employer suggested that the government's tender process could be compromised if the information was disclosed to the general public, it did not lead evidence about which plans that concern is applicable to. The employer has therefore presented possibly legitimate abstract reasons for confidentiality, that in the absence of more concrete facts, we disregard. In the absence of such evidence, the employer cannot sustain its argument that its requirement of confidentiality was and is warranted.

52. Finally, we note that the employer's proposal to give the information to only a small group (at best) of the bargaining committee, and not to the bargaining committee as a whole, is also problematic. There was no evidence before us other than Mr. Baxter is just the spokesperson of the bargaining committee. He has no special status and is not in a position to keep information from the rest of the committee. The employer's requirement that information be provided to some members of the bargaining committee and not to others would be difficult to sustain even with the appropriate evidentiary support. The effect of excluding information from certain members of the committee excludes them from decision making with respect to that information. Such a requirement, could be seen as effectively dictating the composition of the union's committee, which the Board has determined is prohibited by the Act.

53. For all of the foregoing reasons we find that section 17 of the Act has not been complied with. There is no evidence that this was anything but an honest mistake. There is no suggestion that the parties are not and will not make every effort to bargain a new collective agreement. We therefore see no labour relations purpose to make any finding regarding section 70 of the Act.

54. The issue of remedy is problematic. While we have found that the employer is seriously contemplating the implementation of the plans which underlie the RBPI documents. It is also possible, that not all of them are seriously contemplated. The employer would normally be under no obligation to provide disclosure about plans that fall into the latter category. However, in choosing not to call specific evidence about the likelihood that the plans will be implemented, all of the plans have been "put into play" and the Board is left with no choice but to direct the employer to provide information about them.

55. OPSEU has been put on notice that certain events may happen during the term of the new collective agreement which may have a significant impact on employees. We have found, on the evidence before us that the employer is seriously contemplating such plans. No union can effectively bargain under those circumstances unless it is provided information about such plans. It would therefore not be appropriate to make a mere declaration of a violation as the employer, in the alternative, requests. We are also mindful of granting a remedy which does not immerse the Board in the parties' bargaining and/or of creating the legal environment which will lead to litigation in the future.

56. Under the circumstances, we direct the employer to do one of the following:

- provide to OPESU the Planning Detail Documents which were the subject of this application and answer OPSEU's appropriate questions about the Planning Detail Documents; or

- during bargaining, answer OPSEU's appropriate questions about the plans which are described in the August 2004 RBPI documents.

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57. We are seized if there are difficulties implementing this decision.

"Brian McLean"
for the Board

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