

*Case Name:*

**Municipal Property Assessment Corp.**

**Stan Futa, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor**  
**Malcolm Jones, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor**  
**Mark Smith, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor**  
**Kevin Prendergast, Applicant v. Ontario Public  
Service Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor**  
**Dan Vresk, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor**  
**Jerry Kocijowsky, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor**  
**Denise DeClerc, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor**  
**Christine Safranka, Applicant v. Ontario Public  
Service Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor**  
**Ross Tennant, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor**  
**Leo Felicetti, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor**  
**Laura Reid, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor**  
**Kathy Cole, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor**  
**Dale Payton, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.**

**Municipal Property Assessment Corporation, Intervenor  
Nadia Futa, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor  
Jeff Lepp, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor  
John Fuller, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor  
Ronald Franklin, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor  
Doug Adams, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor  
Rose Campbell, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor  
Ian Thow, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor  
Marina Seferian, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor  
Paul Alves, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor  
Michael Weatherbee, Applicant v. Ontario Public  
Service Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor  
Sharon Moran, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor  
Janet Orchard, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor  
John Cole, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor  
Kelly Wickett, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor  
James Murrell, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor**

**Cathy Henry, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor  
Jo-Anne Jaekl, Applicant v. Ontario Public Service  
Employees Union "OPSEU", Responding Party v.  
Municipal Property Assessment Corporation, Intervenor**

[2007] O.L.R.D. No. 4958

Nos. 2569-06-U, 2571-06-U, 2573-06-U, 2574-06-U,  
2599-06-U, 2618-06-U, 2619-06-U, 2620-06-U,  
2665-06-U, 2693-06-U, 2703-06-U, 2716-06-U,  
2721-06-U, 2723-06-U, 2725-06-U, 2726-06-U,  
2731-06-U, 2815-06-U, 2817-06-U, 2829-06-U,  
2962-06-U, 3480-06-U, 3481-06-U, 3482-06-U,  
3499-06-U, 3551-06-U, 3632-06-U, 3649-06-U,  
3689-06-U and 3729-06-U

Ontario Labour Relations Board

**BEFORE: Kelly Waddingham, Vice-Chair**

November 27, 2007.

(57 paras.)

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## **DECISION OF THE BOARD**

### **Introduction**

**1** These are 30 individual applications filed pursuant to section 96 of the *Labour Relations Act, 1995*, S.O. 1995, c. 1, as amended (the "Act") alleging breaches of section 74 of the Act.

**2** In its response to the applications the responding union, the Ontario Public Service Employees Union ("OPSEU"), made a preliminary request that these applications be dismissed without a hearing or consultation on the basis of delay, lack of particularity, failure to state a *prima facie* case of a contravention of the Act, and failure to request any remedy that the Board might order; and that the applications are an abuse of the Board's process.

### **The Proceedings to Date**

**3** In its decision of June 21, 2007, the Board consolidated the 30 applications and directed the applicants to respond to OPSEU's request for dismissal.

**4** Prior to reviewing the applicants' submissions on OPSEU's request for dismissal, the Board received 30 separate and identical Requests for Reconsideration of its June 21, 2007 decision.

**5** By decision dated July 26, 2007, the Board denied the applicants' Requests for Reconsideration. Upon review of the applicants' submissions, the Board was persuaded that a consultation was required in order to determine whether the applications should be dismissed for delay and or failure to state a *prima facie* case. The Board also directed that it would hear from one representative applicant at the consultation, but provided that if an individual applicant believed that they should be allowed to make their own representation, the Board would consider their submission at the consultation.

**6** A consultation was held on October 23, 2007. At the outset of the consultation, the Board noted that the applicants were not represented by counsel, and advised them that while the Board would be pleased to answer any questions they might have about the Board's processes, the Board could not provide them (or any other party) with legal advice as to do so would be incompatible with the Board's role as an impartial decision maker.

**7** The Board noted that the applicants had made extensive but identical filings in each of the applications, and advised that as the starting point for their oral submissions at the consultation, the applicants should assume that the Board's understanding of the essential facts underlying the applications. Accordingly, the parties should take care to apprise the Board of any additional facts that should be taken into account. The Board then proceeded to hear the parties' submissions with respect to the application. The Board explained to the applicants that OPSEU would proceed first on the basis of its preliminary argument. The representative applicant would then proceed and set forth all the facts that he relied on to establish that OPSEU had contravened section 74. The applicant would respond by indicating where he agreed or disagreed with OPSEU's facts or the conclusions he urged the Board to draw and that he would then have an opportunity to reply to the OPSEU submissions, and to indicate where he disputed OPSEU's assertions of fact or disagreed with the conclusions of law it urged the Board to reach.

**8** The Board heard submissions with respect to the request for summary dismissal on the basis of delay and failure to state a *prima facie* case.

### **Facts**

**9** The applicants are former Ontario Public Service ("OPS") employees who worked for the Property Assessment Division ("PAD") of the Ministry of Finance. As OPS employees they were represented by OPSEU and were members of the OPSEU Pension Trust ("OPT").

**10** On or about December 30, 1998, PAD was divested from the provincial government to a new employer, a non-unionized entity, the Ontario Property Assessment Corporation ("OPAC"), which is now called Municipal Property Assessment Corporation ("MPAC").

**11** At the time of divestment, OPSEU did not have a continued automatic right to represent divested employees or collectively bargain their terms and conditions of employment. This meant that employees affected by divestment had no job security as OPAC had no statutory obligation to hire

the PAD employees or provide the same terms and conditions of employment, which the PAD employees had enjoyed with the Crown including the right to continue in the OPT.

**12** In 1998, there were large scale divestments in the OPS, one of which involved PAD. OPSEU attempted to mitigate the brunt of divestment for OPS employees by negotiating Appendix 9 of the OPS Central Agreement between the Crown and OPSEU. It provided that the Crown would make "reasonable efforts," when divesting to insure that the new non-union entity provides similar terms and conditions of employment which OPS employees had enjoyed with the Crown. Appendix 9 provided some protection for PAD employees who were offered employment by OPAC at the same wages and with similar benefits.

**13** When PAD employees were hired by OPAC, they received an "Information Sheet" from OPAC setting out the terms and conditions of their employment. It advised the employees that "Commencing December 31, 1998, you will cease contributing to the OPSEU Pension Trust and will be enrolled under the OMERS Plan ..." and further on page 9, "OPAC passed a resolution formally authorizing participation in the OMERS Pension Plan, and OMERS has notified OPAC of its concurrence to their participation ....".

**14** On January 20, 1999, OPSEU secured Appendix 18, Section 2.1 in the central collective agreement between OPSEU and the Crown which could allow for OPS employees who had been divested to continue their membership with the OPT if the receiving new employer agreed prior to signing any first collective agreement.

**15** On August 1999, OPSEU was certified as the bargaining agent for the OPAC employees. From that date, OPSEU was in a position to collectively bargain for a first collective agreement with OPAC.

**16** In the weeks leading up to collective bargaining, OPSEU's Bargaining Team met with OPAC, the OPT and OMERS in an attempt to resolve the split pension issue but to no avail. In the face of OPAC's intransigence, the union's only option was to try to secure something in bargaining.

**17** Collective bargaining began in September 1999. OPSEU's bargaining positions, as developed through the membership were made known to the membership at regular intervals. In the September 20, 1999 issue of OPSEU's internal newsletter, The Advocate, (also posted on the OPSEU website) the membership's priorities were listed, the foremost of which were the "pension issues". OPSEU members were provided with contact information for the local representatives or nearest bargaining team members and encouraged to keep the bargaining team informed of their issues and concerns.

**18** The October 29, 1999 issue of "The Advocate", OPSEU informed its members:

"When OPAC transferred us from the OPSEU Pension Trust to the Ontario Municipal Employees Retirement System, they left one thing behind: our money.

For all of us who transferred in from the OPS, this means our pensions are split in two. When we retire, we will receive two cheques. The OPT cheque will be based only on our OPT years, adjusted for inflation, but not for any real wage gains during our OMERS years. Net result? A smaller pension.

OPAC did this without asking our permission. They saw OMERS as a chance to pay less, at least for now and they jumped at it.

On Aug. 30, your OPSEU representative met with representatives from OPAC and all three pension plans: the OPT, OMERS, and the Ontario Pension Board (representing managers). We were there to talk about moving our OPT money over to OMERS.

We learned one thing from the meeting: unless OPAC takes the initiative, our OPT money will stay right where it is.

Our loss of pension income is a problem OPAC created; it OPAC's duty to fix it.

We'll be talking - at the bargaining table.

**19** In the same issue of "The Advocate" OPSEU's members were provided with contact information for the local representatives or nearest bargaining team members and encouraged to keep the bargaining team informed of their issues and concerns. The article (also posted on the OPSEU website) provided:

We've built up a powerful network of workplace contacts to keep everyone informed about goings-on at the table. At different times, we may call for your support ... Whatever happens, stay in touch and stay involved - keep your co-workers involved too. That way, we all win.

**20** In bargaining OPAC would not entertain moving the employer's pension back to the OPT. Therefore OPSEU proposed that OPAC create an indemnification fund to compensate employees who transferred to OPAC from the OPS.

**21** OPAC refused to negotiate regarding the split pension. A tentative collective agreement was struck between OPAC and OPSEU on May 1, 2000. The agreement was announced in "The Advocate", and posted on the OPSEU website.

**22** A ratification vote was held and the membership voted to accept the agreement. OPAC continued to be a member of OMERS. With the ratification of the new agreement by the membership, the window of opportunity created by Appendix 18 of the Central Agreement to rejoin the OPT was closed.

**23** OPSEU has bargained two subsequent collective agreements with OPAC and previous OPS employees of OPAC continue to have split pensions.

**24** OPSEU was able to bargain first collective agreements with other "divestment employers," to include continued membership in the OPT. OPSEU's ability to negotiate such an agreement was contextual and depended on many variables including the bargaining strength of the group at issue, the timing of the negotiations, willingness to take terms to a strike, prioritization of the issue in bargaining by the affected membership and the position of the employer.

**25** OPSEU's July 15, 2005, *IMPACT* newsletter, advised its members that:

Two pensions

As most of us know, there has been a group of employees (both Management and Bargaining Unit) who have been researching the concept of merging our two pensions. As is [sic] currently stands, some members who have received promotions since divestment are very negatively affected by the split pensions. If most of a members [sic] time in the OPT (OPSEU Pension Trust) was at a PA2 salary, and now the member is a CSR, the long term impact on pension income is significant.

What people must remember is that it was the decision of OPAC (OPAC) Transition Board to move us into OMERS at the time of divestment. They had the option of continuing in OPT for OPSEU-represented employees. Ultimately, the blame for people's frustration lies with the government appointed Transition Board of Directors. While the contribution holiday may have looked attractive at the time, some people will be paying for this unilateral decision for the rest of their lives.

The UMC was given legal advice by OPSEU counsel that in order to merge the plans, a legislative change would have to take place. It would seem the only recourse at present is to lobby your MPP for the required change to the Pension Benefits Act.

**26** On September 17, 2005, OPSEU met with OPAC employees to address the memberships concerns regarding the "two pensions" problem.

**27** In 2006, OPSEU undertook a campaign to strengthen and improve pensions for employees in the OPS.

**28** In April 2006, July 2006 and November 2006, the applicants individually wrote OPSEU and some of OPSEU's executive board members inquiring "*how and under what circumstances this movement of hundreds of member's [sic] pension membership from the plan and financial and individual members actually occurred*". The applicants also inquired "*please write advising what steps/actions (if any) have actually been taken by OPSEU to address and correct this very important detrimental matter*".

**29** In November 2006, December 2006 and February 2007, 30 individual applicants filed identical applications at the Board.

**30** In October 2007, OPSEU appeared before the Expert Commission on Pensions and made submissions which included the issue of split pensions.

### **Decision**

**31** After reviewing the pleadings and documentation filed, the submissions of the parties at the consultation, and the case law relied upon, the Board has determined that these applications must be dismissed.

**32** The divestment and the issue of split pension occurred approximately 10 years prior to the applications being filed, the Board declines to inquire into the applications on grounds of delay. Further, the applicants asserted no *prima facie* case of a contravention in respect of OPSEU's response to the issue of their split pension.

## Delay

**33** *Corporation of the City of Mississauga*, [1982] OLRB Rep. March 420 is frequently cited for its articulation of the rationale behind the Board's approach to delay. At paragraphs 20 and 21 of that decision, the Board notes that the parties to a collective bargaining relationship have a reasonable expectation that matters that have apparently been resolved will not re-emerge later, and that the resurrection of old claims may have a corrosive effect on the bargaining relationship. In paragraph 22 of *City of Mississauga* the Board enumerated certain factors that it considers in determining whether delay has been excessive. In subsequent cases, the Board has expanded upon these somewhat, so that the list of factors considered is more accurately (and succinctly) set out in, for example, *Coca-Cola Bottling Ltd.*, [1998] O.L.R.D. No. 2537, at paragraph 5: "the length of the delay, the explanation for the delay, the relief sought, and the relative prejudice to the parties should the application be permitted to proceed, or be dismissed". The Board also noted that the need to provide a persuasive explanation for the delay increases with the length of the delay and the degree of prejudice to the parties.

**34** As a general rule, the Board has stated that delay is to be measured in months, not years, and that it will presume prejudice to a responding party or intervenor where the delay exceeds one year.

**35** In the present case the applicants have provided three reasons for the delay in filing their applications. First, "*they were told by OMERS that there wouldn't be a change*". According to the applicants they became concerned about the issue of a split pension as they neared retirement. Second, after OPSEU's July 15, 2005, *IMPACT* newsletter came out, the applicants attempted to find a resolution to the split pension by approaching the Financial Services Commission of Ontario, the Ombudsman, OPT, OMERS, the Ministry of Finance, and the Ministry of Government Services. Third, OPSEU is responsible for the delay because it failed to answer the applicants' correspondence written on April 2006, July 2006 and November 2006.

**36** The applicants claim that they did not know about the detrimental effect on their pension until they came nearer to retirement. This is not a sufficient excuse for a delay in which the events which give rise to the split pension that happened 10 to 11 years prior to the applicants filing of this complaint.

**37** The issue of the split pension crystallized on December 31, 1998, when PAD was divested to OPAC. When OPSEU became the bargaining agent for OPAC employees, it advised its membership about the detrimental effect of the split pension. The October 29, 1999 edition of OPSEU's Advocate states clearly that a split pension means a "smaller pension". OPSEU encouraged its membership to "communicate its concerns". It appears that the applicants didn't care about the issue at the time, but only became concerned when they got closer to retirement.

**38** Even if the applicants were unaware of the detrimental effects of a split pension until the publication of OPSEU article in 2005, the fact that they attempted to find a remedy to the problem elsewhere does not excuse a delay of over 1 year prior to filing an application at the Board. As the Board stated in *Mark Carter* [1989] O.L.R.B. Rep. February 112 (McDowell):

[t]he fact that a complainant may be acting upon his solicitor's advice in pursuing other remedies against other parties in other forums may EXPLAIN a tardy complaint under the Labour Relations Act but does not necessarily JUSTIFY it - particularly when the complaint being unsuccessful in those other forums, changes



"targets" and seeks relief under the Act against a new party whose behaviour was previously not the subject of complaint ... It matters little that the reason for the delay is that the complainant was unsuccessfully pursuing legal remedies against someone else. [Original emphasis]

**39** While it is objectionable that OPSEU did not respond to the applicants' correspondence of April 2006, July 2006 and November 2006, it does not justify the applicants' delay in filing their complaint at the Board. Even if the applicants were unaware of the "split pension" situation until OPSEU's July 15, 2005, IMPACT newsletter, they waited 10 months until they first contacted OPSEU in April 2006 and 17 months to file their complaint at the Board, about a situation which had crystallized 10 years earlier.

**40** The issue of the split pension occurred approximately 10 years prior to the applications being filed, the Board declines to inquire into the applications on the grounds of delay.

***Prima Facie***

**41** The case law cited by the applicants on the issues of *prima facie* and delay are cases in which the Board refused to dismiss the applications on the basis of written submissions for failure to state a *prima facie* contravention of the Act and delay, and referred the matter to a hearing. The Board accepts this case law. As in the cases cited by the applicants the Board decided to refer their applications to a consultation in order to receive oral submissions and arguments and then determine whether or not to dismiss their applications.

**42** The applicants failed to plead in their application any facts to support their allegation that OPSEU "failed to and/or did not properly protect and represent its member's [sic] basic rights and best interests regarding OPAC (OPAC) divestment and ensuing adverse pension problems". The written submissions which each of the 30 applicants filed in response to the Board's direction to respond to OPSEU's request for summary dismissal of their applications were identical in form and imprecise.

**43** At the consultation, the applicants argued that OPSEU had violated section 74 because OPSEU did not exercise their "fiduciary duty" and advise the applicants prior to the divestment that the transfer of their pensions would be detrimental. Further, they believe that OPSEU did not "*fight for their pensions*" prior to, at the time of, or after the divestment.

**44** The hallmark of a fiduciary relationship is that the relative legal positions are such that one party is at the mercy of the other's discretion. Certainly, the OPAC employees and their pensions were vulnerable at the time of divestment. OPSEU did not hold the bargaining rights for the OPAC employees at the time of divestment.

**45** While OPSEU does not have a fiduciary duty in this case it does have a duty of fair representation to its members, which it has met and exceeded in these circumstances.

**46** The applicants argued that OPSEU could have organized job action against their previous employer, the Ministry of Finance to stop the divestment. The Ministry of Finance had no part in OPAC's decision to join OMERS. Therefore, taking job action against the Ministry of Finance would not have made any difference as to whether or not OPAC chose to join OMERS. OPSEU held no discretion or power to stop any divestment. Further, OPSEU was not in a position to initiate a legal strike.

**47** Prior to the divestment, OPSEU attempted to stabilize the terms of employment for employees who were being divested from the OPS. Although OPSEU had no bargaining relationship with the new employer OPAC, it negotiated Appendix 9 of the OPS Central Agreement between the Crown and OPSEU. Appendix 9 provided that the Crown would make "reasonable efforts", when divesting to insure that the new non-union entity provides similar terms and conditions of employment which OPS employees had enjoyed with the Crown.

**48** In February 1999, following divestment, OPSEU continued to negotiate and "fight" for OPAC employees for whom at the time they no longer had bargaining rights. OPSEU negotiated Appendix 18, section 2.1 in the central collective agreement between OPSEU and the Crown, which could allow for OPS employees who had been divested to continue their membership with the OPT if the receiving new employer agrees prior to signing the first collective agreement.

**49** After OPSEU became the bargaining agent for OPAC employees, and at the time of negotiating a first contract with OPAC, OPSEU was obligated and did communicate to its members the serious detrimental effect of the split pension.

**50** In its October 29, 1999 issue of "The Advocate," OPSEU informed OPAC employees: "We learned one thing from the meeting: **unless OPAC takes the initiative**, our OPT money will stay right where it is". (emphasis added)

**51** The applicants did not plead that there was bad faith involved, that OPSEU purposely withheld information from the OPAC employees at the time of negotiating the first contract.

**52** OPSEU did not purposely withhold information, it put the split pension issue "front and centre," and told its members that it was up to OPAC to "take the initiative" to change the situation. Appendix 18, section 2.1 makes clear that it is the employer who must agree prior to the signing of the first contract to allow previous OPS members to continue their membership in the OPS.

**53** Whether OPSEU should or should not have advised its members about Appendix 18, section 2.1 when the first contract was negotiated, it is not a violation of the Act as it is not capricious or implausible.

**54** OPSEU fulfilled its section 74 obligations by attempting to protect the terms and conditions of PAD employees who were being divested to a non unionized employer OPAC. In February 1999 even when OPSEU was not the bargaining agent for OPAC employees OPSEU was "*fighting for their pensions*" by negotiating a provision which would allow OPAC employees to return to OPT if "*The receiving employer agrees ...*". OPAC unilaterally decided to join OMERS and did not agree to join OPT and therefore the applicants were left with a split pension. While the Board sympathizes with the applicants' situation, OPSEU is not to blame. OPSEU has met and exceeded its section 74 obligations to OPAC employees.

### **Disposition**

**55** For all the aforementioned reasons, these applications are dismissed.

**56** The dismissal of the applications does not end matters, as OPSEU argues that there has been an abuse of process and seeks orders from the Board restraining the applicants from contacting OPSEU or its Executive Board Members regarding the split pension issue and restraining the applicants from further complaints at the Board regarding the split pension.

**57** The individual applicants who have communicated with the Board are all parties to this proceeding. There is nothing before the Board which would warrant the remedy/orders that OPSEU is seeking.

cp/e/qlemo

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