

OMERS

In the Matter of an Appeal from the decision of the President

By: “The Appellant” to the Appeals Sub-Committee

Heard: Tuesday, April 7, 2009

DECISION

1. The Appellant brings this appeal to the Appeals Sub-Committee of the OMERS Administration Corporation (the “Committee”) from the September 17, 2008 decision of the President of OMERS, Mr. [●], confirming the entitlement of “Ms. ★” to payment of a survivor benefit from the OMERS pension of the late Member.
2. By this appeal, the Appellant seeks a determination that he was the surviving spouse (as that term is defined under the OMERS Primary Pension Plan (the “Plan”)) of the late Member and that he is eligible for payment of a spousal survivor benefit from the Plan
3. Ms. ★ is the sister of the late Member and she claims that, as the Member’s designated beneficiary, she is entitled to payment of a survivor benefit from the Plan.
4. This Appeal proceeded as a hearing *de novo* by written submissions. As a preliminary issue, the Committee had to consider whether it would accept for filing additional reply material submitted by Ms. ★ after the deadline for filing such material had elapsed. The additional reply material consisted of a letter from Ms. ★ attaching a letter from Ms. [■], Director of Patient Relations at the [Organization]. In the Committee’s view, the additional reply material was not relevant to the appeal and it was not accepted for late filing by the Committee.
5. The Committee considered all of the evidence and written submissions filed by the Appellant and Ms. ★.
6. It is uncontested that the Member was employed with [Employer] from September 1, 1974 to December 31, 2006 and that on December 31, 2006, the Member died before retirement.

7. Section 19 of the Plan concerns the payment of survivor benefits when a member has died before retirement.

8. Subsection 19(9) of the Plan provides:

‘If, at the date of death of a member, there is no surviving spouse or child of the member eligible for a pension under this section, the member’s designated beneficiary, or estate if there is no designated beneficiary, is entitled to a refund of an amount equal to the minimum value of the member’s pension.’

9. When a member dies before retirement, a designated beneficiary or an estate if there is no designated beneficiary, is only entitled to payment of a survivor benefit when there is no surviving spouse or child of the member eligible for payment under the other provisions of section 19.

10. It is uncontested that the Member had no eligible children and that Ms. ★ is the designated beneficiary of the Member’s OMERS pension. Therefore, unless the Appellant can demonstrate that he was the Member’s surviving spouse and that he is eligible for payment of a survivor benefit under section 19 of the Plan, then Ms. ★, as the designated beneficiary, is entitled to payment of a survivor benefit under subsection 19(9) of the Plan.

11. Subsection 19(1) of the Plan concerns the payment of survivor benefits to a surviving spouse. It provides, in part:

‘A pension is payable under this section on the death of a member before the date that payment of the first instalment of the pension is due,

(a) to the surviving spouse, if the member and the surviving spouse were not living separate and apart on the date of the member’s death.

12. In order to be eligible for payment of a survivor benefit under the Plan, a surviving spouse must not have been living separate and apart from the member on the date of the member's death.
13. Likewise, the pre-retirement death benefit provision under clause 44(4)(b) of the *Pension Benefits Act* does not apply where the member and his or her surviving spouse are living separate and apart on the date of the member's death.
14. Subsection 1(1) of the Plan defines "surviving spouse" as:

"surviving spouse" means the person who was the spouse of a member immediately before the member's death.
15. Subsection 1(1) of the Plan defines "spouse" as:

"spouse" has the same meaning as in the Pension Benefits Act.
16. Under section 1 of the *Pension Benefits Act*, R.S.O. 1990 c.P.8 (as amended), the term "spouse is defined as:

"spouse" means either of two persons who,

 - (a) are married to each other, or
 - (b) are not married to each other and are living together in a conjugal relationship,
 - (i) continuously for a period of not less than three years, or
 - (ii) in a relationship of some permanence, if they are the natural or adoptive parents of a child, both as defined in the Family Law Act.
17. The Appellant claims that he and the Member were living in a common-law relationship which extended back to 1994. In order for the Appellant to succeed with his claim that he

is an eligible surviving spouse, he must meet two criteria based on the aforementioned provisions of the Plan and the *Pension Benefits Act*:

- (a) He and the Member must have lived together in a conjugal relationship continuously for a period of not less than three years prior to the Member's death; and
- (b) He must not have been living separate and apart from the Member as at December 31, 2006, the date of the Member's death.

18. When assessing whether the Member and the Appellant were living together in a conjugal relationship, the Committee relies on *Molodowich v Penttinen* [1980] O.J. No. 1904 (Ont. Dist. Ct.), a decision of the Ontario District Court, defining the generally accepted characteristics of a common-law (conjugal) relationship. The *Molodowich* decision states that not every characteristic of a conjugal relationship needs to be present, or present in the same degree, in order for a conjugal relationship to be established. The facts will vary from case to case.

19. Certain of the important evidence and submissions of the parties is set out below:

I. By the Appellant

- (a) Statutory Declaration of the Appellant dated July 14, 2008, citing "the two of us had a long and loving relationship and resided together as a couple at Apartment # [●] at [Address 1], for longer than the three year period", with various exhibits attached:

- (i) Exhibit A – letter dated July 9, 2008, from the Appellant to OMERS noting that he and the Member had a “long and lasting relationship filled with love and long-term commitment”. Reference is made to a life insurance policy in favour of the Member’s life-long friend, [Friend of the Member] (the “MLF Policy”). The Appellant states that the Member “took care of most of our affairs”.

- (ii) Exhibit B – Manulife Financial health benefit card – “[Member] & Family” under which the Appellant received health benefits from the Member’s employer.

- (iii) Exhibit C – letters from neighbours:
 - (A) [Neighbour 1] who lived at [Address 1] for 3 years. The undated and unsigned letter states that [Neighbour 1] knew that the Member and the Appellant lived together for the last 12 – 15 years “for [Member] told me a long time ago about his companion”.

 - (B) [Neighbour 2]’s letter dated January 30, 2007, states that she has resided at [Address 1] since June 1996 and during that time frame “observed [Member] and [Appellant] sharing Apartment # [●] of [Address 1]”.

 - (C) [Neighbour 3]’s letter dated January 16, 2007 who lived at [Address 1] and “have known the Member and the Appellant of this address for approximately 12 years. I have known them to be a very loving

and caring couple. They have shown themselves to be life partners in every sense of the word.”

- (D) [Neighbour 4]’s e-mail to the Mayor of [●] dated January 12, 2007, referencing the Appellant’s loss of his same sex partner and urging provisions of survivor pension benefits in favour of the Appellant.
- (iv) Exhibit D – Obituary – [Newspaper] where the deceased is referred to as “a special friend of [the Appellant]”. Ms. ★ advised that the obituary was written by her father – letter dated August 5, 2008).
- (v) Exhibit E – A letter from Benefits Administration, City of [●] offering condolences on the death of the Member and advising of the termination of Manulife Health Drug/Dental benefits as of January 15, 2007.
- (vi) Exhibit F – Updated [●] Cable Inc. Service Agreement (Original Agreement dated May 4, 2006) and a [●] Cable bill as of August 18, 2006 both addressed to the Appellant at [Address 1], Apt. # [●], [City].
- (vii) Exhibit G – [Bank] debit slip dated March 25, 2002 re account [#]; customer name: The Appellant with mailing address to the Appellant at [Address 1], Apt. # [●], [City].
- (viii) Exhibit H – Handwritten undated note addressed to the Appellant from the Mayor expressing condolences “on the loss of your partner [Member]”.
- (ix) Exhibit I – Letter of condolence from [Person 1], a City Manager.

- (x) Exhibit J – Unsigned letter dated December 2007 from the Appellant to his liver transplant donor referencing his “partner of 15 years”.
 - (xi) Exhibit K – Funeral Director’s Certificate of Death of the Member dated January 2, 2007.
 - (xii) Exhibit L – Various [Member] personal identification cards.
 - (xiii) Exhibit M – Undated [Bank] cheque #122 showing the Appellant’s address as [Address 1].
 - (xiv) Exhibit N – Medic Alert Member Registration Form completed by the Appellant and dated December 22, 2006 showing the Appellant’s address as [Address 2], also showing two “home” telephone numbers and handwritten notation “[Member] partner”.
 - (xv) Exhibit O – Various photographs.
- (b) OMERS Statutory Declaration of Common Law Relationship sworn by the Appellant on July 30, 2008 stating:
- (i) the Appellant’s address as # [●] – [Address 3],
 - (ii) October 1994 as date began living as a married couple,
 - (iii) Relationship continuing until the Member’s death,
 - (iv) Living together as a married couple to exclusion of all others; and
 - (v) No children or other spouse.

The Declaration is not accompanied by the required three supporting documents but is accompanied by a statement of common-law relationship informing that, when the relationship began, a loving common-law relationship existed (physical relationship, ate meals together, socialized together as a couple), detailing a 2002 break in relationship, that the Appellant moved back into [Address 1] in January 2003 where the Appellant and the Member resided until the Member's death, that after surgery the Appellant moved into [Address 2] in April 2003, that he did not sleep at [Address 2] and that the Appellant's opinion was sought over ending the Member's life support system. The Appellant concludes by stating that because he was not expected to live, the Appellant was not listed as the Member's decision-maker or in his Will.

- (c) Letter dated August 18, 2008 from the Appellant to OMERS responding to Ms. ★'s submissions.

II. By Ms. ★

- (a) Letter dated January 5, 2007 from Ms. ★ to OMERS stating she was not told by the Member that there existed any form of spousal relationship in his life and that he never referred to any person as his spouse.
- (b) Letter dated January 26, 2007 from Ms. ★'s counsel to OMERS and Human Resources, [Employer] denying a relationship between the Appellant and the Member that would qualify as a spousal relationship under current [Provincial] legislation and stating that the Appellant maintained a separate residence at [Address 2].

- (c) Letter dated February 22, 2007 from Ms. ★'s counsel to OMERS enclosing the Member's income tax returns for the years 2000 to 2005, inclusive, whereby the Member filed as a single person.
- (d) Letter dated July 10, 2008 from Ms. ★ to OMERS outlining why the Appellant did not meet the criteria for spousal benefits as defined in the OMERS statutes:
 - (i) The Appellant was living in public housing and had addresses at [Address 2] and [Address 3]. The Appellant had a separate telephone number in his name: [Phone Directory] (2006) [Phone Number];
 - (ii) The Appellant did not share any bank accounts with the Member;
 - (iii) The Appellant impersonated the Member near the time of the Member's death in order to withdraw funds;
 - (iv) The Member declared single status on his tax returns for the past 5 years;
 - (v) Lifestyle of the Member;
 - (vi) Coroner's report;
- (e) Letter dated November 5, 2007, from [●] Credit Union to Ms. ★ confirming Account # [●] was solely in the Member's name at the time of his death.
- (f) Coroner's Investigation Statement [#] states that "deceased lived by himself".
- (g) Death Benefit – survivor status confirmation dated April 20, 2008, signed by Ms. ★ confirming that, to the best of her knowledge, there was no eligible spouse at the Member's death.

- (h) Letter dated August 5, 2008, from Ms. ★ to OMERS responding to the Appellant's affidavit. Ms. ★ states that the Appellant "was one of my late brother's many friends whom he associated with", and was only mentioned in the obituary as a courtesy. Ms. ★ further states that the Appellant was collecting Social Assistance and had a residence at [Address 2]. Ms. ★ refers to the Appellant's Registration Form (Exhibit N) for Medic Alert where the Appellant, on December 22, 2006, states that he lives at [Address 2].

III. By [Friend of Member]

[Friend of Member] long-time friend of the Member, by letter dated September 27, 2008, references her witness to "the long and loving relationship between [the Member] and [the Appellant]". She further states that "While [the Member] and [the Appellant] were residing at [Address 1], I would visit them."

DECISION

20. The evidence shows that the Appellant had a separate apartment with a separate telephone for 5 years preceding the Member's death. The Appellant did not dispute this.
21. The evidence further shows that the Appellant and the Member had a special relationship but very little evidence was offered as to their domestic life or the attitude of the community in which they resided towards them as a couple. The evidence also tends to point to separate economic existences. For example, the Appellant and the Member did not have a joint bank account; the Appellant only had an access card to the Member's bank account. There was evidence, although not presented in affidavit form, from neighbours that there was an undefined period during which the Appellant and the Member shared apartment #

[●] at [Address 1]. This evidence must be contrasted with evidence that the Appellant maintained a separate residence during the last 5 years of the Member's life due to the necessity of separate residences following the Appellant's surgery for hygiene reasons (according to the Appellant).

22. [Friend of Member], a long-time friend of the Member and the sole beneficiary of the Member's life insurance policy, states her witness to the long and loving relationship between the Appellant and the Member. Unfortunately, her letter does not state a specific period during which a conjugal relationship existed.
23. Further, evidence was lacking as to whether the Appellant or the Member provided assistance to each other during their respective illnesses or as to any community involvements.
24. The Committee was not persuaded, on all of the evidence including the evidence from neighbours and the Friend of the Member, that a conjugal relationship over at least a three year period prior to the Member's death existed and was existing at date of the Member's death.
25. After considering all the evidence and the written submissions of the Appellant and Ms. ★, the Committee finds that the Appellant did not establish, on a balance of probabilities, that the relationship between him and the Member constituted a continuous conjugal relationship lasting for at least three years, as is required for demonstrating spousal status under the *Pension Benefits Act*, up to and including the date of the Member's death
26. Accordingly, the Committee determines that the Appellant is not the surviving spouse of the Member and is not eligible for the payment of a spousal survivor benefit from the Plan.

27. For these reasons, the appeal of the Appellant is dismissed and the decision of the President is upheld.

Dated this _____

By Order of the Appeals Sub-Committee

John Goodwin
Chair

Eugene Swimmer
Vice Chair

Rick Miller