

**IN THE MATTER OF AN APPEAL FROM  
THE DECISION OF THE PRESIDENT**

By: "The Appellant" to the  
Appeals Sub-Committee

Heard: Wednesday October 8, 2008

**DECISION**

The Appellant brings this appeal to the Appeals Sub-Committee of the OMERS Administration Corporation (the "Committee") from the decision of the President of OMERS dated March 3, 2008 in which he confirms that: (1) Mrs. [★] is the eligible surviving spouse of the Member under the OMERS Primary Plan (the "Plan"); and (2) she is eligible to continue receiving a spousal survivor benefit from the Member's OMERS pension.

By this appeal, the Appellant seeks a determination that she was the surviving spouse of the Member under the Plan and that she is entitled to be paid a spousal survivor benefit from the Plan.

This appeal proceeded as a hearing *de novo* by written submissions. The Committee considered all of the evidence and written submissions of the Appellant and Mrs. ★. The Committee also considered the evidence submitted by OMERS staff and the evidence that was before the President.

Section 1 of the Plan defines spouse as:

"spouse" has the same meaning as in the *Pension Benefits Act*.

Under subsection 1(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 the *Family Law Act*.

Section 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.

Subsection 20(1)(a) of the Plan states that a spousal survivor benefit is payable to the surviving spouse of a member, such as [the Member], who dies after the date of their retirement.

The evidence submitted by the parties is set out below:

- Certificate of Marriage between the Member and Mrs. ★ dated September 22, 1973 submitted on January 14, 2004 by Mrs. ★ with the Benefit Application Form.
- In early 2004, OMERS determined that Mrs. ★ was the legal surviving spouse of the Member and began paying her a spousal survivor benefit from the Plan.
- Affidavit dated December 13, 2007 by Mrs. ★ affirming her as the legal spouse of the Member; stating they lived separate and apart at the time of retirement and at the time of death; stating there was no separation agreement.
- The Appellant’s Lawyer communicated with OMERS on July 13, 2004 claiming that the Appellant was the common-law spouse of the Member, and therefore entitled to the payment of a spousal survivor benefit from the Plan.
- Affidavit from [Person 1] stating that he became aware that the Member and the Appellant had entered into a common-law relationship.
- Affidavit from [Person 2] stating that she became aware that the Member and the Appellant had entered into a common-law relationship.
- OMERS stopped paying a spousal survivor benefit to Mrs. ★ pending resolution of this issue.
- Affidavit from the Appellant stating that she was the common-law spouse of the Member prior to his death.

The Committee referred to *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.

There was no meaningful evidence presented by the Appellant to corroborate her claim for spousal survivor benefit as the surviving spouse. The only external evidence provided was the Appellant’s inclusion on the automobile insurance policy.

The Committee noted that the owner of the automobile, the Member, was listed as unlicensed on the Insurance Application Form.

After considering all of the evidence and the written submissions of the parties, the Committee finds that the Appellant did not establish on a balance of probabilities that the relationship between her and the Member was a conjugal relationship as defined under the *Pension Benefits Act*.

Accordingly, the Appellant is not the surviving spouse of the Member under the Plan and the Appellant is not eligible for the payment of a spousal survivor benefit from the Plan.

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

\_\_\_\_\_  
David S. O'Brien  
Chair

\_\_\_\_\_  
John Goodwin  
Vice Chair

\_\_\_\_\_  
John Weatherup

\_\_\_\_\_  
Cameron Weldon

\_\_\_\_\_  
Michael Power