

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

JOHN GOODWIN, JAMES McMAHON and JAMES SPRAY

Applicants

– and –

THE ELEMENTARY TEACHERS' FEDERATION OF ONTARIO, THE ONTARIO
SECONDARY SCHOOL TEACHERS' FEDERATION DISTRICT 17, THE
EXECUTIVE OF LOCAL 1310 OF THE CANADIAN UNION OF PUBLIC
EMPLOYEES, THE ONTARIO PUBLIC SERVICE EMPLOYEES UNION, and THE
SIMCOE COUNTY DISTRICT SCHOOL BOARD

Respondents

**APPLICATION UNDER Rules 14.05(3)(a), (d) and (g)
of the *Rules of Civil Procedure***

FACTUM OF THE RESPONDENT OPSEU

PART 1 – OVERVIEW

1. The Ontario Public Service Employees' Union ("OPSEU") is seeking this Honourable Court's approval of its distribution methodology regarding the proposed distribution of its portion of the surplus of the Insurance Trust to its members (as hereinafter defined).

2. Between 1969 and 2007 the Insurance Trust arranged for and administered group insurance for certain employees of the Simcoe County District School Board (together with its predecessors, the "Board").

3. The Applicants are the Administrative Trustees of the Insurance Trust. The Respondents are the parties to the agreement governing the Insurance Trust (the “Parties”).

4. Pursuant to amendments to the trust agreement (the “2006 Amendments”), the Parties agreed that the Insurance Trust should be wound up, and that certain assets of the Insurance Trust (the “Insurance Trust Assets”) distributed to the Parties.

5. Following an extensive notice program, as described below, this Court approved the distribution of the Insurance Trust Assets to the Parties. OPSEU seeks the approval of this Court pursuant to that Order, to distribute the funds directly to its members.

A. *The Notice Program*

6. On August 17, 2009 and September 9, 2009, the Applicants appeared before this Honourable Court to seek its advice and direction as to whether its notice program (the “Notice Program”) constituted necessary and appropriate notice within the meaning of the 2006 Amendments.

7. The Notice Program involved the following elements:

- (a) notice was published in local and national newspapers on two successive Saturdays (in English and French);
- (b) a letter explaining the proposed distribution was sent to employees and former employees of the Simcoe County District School Board who were

at any time covered by group insurance provided by the Insurance Trust (the “Covered Employees”) and for whom the Trustees have addresses, by first-class mail to the last known address of each Covered Employee;

- (c) the notice and the letter (referred to in clause (a) and (b) above, respectively) was published on OPSEU’s websites;
- (d) a dedicated toll-free hotline and website, which contained further information concerning the proposed distribution and copies of the court documents filed in the Application, were established;
- (e) a separate notice directed at notifying possible creditors of the Insurance Trust of the proposed wind up and distribution was published for each Saturday for two consecutive weeks commencing in local and national newspapers.

Affidavit of Amanda Darrach, sworn July 20, 2011 at para. 9.

- 8. On January 27, 2010 this Honourable Court approved the distribution of a \$22 million portion of the Insurance Trust Assets.

Affidavit of Amanda Darrach, sworn July 20, 2011 at paras 3 and 4.

B. Attempts to Notify Current and Former OPSEU Members of the Pending Surplus Distribution

9. Prior to the distribution of any assets from the Insurance Trust, OPSEU took a number of further steps in order to notify its current and former members of the pending distribution of the Insurance Trust surplus to them.

Affidavit of Amanda Darrach, sworn July 20, 2011 at para. 7.

10. OPSEU has taken the following steps:

- (a) On January 29, 2010 OPSEU announced on its website that the Application for partial distribution of the Insurance Trust surplus had been approved;
- (b) On January 29, 2010 OPSEU Local 330 (“Local 330”) emailed the announcement to all current and former members of Local 330 (“current and former members”) for whom it had an email address on file;
- (c) On January 29, 2010 OPSEU created a dedicated email address to field inquiries from current and former members (simcoewindup@opseu.org);
- (d) On April 27, 2010, NPT RicePoint was retained to manage the administrative aspects of the Notice Program, the details of which can be found in the Affidavit of David Weir, sworn the 5th day of July 2011;
- (e) On February 22, 2011 Local 330 emailed all current and former members for whom it had an email address on file to inform them of an information meeting scheduled for June 8, 2011;

- (f) On February 25, 2011 OPSEU and Local 330 both posted updates on their respective websites announcing the information meeting scheduled for June 8, 2011;
- (g) On June 8, 2011 OPSEU held an information meeting for current and former members. As part of the meeting, OPSEU distributed a “backgrounder” and a “Frequently Asked Questions” information sheet;
- (h) At the June 8, 2011 information meeting OPSEU and Local 330 asked all attendees to contact any other former members they knew who might be eligible. A contact sheet was also distributed.
- (i) Following the June 8, 2011 information meeting, a 1-800 number was set up for current and former members to call with inquiries or to provide their contact information; and
- (j) On June 9, 2011 the above noted “backgrounder” and “Frequently Asked Questions” information sheet were posted on both the OPSEU website as well as the Local 330 website. These documents were also circulated via email to all current and former members for whom Local 330 had an email address on file.

Affidavit of Kim Macpherson, sworn July 19, 2011 at paras 3 – 13.

PART 2 – PROPOSED DISTRIBUTION

11. OPSEU is now seeking this Honourable Court's approval of its distribution methodology regarding the proposed distribution of its share of the Insurance Trust surplus to its members.

12. It is OPSEU's intention to distribute its share of the Insurance Trust surplus directly to its members.

13. Distributing the surplus to current or former OPSEU members ("members") would normally be done on the basis of a member's individual, overall contribution to the Benefit Plan (the "Plan"); however, in this case that is not possible.

Affidavit of Anne Stevenson-Schramm, sworn July 6th, 2011 at para. 16.

14. Determining how to distribute the surplus has been complicated by the fact that:

- (a) A complete accounting of members' individual, overall contributions to the benefit plan is not available;
- (b) The rate history dating back to January 1, 1977 is also not readily available;
- (c) Participation in the Plan was voluntary with members opting in and out of coverage and not participating in all of the benefits;
- (d) Not all members' dates of retirement are clear;
- (e) Members who moved into and out of various other groups including Administrative staff and Elementary Teaching Staff;

- (f) Approximately fifteen to twenty percent (15 – 20%) of the retired members have had retroactive changes made to their records making it very difficult to ascertain exactly which benefits any particular member was receiving at any particular time;
- (g) The retiree group included retirees from all employee groups, and is not limited to OPSEU members;
- (h) On September 1, 1994 identification numbers under the Plan were changed from Social Insurance numbers to a general certificate number; and
- (i) Members' names were sometimes changed coincident with the change in the identification numbers, further complicating attempts to match participants

Affidavit of Anne Stevenson-Schramm, sworn July 6th, 2011 at para. 17.

15. Given the complications in attempting to determine how to distribute the surplus, including the imperfections in the data, the following distribution methodology for the surplus is being proposed:

- (a) The formula for surplus distribution will be based on years of service under the Plan as an OPSEU member multiplied by their “point total”. That total will equal the members' value.
- (b) A member's point total will be determined by participation in specific benefits over the participation period, as detailed below.

- (c) The aggregate total of all members' values will be divided into the available surplus (while subtracting the estimated expenses and contingency fund) to determine the dollar value of each point.
- (d) Because the actual retirement date of each member is unclear and the date they were added to the retiree division may not necessarily reflect the actual retirement date, a member's full period of participation in the Plan both as an active member and a retired member has been included in their years of participation in the Plan.
- (e) Once the initial calculation is done, if a member's points represented less than \$20.00, the member's entitlement would be increased to \$20.00 and the available funds would be re-distributed based on the minimum payment criteria.
- (f) The points will be assessed as follows to reflect the relative value of the benefit over time.

BENEFIT	POINTS
\$25,000 Life Insurance & AD&D	0.5
\$100,000 Life Insurance & AD&D	1.0
\$150,000 Life Insurance & AD&D	1.5
\$200,000 Life Insurance & AD&D	2.0
Dependent Life	0.5
Long Term Disability	1.0
Single Extended Health Care	1.0

Single Dental	1.0
Family Extended Health Care	2.0
Family Dental	2.0

This point distribution recognizes the relative cost of the benefits provided to each other but it is not necessarily reflective of the actual historical changes in the rates paid as that information is not readily available over the full term of the plan.

Affidavit of Anne Stevenson-Schramm, sworn July 6th, 2011 at para. 18.

PART 3 – LAW AND SUBMISSIONS

A. This Court May Give Advice and Directions to OPSEU Concerning the Proposed Distribution of its Share of the Insurance Trust Surplus to its Members

16. In the interests of fairness, transparency and accountability, OPSEU is seeking the approval of this Honourable Court in respect of its distribution methodology in order to distribute its portion of the Insurance Trust surplus to its members.

17. OPSEU submits that this Honourable Court may properly direct OPSEU on its proposed distribution methodology, under Rule 14.05(3)(a), (d), and (g) which grant this Honourable Court the authority to provide its opinion, advice or direction, in this type of situation. This motion is simply a further extension of the Application brought before this Court is January 2010.

Courts of Justice Act, R.R.O. 1990, Regulation 194 Rules of Civil Procedure rule 14.05(3) (a), (d), and (g).

18. Rule 14.05(3)(a) provides that a proceeding may be brought by application where the relief claimed is “the opinion, advice or direction of the court on a question affecting the rights of a person in respect of ... the execution of a trust”.

19. Rule 14.05(3)(d) provides that a proceeding may be brought where the relief claimed is “the determination of rights that depend on the interpretation of a deed, will, contract or other instrument ...”.

20. Rule 14.05(3)(g) provides that a proceeding may be brought where the relief claimed is a “ ... declaration or ... other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application”.

B. This Court has the Inherent Jurisdiction to Give Advice or Direction to OPSEU Concerning the Proposed Distribution of its Share of the Insurance Trust Surplus to its Members

21. OPSEU submits that the Order being sought stems directly from this Honourable Court’s order of January 27, 2010 whereby the distribution of a \$22 million portion of the Insurance Trust Assets, to the Respondents, including OPSEU, was ordered.

22. Accordingly, it is OPSEU’s submission that this Honourable Court may also rely on section 11 of the *Courts of Justice Act* (the “*CJA*”) in providing an opinion, advice, or direction on the proposed distribution methodology.

23. Section 11 of the *CJA* provides that the Ontario “Superior Court of Justice has all the jurisdiction, power and authority historically exercised by courts of common law and equity in England and Ontario”.

Courts of Justice Act, R.S.O. 1990, C.43, s. 11.

24. On the basis of section 11 of the *CJA* this Honourable Court has an inherent jurisdiction to offer direction and advice in respect of OPSEU's proposed distribution methodology.

80 Wellesley St. East Ltd. v. Fundy Bay Builders Ltd., [1972] 2 O.R. 280, 25 D.L.R. (3d) 386 (C.A.) at para. 9.

25. As described above, this distribution is made on a fair and rational basis, with full notice made to all affected parties. It is appropriate in the circumstances for this Court to exercise its discretion and approve the distribution and its methodology.

26. In light of the foregoing, OPSEU respectfully requests that this Honourable Court grant an order substantially in the form included as part of the Application Record.

27. All of which is respectfully submitted.