

1 **OMERS ADMINISTRATION CORPORATION**

2 **APPEALS COMMITTEE**

3 **In the Matter of an Appeal by the Appellant**

4			
5	<b>PANEL:</b>	Gene Swimmer	Panel Chairperson
6		David Tsubouchi	Panel the Member
7		Sheila Vandenberg	Panel the Member

8

9 **BETWEEN**

10			
11	Appellant	)	Appellant’s Lawyer
12		)	
13		)	
14	- and -	)	
15		)	
16	Respondent	)	Respondent’s Lawyer
17		)	
18		)	
19		)	
20		)	Independent Legal Counsel
21		)	
22		)	
23		)	Heard June 23, 24 and 29, 2016
24		)	

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26 **DECISION AND REASONS FOR DECISION**

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1 **Description of the Case and Issues in Dispute**

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3 The Member was a civilian employee of [●] and, as such, was a member of the OMERS Primary  
4 Pension Plan (the “Plan”). She passed away on April 25, 2013, while on long term disability from  
5 work. The Appellant, the Member’s only child, is the designated beneficiary of the survivor  
6 benefits. Under Section 19(1) of the Plan, if the member had a surviving spouse who was not living  
7 separate and apart on the date of her death, the spouse would take precedence over a designated  
8 beneficiary and receive any benefits payable.

9 The Respondent claims to be the Member’s common-law spouse. He provided sufficient evidence  
10 for the OMERS administrative staff to determine that he was the Member’s surviving common-  
11 law spouse (based on a conjugal relationship lasting at least three years up to the date of the  
12 Member’s death), and therefore was entitled to the survivor pension benefits. The Appellant  
13 challenged the administrative decision to the OMERS President, whose designate [●] subsequently  
14 ruled in favour of the Respondent. The Appellant then appealed the President’s decision to the  
15 Appeals Committee, and this panel of the Appeals Committee was composed to determine the  
16 matter (the “Panel”).

17 The Appellant asked this Panel for an oral hearing. Through his lawyer, the Respondent objected  
18 to an oral hearing, on the grounds that it would needlessly delay the process. Given that credibility  
19 was a major factor in this case, the Panel determined that a formal oral hearing would be  
20 appropriate.

21 At the outset of the hearing the parties were informed that the Appellant had the onus to prove that,  
22 on the balance of probabilities, the Respondent was not involved in a continuous conjugal

1 relationship with the Member for the three year period prior to her death (April 23, 2010 - April  
2 23, 2013). The Panel uses a *de novo* process, deciding the matter afresh, based solely on the  
3 evidence and submissions provided at the hearing.

4 Over three days, the Panel heard from ten witnesses, and received a document brief as evidence  
5 from each party to the dispute.<sup>1</sup> The document briefs included primary documents and affidavits  
6 from various witnesses.

7 For the witnesses who testified in person, their affidavits formed part of their evidence-in-chief.  
8 With respect to those affidavits where the witness did not attend in person, the panel treated such  
9 evidence as hearsay, which is admissible before this Panel but subject to concerns about weight.

10 The witnesses heard in person for the appellant were:

- 11 a. “Family Lawyer”, a family lawyer who had a consultation with the Member in  
12 August 2010;
- 13 b. “Work Colleague of the Member”, a work colleague and friend of the Member;
- 14 c. “Appellant”, the Member’s daughter (and the Appellant); and
- 15 d. “Friend of the Member”, a friend of the Member.

16 The witnesses heard for the respondent were:

- 17 a. “Respondent’s Daughter”, the Respondent’s daughter;
- 18 b. “Respondent’s Son-in-Law” (the Respondent’s Daughter’s husband);
- 19 c. “Respondent’s Son”, the Respondent son;
- 20 d. “Respondent’s Son-in-Law’s Mother” (the Respondent’s Daughter’s MIL);
- 21 e. “Pharmacist of the Member”, the member’s pharmacist; and
- 22 f. “Respondent”, the respondent.

23 Based on the evidence, there are some facts which are not in dispute:

- 24 a. The Member and the Respondent resided in the same townhouse (owned by the Member  
25 in [Town, Province]) beginning in 2003, for ten years, until the time of her death.

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<sup>1</sup> At a pre-hearing conference, it was agreed that each party would submit a brief (which would include documents and affidavits). At the hearing the Respondent’s Lawyer objected to certain material included in the Appellant’s brief, one on the grounds of lawyer-client privilege and the other on the grounds of relevancy. The Panel heard the parties arguments and deliberated. The Panel ruled that all the documents in question were admissible, and that the Panel would assess what weight, if any, to give them at the conclusion of the case.

- 1 b. In December 2003, the Member modified her dependent status with respect to Sun Life
- 2 Financial, listing the Respondent as her spouse (making him eligible for extended health
- 3 benefits from her employer). The declaration was never amended.
- 4 c. All of the home-related bills (mortgage, condo fees, property taxes and utilities) were made
- 5 out exclusively to the Member.
- 6 d. The Member and the Respondent did not share a joint bank account.
- 7 e. In August 2010, the Member consulted with a Family Lawyer, to investigate ways of
- 8 getting the Respondent out of her house. She never followed that meeting up with the
- 9 lawyer.
- 10 f. The Member filed her taxes in 2011 and 2012 as “single”.
- 11 g. In the Member’s obituary, the Respondent is referred to as “her partner”.
- 12 h. The Member left no will.
- 13 i. The Appellant was appointed as the Member’s Estate Trustee.
- 14 j. The Appellant applied for and received the CPP death benefit, following the Member’s
- 15 passing, while the Respondent applied for and was granted the surviving spouse CPP
- 16 pension (from the same federal government agency).

17 The remainder of the two parties’ evidence diverges to a great extent. The Appellant’s submissions  
18 describe the relationship between her mother and the Respondent as, at most, romantic for a very  
19 short time, and more like a landlord/tenancy agreement between two friends. Over time their  
20 relationship worsened with the Member wanting to get the Respondent to leave her home, but  
21 unable to follow through, because of worsening health. The Respondent’s submissions portray  
22 their relationship as a loving and caring one throughout the period, albeit with minor bickering,  
23 like most couples.

24 The next section discusses two relevant legal issues: which party bears the onus of proof, and what  
25 is legal definition of a common-law conjugal relationship (and the related question of what  
26 constitutes termination of the conjugal relationship). The final section outlines the deliberations  
27 of the Panel as to the nature of the relationship between the Member and the Respondent, which  
28 involves weighing the evidence and assessing the credibility of the witnesses presented by both  
29 sides.

30 **The Legal Issues**

1     **(a)     Which Party Bears the Onus of Proof**

2     The Appellant’s Lawyer argues that the onus should be on the Respondent, citing the case of  
3     *Clifford v. Ontario (Attorney General)* (2008) 90 O.R. (3d) 742 (Div. Ct.), subsequently reversed  
4     on other grounds at (2009) 98 O.R. (3d) 210 (C.A.). At paragraph 26 of *Clifford*, the Divisional  
5     Court wrote: “The onus should have been placed on Ms. Campbell to prove that the conjugal  
6     relationship was still in existence.” The Divisional Court gives no reasons for this conclusion, but  
7     presumably it reasons that since the appeal was treated as a hearing *de novo*, the Panel should have  
8     approached this as an initial challenge to the beneficiary designation, and placed the onus on the  
9     challenging party.

10    The Respondent’s Lawyer relies on the fact that this process is referred to and described as an  
11    appeal from the decision of the President’s Delegate. She states that the onus should be on the  
12    Appellant. She referred to a document entitled, “Practice Essentials for Administrative Tribunals”,  
13    produced by the Ombudsman of Saskatchewan. Paraphrasing page 63, the Respondent’s Lawyer  
14    states that the onus of proof, or the burden of proof in an adversarial hearing model falls on the  
15    party making the application or seeking a change. It is not clear whether this document, written  
16    for administrative tribunals created by the Saskatchewan government, is relevant to this Panel.  
17    The Respondent’s Lawyer also submitted an Interim Decision from the Human Rights Tribunal in  
18    the matter of *Lambe v. OMERS Administration Corporation* 2009 HRTO 1135 (CanLII) that does  
19    not really address this issue.

20    Because “onus of proof” is only crucial in a case where the balance of probabilities does not favour  
21    one side or the other, the Panel decided to hold this issue in abeyance, and see whether it could  
22    render a decision based on the evidence provided, regardless of which party bore the onus of proof.

1     **(b)     The Test for Proving a Common Law Relationship**

2     The second legal issue concerns the determination of whether the Member and the Respondent  
3     were in a common-law relationship at the time of her death. For couples who are not married or  
4     do not have children together, OMERS considers a common-law spouse to be one who has lived  
5     together with the Plan member in a conjugal relationship for a period of not less than three years.

6     The parties agree that the test for whether such a relationship existed is set out in such cases as  
7     *Molodowich v. Penttinen* 1980 CanLII 1537 (ONSC) and *Glenn v. MacLean-Kirby Estate*, [2006]  
8     O.J. No. 520 (S.C.J.). A conjugal relationship has both a subjective and objective test: What was  
9     the intention of the parties as gleaned from the facts and how were they regarded by others?

10    In discerning the intention of the parties, there are descriptive factors that can be useful in assisting  
11    the panel to determine whether a conjugal relationship existed. Those categories are:

- 12           1.     shelter,
- 13           2.     sexual and personal behaviour,
- 14           3.     services,
- 15           4.     social activities,
- 16           5.     economic support,
- 17           6.     children, and
- 18           7.     societal perception of the couple.

19    These categories are not exclusive and not every characteristic needs to be present, or present in  
20    the same degree, to establish a conjugal relationship. The Panel recognizes that there are many  
21    different kinds of relationships, and common-law spouses can arrange their affairs in a variety of  
22    ways.

1 Common-law conjugal relationships can come to an end. While many end when one party  
2 physically separates from the other, that is not the only way that conjugal relationships can end.  
3 The Panel considered the cases of *Hodge v. Canada (Minister of Human Resources Development)*,  
4 2004 SCC; *J.J.G. v. K.M.A.* 2009 BCSC 1056 (CanLII); and *Watt v. Copeland* 2009 BCSC 1485  
5 to determine what the Member would have to do to “separate” from the Respondent while still  
6 living under the same roof. The key factors to consider include the absence of sexual relations, a  
7 clear statement by one of the parties of his or her intention to terminate the relationship, the  
8 physical separation of the parties into different rooms of the same house or different residences,  
9 and the cessation of the presentation to the outside world that they are a couple. This list of factors  
10 is not exhaustive, and not all factors must be present.

11 The Panel had the benefit of transcripts of the hearing, and reviewed all the evidence in its  
12 deliberations. Below is the summary of how the most relevant evidence in this case was applied  
13 to the legal definition of common-law spouse.

## 14 **1. Shelter**

### 15 **a. Did they live under the same roof?**

16 The evidence is clear that the Respondent and the Member lived continuously in the same  
17 home for at least three years prior to the Member’s death. Despite some conflicting  
18 evidence about when the relationship started (2003 or 2006), the start can be dated  
19 objectively at 2003, when the townhome was purchased and the Sun Life benefits  
20 declaration was amended.

### 21 **b. What were the sleeping arrangements?**

22  
23 There is conflicting evidence.

24  
25 The Respondent stated that they shared a bed until the Member got sick and could not  
26 manage the stairs. The Respondent says he and the Member jointly purchased an electric  
27 bed for the Member in the living room.  
28

1 The Family Lawyer's notes from her consultation with the Member (August 2010)  
2 indicated that the Member had slept on the living room couch for the last 4 months.

3  
4 The Appellant testified that while she lived in the basement of the [●] townhome (from  
5 2004-07), her mother often slept on the living room couch.

6  
7 The Respondent's Daughter testified that the Member had said that she and the Respondent  
8 fought over whether to use the air conditioning in the bedroom. This may explain why the  
9 Member used the couch.

10  
11 When the Member and the Respondent stayed at a friend's cottage (which seemed to have  
12 stopped by 2008 or 2009), they slept in the same Bunkie with only one double bed,  
13 according to the affidavit of [●].

14  
15  
16 **c. Did anyone else occupy or share the available accommodation?**

17  
18 The Appellant testified she and her boyfriend lived in the basement of her mother's  
19 townhome from 2003-2007, but it was not as though the Member regularly rented rooms.

20  
21  
22 **2. Sexual and personal behaviour**

23 **a. Did they have sexual relations?**

24 The Respondent says they had sexual relations on a regular basis until the Member was  
25 unable to for medical reasons (which he says in his affidavit was around 2012, although  
26 there was evidence that the Member's health started worsening earlier than that).

27 The notes from the Family Lawyer the Member consulted in 2010 indicate that the Member  
28 told the Family Lawyer that she and the Respondent hadn't had sex since 2004. The Family  
29 Lawyer's notes also indicate the Member went to see her "about a common-law  
30 relationship".

31 The Work Colleague of the Member testified that the Member confided that she and the  
32 Respondent were not having sex.

33 The Friend of the Member's affidavit indicates that, among other things, the Member told  
34 her that she and the Respondent had no intimate relationship.

35 **b. Did they maintain an attitude of fidelity toward one another?**

36 The Work Colleague of the Member says the Member had a weekend at the [● Hotel] with  
37 an old boyfriend in the year she left work permanently (which was April 2011).

38 Both the Appellant and the Friend of the Member testified that in 2012, after her stint in  
39 hospital, when she had lost some weight and felt good about herself, the Member was on a



1 dating website, Christian Mingle. There was no independent confirmation of the Member  
2 being on the dating website.

3 The Friend of the Member says that at a party in December 2012, the Member announced  
4 she was single, and available to date. The Friend of the Member said the Member was not  
5 joking when she said this. She testified that the Respondent was present when the Member  
6 made this announcement and did not react.

7 The Respondent does not remember any conversation at that party in 2012, although the  
8 details of the alleged conversation were not put to him specifically.

9 There was no evidence that the Respondent had any affairs.

10 **c. What were their feelings toward one another?**

11 The Respondent gave evidence about his feelings, as follows: “we felt a lot of one another”,  
12 “we just shared like we were husband and wife”, “I loved [the Member]. She’s a nice  
13 woman.” (p 383). He was visibly upset when describing the Member’s death and the  
14 aftermath. He said that he was “too emotional” to speak at the funeral.

15 The Member arranged a surprise 60<sup>th</sup> birthday for the Respondent in 2006. She invited his  
16 family, but not hers.

17 The Work Colleague of the Member testified that the Member spoke about the Respondent  
18 in very derogatory terms, from 2009-2010 on. The Appellant and the Friend of the Member  
19 gave the same evidence.

20 **d. Did they communicate on a personal level?**

21 The Appellant said that the Respondent would call the Member names, and she would tell  
22 him to get out of her house; the Appellant heard some of these encounters while living in  
23 the house and her mother related others (once she had moved out).

24 The Friend of the Member also testified that the Member had said that the Respondent  
25 called her names. She said they were never physically affectionate with one another in  
26 public.

27 The Respondent’s Daughter, the Respondent’s Son-in-Law and the Respondent’s Son all  
28 testified that the Respondent and the Member were like a bickering, normal married couple.  
29 “A fun couple”.

30 The Family Lawyer’s notes indicated that during her consultation with the Member in  
31 2010, the Member had called the Respondent a bully who yelled and gave orders.

32 There was no evidence of notes or letters that they wrote to each other.

33 **e. Did they eat their meals together?**

1 Apart from some vague statements, there was not much specific evidence on this point,  
2 other than the evidence that the Respondent made breakfast for the Member by pouring  
3 milk in cereal and cutting up strawberries. He worked shift work, making it hard to  
4 conclude one way or another on this point.

5 The Respondent says he helped the Member with the cooking, and that they cooked  
6 together.

7 **f. What, if anything, did they do to assist each other with problems or during illness?**

8 The Member took the Respondent to his doctor for cancer treatments, which occurred  
9 before 2010.

10 For some years up until her death, the Respondent took the Member to at least some doctor  
11 appointments, and sometimes took time off work to do so. He took her to the pharmacy  
12 and visited her every day during her 2012 hospital stay. After the Member lost her driver's  
13 license, he drove her to work and picked her up. The Member left work for health reasons  
14 in April of 2011.

15 The Appellant agreed the Respondent took her mother to at least some appointments, but  
16 stated there was a team of five people, that she coordinated.

17 **g. Did they buy gifts for each other on special occasions?**

18 There is no evidence about gifts for each other, but they gave joint gifts to others. The  
19 surprise party that the Member organized for the Respondent's 60<sup>th</sup> birthday was a kind of  
20 gift (2006).  
21

22 **3. Services**

23 **a. What was the conduct and habit in relation to household maintenance and other**  
24 **domestic services?**

25 The Respondent did outdoor work and gardening and put up Christmas lights.

26 The Respondent says they both did household work, both cooked together and for each  
27 other, and had a cleaner toward the end that the Respondent says he paid for.  
28

29 **4. Social**

30 **a. Did they participate together or separately in neighbourhood and community**  
31 **activities?**

32 The Member and the Respondent went to the Legion Hall together on a regular basis,  
33 although the Friend of the Member says the Respondent just drove her there, and they  
34 socialized separately.

1 They attended the Respondent's family events together (Christmas holidays and birthdays)  
2 about twice a year.

3 They went up to a friend's cottage together until 2008 or 2009.

4 **b. What was the relationship and conduct of each of them toward members of their**  
5 **respective families, and how did the families behave toward them?**

6 The Respondent's and the Appellant's relationship was non-existent to poor.

7 The Appellant admits that she made the choice to describe the Respondent as the Member's  
8 "partner" in the obituary. At the hearing, she testified that on the day of her mother's death,  
9 she was emotionally distraught from grief and just trying to be polite. She allowed the  
10 Respondent and his family to attend the funeral home with her. The funeral director  
11 suggested language for the obituary, and she agreed with his suggestions without really  
12 thinking about it.

13 The Respondent sat up front at the funeral with his family, across the aisle from the  
14 Appellant and her friends.

15 The Appellant displayed a picture of the Respondent and the Member at the funeral on  
16 the picture boards.

17 There were text messages between the Appellant and the Respondent's Daughter following  
18 the Member's death, which were very cordial and what one would expect in the  
19 circumstances.

20 In an affidavit filed as Estate Trustee, the Appellant referred to the Respondent as the  
21 Member's "boyfriend". She testified at this hearing that was a mistake that she overlooked  
22 at the time.

23 The Respondent's grandchildren would refer to the Member as "Grandma ●." The  
24 Member had a close relationship with the Respondent's Daughter, especially over the  
25 phone.

26 Some of the Member's and the Respondent's friends describe them as a couple, others say  
27 they were not a couple. The evidence of those friends describing them as a couple generally  
28 comes from very short written statements (1-2 sentences), and none of those witnesses  
29 attended to be cross-examined.

30 **5. Societal**

31 **a. What was the attitude and conduct of the community toward each of them and as**  
32 **a couple?**

33 As indicated above, there is a conflict in the evidence. Only one of the Respondent's  
34 objective affiants attended the hearing to testify, the Member's Pharmacist. The Member's

1 Pharmacist said the Member and the Respondent appeared to be a couple, on the many  
2 times they came to the pharmacy or he delivered prescriptions to the Member's townhome..

3 The Friend of the Member said that she never regarded the Member and the Respondent as  
4 a couple.

5 **6. Children - not applicable**

6 **7. Support**

7 **a. What was the financial arrangement between them regarding the provision of or**  
8 **contribution toward the necessities of life (food, clothing, shelter, recreation)?**

9 The Member and the Respondent did not have a joint bank account. The mortgage, condo  
10 fees and utility bills were all exclusively in the Member's name.

11 The Family Lawyer's notes from 2010 indicate that the Member told her that the Member  
12 banked a pay bi-weekly cheque (which the Panel assumes was the Respondent's) of \$2,700,  
13 so he earns a healthy salary. The Member further told the Family Lawyer that the  
14 Respondent paid the Member \$200 one week, \$300 another week.

15 No documents exist setting out rent, or providing for financial arrangements.

16 The Appellant says that the Member complained that the Respondent was paying her less  
17 money than he had promised.

18 The Work Colleague of the Member says the Member claimed the Respondent gave her no  
19 financial support, even when she had to take extended leave from work, and she had  
20 temporarily run out of sick leave.

21 The Respondent says they had no specific agreement regarding finances, "we just shared  
22 like we were husband and wife, basically". He says he would buy groceries, give the  
23 Member money for things, etc.

24 The Respondent had 2 receipts to submit to the Panel – one for the electric bed and one for  
25 a beauty parlour appointment. He claims to have bought the Member an electric Lazy Boy  
26 chair, but was unable to find the receipt.

27 Following the Member's death in April of 2013, the Appellant was prepared to let the  
28 Respondent stay in the [●] home for 3 months rent-free, and understood that he was entitled  
29 to 3 months' notice, after her mother died. The Respondent paid the electricity bill but not  
30 the gas bill. Eventually, once court proceedings were underway, the Respondent agreed to  
31 pay \$500 rent per month from April 2014 until he left the home. He left within a month.

32 **b. What were the arrangements toward the acquisition and ownership of property?**

1 The Member was completely in charge. Every bill was in her name. the Respondent knew  
2 nothing about the mortgage, property taxes, any condo fees or any other bill relating to the  
3 property.

4 **c. Was there any special financial arrangement between them that both agreed would**  
5 **be determinant of their overall relationship?**

6 There was no cohabitation agreement, rental agreement or any other document.

7 **d. Did either of them make any arrangements or plans to protect the other in event**  
8 **of calamity?**

9 The Member listed the Respondent on her extended health insurance as “spouse” from  
10 2003 onward.

11 The Member also had his car on her vehicle insurance.

12 The Member declared herself as “single” on her income tax returns in 2011 and 2012. The  
13 Panel did not place much weight on this, as this declaration was likely in her interest and  
14 it is not clear whether the Respondent was filing income taxes during these years.

15 There is no evidence of the Respondent’s tax returns.

16 The Member did not have a will.

17 The Respondent received the CPP spousal survivor benefit. The Panel understands that  
18 the Appellant would not have been able to contest this.

19 The Appellant states that she received the CPP death benefit.

20 **Assessments of the Witnesses’ Credibility**

21 Before discussing the Panel’s views on relevant facts which are in dispute it is necessary to assess  
22 the credibility of the witnesses who presented evidence.

23 **The Family Lawyer** met the Member once in 2010, when the Member came to see her about a  
24 common-law relationship that she wanted to end. The Family Lawyer admitted that she could not  
25 recall this event, but she had contemporaneous notes that were submitted into evidence. The  
26 Family Lawyer did not try to embellish or fill in gaps, and she candidly admitted that she never  
27 followed up with the Member after their meeting, despite indicating that she would. There were

1 no internal inconsistencies in her evidence, and she has no interest in the outcome of this case.  
2 The panel therefore believes that her notes are accurate as to what the Member told her.  
3 Nonetheless, the Panel needs to consider the reliability of the Member's statements to the Family  
4 Lawyer. There is the possibility that the Member's mental health issues could colour her  
5 interpretation of events. However, her comments to the Family Lawyer (as recorded in the notes)  
6 seemed balanced and did not appear to use exaggerated language or be completely one-sided in  
7 recounting events. There is no indication in the notes that she presented manic or extreme  
8 demeanour. On balance, the Panel believes the Family Lawyer's notes are highly credible of the  
9 Member's views on her relationship with the Respondent, at that point in time (August 2010). the  
10 Member did not return to the lawyer, subsequent to this meeting.

11 **The Work Colleague of the Member** worked with the Member for several years. After the  
12 Member left work, he saw her occasionally. He did not know the Respondent. He did not socialize  
13 with the Member at her home or the Legion.

14 The Work Colleague of the Member seemed to be honestly reporting what he observed and heard  
15 from the Member, but the truth and reliability of what the Member apparently said to him is  
16 questionable. For example, the Member apparently said that the Respondent never gave her any  
17 money, when she told the Family Lawyer that the Respondent did give her money.

18 The Work Colleague of the Member was close enough with the Member that he gave the eulogy  
19 at her funeral. His objectivity may have been subconsciously affected. It seemed to the Panel that  
20 he was at the hearing to take the Appellant's side and support her. His evidence that there would  
21 have been a police investigation of the Respondent for failing to support his spouse if he believed

1 that the Respondent was, in fact, the Member's spouse sounds somewhat extreme and lacks  
2 plausibility.

3 Unlike all other witnesses who testified, he depicted the Member as fragile, crying, stressed out  
4 and sometimes too stressed to work or to drive. It is possible she presented differently at work  
5 than in other places. It is possible that at work, the Member might have been prone to exaggeration  
6 and giving a more one-sided account of her relationship with the Respondent.

7 **The Appellant** presented her evidence in a straightforward, honest manner. She has a clear interest  
8 in the outcome of the case (as she will receive the pension benefit if her appeal is successful), and  
9 she clearly does not like the Respondent. However, the Appellant says that this appeal is not about  
10 the money. She truly believes that her mother would not have wanted the Respondent to be  
11 declared her mother's spouse.

12 The Appellant was honest about what she did not recall and when she couldn't remember a detail  
13 or event, she would say so. Her explanations for why her memory was sometimes vague (for  
14 example, some of the details of planning the funeral) were generally understandable.

15 The Panel has some concern that the Appellant initially said she had deleted/lost many electronic  
16 communications that might have been relevant. During the middle of the hearing she was able to  
17 find some photos that she thought might be helpful to her case, which the Panel did not allow her  
18 to present because they had not been produced in a timely fashion.

19 Many of her observations may have been accurate as far as they went, however, there were facts  
20 she did not know. She admittedly was not privy to information about her mother's sex life. She  
21 did not know that the Respondent's grandchildren called her mother "Grandma ●."

1 The Appellant describes the Member as someone who avoided confrontation, which is not  
2 consistent with how others described her. She sometimes spoke in an exaggerated fashion (“Rarely  
3 a day went by when the Member wouldn’t complain about wanting the Respondent out of the  
4 house”).

5 Her evidence at the hearing is inconsistent with how she described the Respondent in the obituary  
6 (“partner”), her sympathetic texts with the Respondent’s Daughter, and with her affidavit where  
7 she described the Respondent as her “mother’s boyfriend.” She has given explanations for this,  
8 which seem credible to the Panel.

9 **The Friend of the Member** clearly does not like the Respondent, and this may have affected her  
10 evidence, tending to paint him in the worst possible light. Given the Friend of the Member’s  
11 obvious hostility towards the Respondent, the Member may have been one-sided in her  
12 conversations with the Friend. The Friend of the Member’s perceptions about the Member and  
13 the Respondent’s relationship may have been coloured by her feelings toward the Respondent, and  
14 by her lack of knowledge about some key events (i.e. the Respondent’s 60<sup>th</sup> birthday party, the  
15 Member’s relationship with the Respondent’s family).

16 Although not comfortable placing much weight on many of the Friend of the Member’s  
17 observations, the Panel does believe her evidence that the Member attended a party in December  
18 of 2012 where she announced she was single and available to date, did not appear to be joking,  
19 and that this did not generate any reaction from the Respondent. The Friend of the Member was  
20 very firm and clear in her recollection of this event, and her recollection was detailed and specific.  
21 It would be a strange anecdote to fabricate. She was not cross-examined on this point. The Panel  
22 believes this incident happened as the Friend of the Member described it.



1 **The Respondent's Daughter** appeared to be coordinating the effort for her father's case. At  
2 times, her memory failed in a way that bordered on self-serving. For example, she did not recall  
3 the process used by the funeral home director for suggesting and selecting language to be used for  
4 the Member's obituary.

5 She presented her extended family as close, which is contrary to some of her own evidence:  
6 extended family visits seem to have occurred only 2-3 times a year, and she was unaware her father  
7 was living with the heat turned off for months after the Member's death. Her description of her  
8 father was inconsistent with those witnesses who described him as bullying and aggressive. This  
9 could be that the Respondent acted differently around different people, and that his behaviour was  
10 open to interpretation.

11 The Respondent's Daughter, her husband, and other people on her father's "side" of this dispute  
12 all said in their initial written statements that the relationship between the Member and the  
13 Respondent began in 2006. At the hearing, the Respondent's Daughter admitted that she made an  
14 error, and the correct date was 2003. The Respondent's Daughter denied having any influence or  
15 involvement in the statements made by others, including her husband. This was difficult to believe.  
16 The Friend of the Member even testified that the Respondent had told her that his daughter had  
17 written the statement he was asking others to sign.

18 Nonetheless, the Respondent's Daughter was believable and credible on many points including  
19 that she developed a close relationship with the Member and perceived her as a family member.  
20 The Panel accepts her testimony that her own children called the Member "Grandma ●", that the  
21 Member enjoyed her time with the Respondent's Daughter and the Respondent's Daughter's

1 family, and that the Member told the Respondent's Daughter important news about the  
2 Respondent's health.

3 **The Respondent's Son-in-Law** had a very limited opportunity to observe events that would assist  
4 the Panel. He did not appear to be close to the Respondent or the Member, or have many  
5 independent conversations with the Member (the conversations were largely between the Member  
6 and the Respondent's Daughter). His evidence at times appeared to be rehearsed, repeating the  
7 same phrases when describing the Member. He denied that anyone else had any involvement in  
8 the preparation of his written statement, which the Panel finds hard to believe given the repetition  
9 of the error in identifying the start of the Respondent's and the Member's relationship as 2006.  
10 The Respondent's Son-in-Law was clearly able to tie the development of the relationship to the  
11 Respondent's Daughter's pregnancy and the birth of their daughter, which he knew to be 2003  
12 (pregnancy) and 2004 (birth). It is likely that he wrote "2006" in his initial will-say statement  
13 because he was given that date by someone else.

14 Still, the Panel believes and accepts that he perceived the Respondent and the Member to be a  
15 couple, and that he perceived the Member to be part of the extended family.

16 **The Respondent's Son-in-Law's Mother** only interacted with the Member and the Respondent  
17 at the birthday parties of the Respondent's Daughter and the Respondent's Son-in-Law's children,  
18 which amounted to once or twice a year for several years up to 2012. Her conversations with the  
19 Member focussed mainly on work, rather than family life. She perceived the Member as  
20 "headstrong", someone who had to stand up for herself in a male-dominated environment at work.  
21 The Respondent's Son-in-Law's Mother was not close to the Respondent.

1 The Respondent's Son-in-Law's Mother's evidence was that she perceived that the Member  
2 presented as someone who was part of the extended family at these events. This evidence was  
3 credible. She confirmed that the grandchildren called the Member "Grandma ●", but she was not  
4 otherwise aware of what kind of relationship the Member had with the grandchildren. The Panel  
5 believes the Respondent's Son-in-Law's Mother made an honest effort to tell the truth, not  
6 claiming to know more than what she had observed.

7 **The Member's Pharmacist** bought his [●] pharmacy from the Member's father. He observed the  
8 Member and the Respondent together at the pharmacy, and also saw the Respondent come in alone  
9 to get prescriptions for the Member. When the Member's illnesses worsened, the Member's  
10 Pharmacist would deliver medications to their home. He recalls the visits vividly, because they  
11 both smoked in the house, and the smell of it was strong. Based on these interactions, he perceived  
12 them as a couple. He appeared to the Panel as making an honest effort to relate what he observed.  
13 He has no interest in the outcome of the case.

14 **The Respondent's Son** testified that he perceived the Member and the Respondent as a couple,  
15 but did not provide details to flesh out his perceptions. He had fairly limited interactions with the  
16 Member and the Respondent and did not appear to be particularly close with either of them.

17  
18 **The Respondent** presented as a taciturn man, not comfortable speaking. He has admitted some  
19 problems with memory, due to a health condition. The Panel believes these memory problems  
20 were genuine and not an effort to evade telling the truth. Nonetheless, there were inconsistencies  
21 with his evidence. Some do not particularly affect his credibility, while others do.

22 The Respondent claimed to have given the Member amounts of cash that were in excess of what  
23 he appeared to have been earning. This discrepancy is probably due to the fact that he went from

1 working full-time to part-time. The Panel accepts, based on the evidence of the Family Lawyer,  
2 that the Respondent did in fact give the Member cash payments.

3 The Respondent was cross-examined thoroughly on the start of his and the Member's relationship,  
4 and he clearly had some problems with dates in his evidence (2003 vs. 2006). The Panel does not  
5 find this to be a serious issue that affects the Respondent's credibility.

6 There were more serious problems with his credibility. The Respondent says the Member never  
7 asked him to leave the house. The Panel disbelieves this, based on the evidence of the Appellant,  
8 the Friend of the Member, the Work Colleague of the Member and the Family Lawyer. The  
9 Respondent says they had regular sexual relations until the Member became too ill (he did not  
10 specify a date). This is inconsistent with what the Member told the Family Lawyer and the  
11 Member's Pharmacist. The Panel finds that the Respondent exaggerated his contributions to the  
12 Member's wellbeing when her illness progressed (such as suggesting he provided the scooter and  
13 the ramp, and installed the new kitchen floor). The Respondent claimed to have no recollection of  
14 the alleged incident in December 2012 when the Member said (in front of the Respondent) that  
15 she was single and available for dating.

16 Although the evidence did not provide much detail about how they treated each other, the Panel  
17 believes the Respondent did care for the Member: visiting her often in the hospital, taking her to  
18 some doctors' appointments, bringing her food at the hospital that she would like (albeit not  
19 healthy food, given her condition). He was visibly upset when testifying about her death, and the  
20 Panel believes that it was traumatic for him to discover her dead body.

21 **Decision**

1 The evidence on balance suggests there likely was a conjugal relationship between the Member  
2 and the Respondent at the start of their relationship in 2003. The Panel’s decision on whether that  
3 conjugal relationship continued during the last three years before her death hinges on the  
4 Member’s behaviour during this period. She went to a Family Lawyer in August 2010, saying she  
5 wanted to end the relationship, but never followed up. The Appellant says the reason for not  
6 returning to the Family Lawyer was financial, not a change of mind. The question then becomes,  
7 does the Member’s conduct after seeing the Family Lawyer support the finding that, even if there  
8 had been a common-law relationship, it was now at an end.

9 As indicated above, the Panel looked to the cases of *Hodge v. Canada (Minister of Human*  
10 *Resources Development)*, 2004 SCC; *J.J.G. v. K.M.A.* 2009 BCSC 1056 (CanLII); and *Watt v.*  
11 *Copeland* 2009 BCSC 1485 to determine what the Member would have to do to “separate” while  
12 still living under the same roof. The key factors to consider include the absence of sexual relations,  
13 a clear statement by one of the parties of his or her intention to terminate the relationship, the  
14 physical separation of the parties into different rooms of the same house or different residences,  
15 and the cessation of the presentation to the outside world that they are a couple. This list of factors  
16 is not exhaustive, and not all factors must be present.

17 According to the Family Lawyer’s notes, the Member had no sexual relations with the Respondent  
18 for many years prior to 2010. The Member apparently confided the same fact to her friends, the  
19 Member’s Pharmacist and the Friend of the Member. The Member and the Respondent were  
20 sleeping in separate rooms for much of the 2010-2013 period, but it is not clear whether the  
21 Member made that as a conscious choice before her mobility issues forced her to remain in a bed  
22 downstairs. Based on testimony, which the Panel finds credible, the Member spent a weekend  
23 away with an old boyfriend in 2011, joined a dating website in 2012, and at a Christmas party that

1 year declared that she was single and available to date, in front of the Respondent, who did not  
2 react. During this time period, there is evidence that she often complained about the Respondent  
3 and talked about wanting him out of her house, to her daughter and several friends. Finally, there  
4 is evidence that she had plans to sell the [●] townhome and move to [●], as a way of forcing the  
5 Respondent to leave.

6 The Panel accepts that the Member and the Respondent continued to present themselves as a  
7 couple to members of the Respondent's family until the Member's death. However, the Panel  
8 finds that the Member would likely have wanted to continue her relationship with the Respondent's  
9 family members even following the termination of her relationship with the Respondent. This  
10 does not mean that her conjugal relationship with the Respondent had remained intact.

11 The Panel believes that, taken together, the Member's actions in the 2010-2013 period pass the  
12 test of ending the conjugal relationship, while still living in the same house. Therefore, on the  
13 balance of probabilities (regardless of which party bears the onus of proof), the Panel rules that  
14 the Member and the Respondent were not in a conjugal relationship for the three years prior to her  
15 death, and OMERS should pay the Member's survivor benefit to her designated beneficiary, the  
16 Appellant.

17 **Conclusion**

18 The Appellant's appeal of the President's Determination is therefore allowed and the Panel orders  
19 that she be entitled to pre-retirement survivor benefits from the Plan.

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22

1 I, Gene Swimmer, sign this Decision as Chairperson of the Panel and on behalf of the Panel  
2 members listed below.

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5 DATED at Toronto this \_\_\_\_\_ day of \_\_\_\_\_, 2016.

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Eugene Swimmer, Chair  
Sheila Vandenberg, the Member  
David Tsubouchi, the Member

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