

ONTARIO MUNICIPAL EMPLOYEES  
RETIREMENT SYSTEM

In the Matter of an Appeal from the decision  
of the President's delegate by the  
Appellant, to the Appeals Sub-Committee

Heard on December 8, 2011

## **DECISION**

### **1. Introduction**

The Appellant brings this appeal pursuant to Section 41 of the OMERS Primary Pension Plan (the "Plan") to a panel of the Appeals Sub-Committee of the OMERS Administration Corporation (the "Panel") from the January 5, 2011 decision of the President's delegate, wherein she concluded, based on the evidence and submissions before her, that the Respondent was the eligible surviving spouse of the Member and that the Respondent was entitled to the payment from the Plan of a spousal survivor benefit.

This appeal proceeded by way of a written hearing *de novo* held on December 8, 2011.

### **2. Background**

On July 4, 2010, the Member died after retirement. The Member was a member of the Plan from March 21, 1969 to March 29, 1996 when he retired and began receiving a pension. At the time of his retirement and death, the Member and his legally married spouse, the Appellant, were living separate and apart. At the time of his death, the Member was living with the Respondent.

In this appeal, the Respondent claims to be the Member's eligible common-law spouse at the date of his death and therefore entitled to payment of a survivor benefit from the Plan. She alleges that their common-law relationship began after the Member's retirement. However, the Member did not divorce the Appellant. The Appellant claims that no common-law relationship existed between the Member and the Respondent and therefore the Appellant should receive the survivor benefit as the date of death spouse.

Pursuant to a separation agreement dated October 30, 1995, (the "Separation Agreement") entered into prior to the Member's retirement, the Member and the Appellant agreed that they are legally separated; that they have been living "separate and apart" and will continue to do so for the rest of their lives; and that the Appellant has released any claim that she might have in the Member's pension with OMERS.

When a member dies after retirement, depending on the circumstances, either the member's spouse at the date of death or at the date of retirement may be entitled to the payment of a survivor benefit.

### **3. Applicable Statutory Provisions and Plan Provisions**

Section 20(1) of the Plan provides for a payment of a survivor benefit in the case of the death of a member after retirement. It provides:

*(only the provisions relevant to this appeal are provided):*

20. (1) A pension is payable under this section on the death of a member after the date that payment of the first instalment of the pension is due,

(a) to the surviving spouse of the member

According to section 1 of the Plan,

“spouse” has the same meaning as in the *Pension Benefits Act*;

....

“surviving spouse” means the person who was the spouse of a member immediately before the member’s death;

According to section 1 of the *Pension Benefits Act* (“*PBA*”),

“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*

Therefore, the general rule when a member dies after retirement is that his or her spouse (married or common-law) at the date of the member’s death may be entitled to a spousal survivor benefit.

There two exceptions to this general rule:

**(i) Joint and survivor benefits under section 44 of the PBA**

Section 44 of the *PBA* provides that, under certain conditions, if a member has a spouse at the date of retirement, that spouse (i.e. the retirement date spouse) is jointly entitled to the member’s pension:

*(only the provisions relevant to this appeal are provided):*

**Joint and survivor pension benefits**

44. (1) Every pension paid under a pension plan to a former member who has a spouse on the date that the payment of the first instalment of the pension is due shall be a joint and survivor pension.

...

**Application of subss. (1-3)**

(4) Subsections (1) to (3) do not apply,

...

(b) in respect of a former member who is living separate and apart from his or her spouse on the date that payment of the first instalment of the pension is due.

A necessary condition in order for section 44 of the *PBA* to confer a joint survivor entitlement on a member’s spouse at the date of the member’s retirement is that the member and his or her spouse must not be living separate and apart at the date of the member’s retirement.

If a benefit is conferred on a spouse by section 44 of the *PBA* that benefit is permanent except if it is waived in accordance with the requirements of section 46 of the *PBA*. In order for a waiver of a spouse’s joint survivor benefit conferred by section 44 of the *PBA* to be valid, the waiver must be in writing, in the form approved by the Superintendent of Pensions or in a valid

domestic contract and must be executed and delivered to the pension administrator within the 12 months preceding the commencement of the payment of the pension benefit.

On this appeal, it is undisputed that the Appellant and the Member were living separate and apart as at March 29, 1996, the date of the Member's retirement. Therefore section 44(4)(b) of the *PBA* precluded the Appellant from obtaining a joint survivor benefit from the Member's OMERS pension pursuant to section 44 of the *PBA*.

In her submissions, the Appellant argues that her release of claims against the Member's pension in the Separation Agreement was not a valid waiver because it did not comply with the requirements of section 46 of the *PBA*. In support of this argument, the Appellant relies on a recent decision of the Ontario Court of Appeal (*Smith v. Casco*, 2011 ONCA 306) that the requirements of section 46 of the *PBA* should be strictly construed.

However, because the Panel has concluded that the Appellant did not obtain a joint survivor benefit from the Member's OMERS pension pursuant to section 44 of the *PBA*, it is unnecessary for the Panel to determine whether the waiver in the Separation Agreement complies with the requirements of section 46 of the *PBA*. The Appellant had no joint survivor benefit obtained pursuant to section 44 of the *PBA* to waive.

**(ii) Exceptions in the Plan**

Sections 20(6) and (7) of the Plan contain an exception to the general rule that when a member dies after retirement the member's spouse at the date of death is entitled to a spousal survivor benefit:

- (6) Despite the definition of surviving spouse, with respect to a member's pension under this Plan where payment of the first instalment of the pension was due on or after January 1, 1988, upon the death of the member, the member's spouse at the date the first instalment of the pension was due shall be deemed to be the surviving spouse instead of the person who would otherwise be the surviving spouse under this Plan.
- (7) Subsection (6) does not apply if,
  - (a) the member and the member's spouse on the date that payment of the first instalment of the pension was due were living separate and apart at that date, or
  - (b) the member's spouse at the date that payment of the first instalment of the pension is due is not alive at the date of death of the member, or
  - (c) the entitlement of the spouse at the date that payment of the first instalment of the pension is due is not entitled to receive a benefit by virtue of a valid court order, a valid written domestic contract or any other valid waiver filed with the Administration Corporation

Section 20(6) of the Plan provides that, notwithstanding the general rule, if a member has a spouse (married and/or common-law) at the date the member retires, that spouse shall be deemed to be the "surviving spouse" of the member notwithstanding the definition of "surviving spouse" in the Plan. Put another way, if section 20(6) of the Plan applies, when a member dies after retirement, the spouse who may be eligible for payment of a survivor benefit is the member's spouse at the date of the member's retirement, not the spouse at the date of the member's death.

Section 20(7) of the Plan sets out three situations where the exception in section 20(6) of the

Plan does not apply:

1. The member and his or her spouse were living separate and apart as at the date of the member's retirement: or
2. The member's spouse at the date of the member's retirement is not alive at the date of the member's death; or
3. A valid court order, domestic contract or waiver has been filed with OMERS Administration Corporation where the member's spouse at the date of the member's retirement has waived his or her entitlement to the benefit

The exception in section 20(6) of the Plan does not apply because two of the above three situations apply:

It is undisputed that the Member and the Appellant were living separate and apart at the date of the Member's retirement.

In addition, as discussed above, the Appellant released claims to the Member's OMERS pension in the Separation Agreement.

Based on the foregoing analysis, the Panel concludes that it is the Member's spouse at the date of his death who may be eligible for the payment of a spousal survivor benefit.

#### **The Member's spouse at the date of his death**

Returning to the PBA definition of "spouse":

"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*

As at the date of the Member's death, the Appellant was the Member's spouse because they were still married to each other (definition (a) above).

However, if the Respondent establishes that she and the Member were living together in a continuous conjugal relationship for a period of not less than three years, then the Respondent could also be the Member's spouse at the date of his death (definition (b)(i) above).

Therefore, it is possible that the Member had two spouses at the date of his death.

It is undisputed that the Appellant and the Member were still married at the date of the Member's death. Therefore, for the purposes of this appeal, the Appellant does not need to establish that she was the Member's spouse at the date of his death.

In contrast, there is a dispute as to whether the Respondent and the Member were living together in a continuous conjugal relationship for a period of not less than three years prior to the Member's death such that the Respondent would also be considered to be the Member's

spouse at the date of his death. The Respondent bears the burden of establishing on a balance of probabilities that, based on the evidence that she has presented and based on her written arguments and the written arguments of her counsel, that she and the Member were in a conjugal relationship at the time of his death, that the relationship was continuous and it existed prior to July 4, 2007 (i.e. at least three years prior to the Member's death).

#### **4. What is a "conjugal relationship"?**

Neither the Plan nor the *PBA* define what is meant by the phrase "conjugal relationship".

*Moldowich v. Penttinen*, [1980] O.J. No. 1904 (Ont. Dist. Ct.) is a widely cited decision of the Ontario District Court providing a list of categories and questions decision makers can refer to when assessing whether there is evidence that a conjugal relationship exists.

Courts have found that the factors discussed in the *Moldowich* decision may be present in various degrees and not all are necessary for a conjugal relationship to exist. The weight to be accorded element can vary widely due the specifics of each situation.

#### **5. The Respondent's evidence supporting a conjugal relationship may be summarized as follows:**

- (a) In 2000, the Respondent began attending • Church. The Member attended with her quite regularly. The addresses of the Respondent and the Member were the same at this time (letter from the Clerk of Sessions/Secretary dated July 2010);
- (b) Neighbours state that the Respondent and the Member were living as spouses since 1999; they travelled often to Cuba; the Respondent was with the Member when he died (letter from the Neighbours dated July 13, 2010);
- (c) A • Guaranteed Issue Life Insurance Plan Enrolment Form, undated but received by OMERS on August 19, 2010, shows the Respondent as Beneficiary and as wife;
- (d) The Respondent and the Member began seeing each other in 1999 and that the Respondent moved into the Member's home on [Address] for many years together as a couple. They managed the • Club on [Address] for several years. The Member and the Respondent were presented as a couple in the community and were part of a group of couples that attended police functions with [Person 1] and his wife for many years. (Statutory Declaration of [Person 1] declared August 6, 2010);
- (e) The Respondent states that (i) she started living with the Member approximately 11 years ago and moved into his home in 2000; (ii) they lived in a common-law relationship until his death: had a physical relationship, ate meals together, socialized as a couple, shared expenses and financially supported each other; (iii) the relationship continued until the Member's death, was to the exclusion of all others and they discussed the possibility of future marriage; (iv) she was named as the beneficiary of the Member's OMERS pension; (v) the Member named the Respondent as his common-law wife on an OMERS Changing Information Form dated July 7, 2009 (Statutory Declaration of the Respondent declared August 5, 2010);
- (f) The Member and the Respondent attended several of the firm's social functions as a couple and [Firm's President] can attest to their common-law relationship (letter from Firm's President Dated July 13, 2010);
- (g) Person 2 has known the Respondent for 22 years and the Member and the Respondent as a

couple for almost 11 years: have co-habitated at [address] for as long as he has known them as a couple (letter from Person 2 dated July 15, 2010);

- (h) The Respondent and the Member actively participated in • Community and in • Church; seen walking hand-in-hand to church: both on a rotation roster at church to provide Sunday lunch and clean-up duties: speaks of joint activities: the Respondent kept a vigil during later stages of the Member's illness (letter from [Person 3] dated July 15, 2010);
- (i) [Person 4] met the Respondent through the Member around 2000 and has attended a number of social events and police related functions where the Respondent and the Member were there as a couple; were regulars at annual Christmas open house (letter from [Person 4] dated July 15, 2010);
- (j) [Person 5] states he had a working relationship and friendship with the Member since 1972; aware that the Respondent and the Member began dating 12 years ago and have been living as husband and wife for last 10 to 11 years; attended many functions with them as a couple (letter from [Person 5] dated July 16, 2010);
- (k) [Person 6] introduced the Respondent and the Member to each other in early 2000; spent many happy years together - travelling, skiing, dancing and golf; entertained [Person 6] and her husband at dinner often (letter from [Person 6] dated July 20, 2010);
- (l) [Person 7] states that the Respondent and the Member moved in together at his cottage early in 2000; attended many social occasions which were also attended by the Respondent and the Member; the Respondent was the primary caregiver for the Member and she took a leave of absence from work to do so (letter from [Person 7] undated but received by OMERS August 19, 2010); and
- (m) Known as a couple since 2000; active in local church as well as working for and supporting [City] Police Services; loving grandparents; the Respondent's caregiver role (letter from [Person 8] undated but received by OMERS August 19, 2010).

**6. The Appellant's evidence refuting a conjugal relationship may be summarized as follows:**

- (a) The Respondent owns her own condo in [Town] which she has not and does not rent out and uses on a regular basis; the Member's will does not list the Respondent as a beneficiary; the only joint bank account was entered into at a time when the Member was incompetent; (letter from the Appellant to OMERS dated July 18, 2010);
- (b) The Member mentioned several times that if anything happened to him, he wanted his OMERS pension to go to the Appellant; the Member stated that the Respondent was not living with him but that the Respondent lived in her own residence (letter from [Person 9] dated July 17, 2010);
- (c) The Respondent did not share any expenses related to the Member's residence and they did not financially support each other; the Member paid all residence bills out of his personal account; the Respondent listed as "single" in the Member's car insurance; the Member charged the Respondent rent as a tenant; the Member's 2008 tax return indicated marital status as "separated"; the Appellant's name on the only safety deposit box (letter from the Appellant to OMERS dated August 20, 2010);
- (d) At the time of the Member's retirement, her brother was not in a common-law relationship

with the Respondent. In about 2005, the Member told his sister that he was taking in the Respondent as a tenant and that she would be financially independent and would pay rent. At the time, the Respondent was allowing her son and his girlfriend to live in her condominium as they needed a place to rent; the Member advised that the Appellant was the beneficiary of his pension plan and that he wished her to remain so (Affidavit of Member's sister sworn August 23, 2010);

- (e) The Member advised on several occasions that he still had the Appellant named as beneficiary on his pension plan and it was his intention to leave the spousal portion of his OMERS pension to the Appellant (Statutory Declaration of [Person 10] declared on August 23, 2010);
- (f) The Member advised [Person 11] that because the Respondent had her own condo and because he charged her rent as a tenant, she was not common-law (Sworn statement by [Person 11] dated August 23, 2010); and
- (g) The Member's residence insurance in both the Member's and the Appellant's names; the Member left the Appellant a small life insurance policy; the Respondent has had an independent telephone number for her own residence (letter from the Appellant to OMERS dated December 7, 2010).

The Appellant, in her letter dated August 26, 2010, recognized that the Respondent and the Member had a physical relationship, ate meals together and socialized as a couple. However, the Appellant states that the Respondent did not share any of the expenses related to the Member's residence and that they did not financially support each other.

## **7. Decision**

Having considered all of the evidence provided by the parties, including the evidence summarized above, this Panel concludes that the Respondent has established, on a balance of probabilities, that she and the Member were in a continuous conjugal relationship at the date of the Member's death and that relationship had existed for at least three years.

Therefore, the Panel concludes that the Respondent was the Member's spouse for the purposes of the Plan at the date of the Member's death.

In reaching this conclusion, the Panel found a sufficient number of the categories listed in the *Moldowich* decision present to support a finding that a conjugal relationship existed for many years prior to the Member's death.

The Panel has therefore concluded that the Member had two spouses at the date of his death: the Appellant, his spouse by marriage and the Respondent, his common-law spouse.

## **8. Which spouse is entitled to the payment of a survivor benefit?**

Section 21(9) of the Plan provides, in part:

- (9) The Administration Corporation may direct that a benefit be paid in accordance with this Plan as if the surviving spouse or the member's beneficiary, as the case may be, had predeceased the member if a benefit would otherwise have been payable under section 19 or 20 to the surviving spouse of a deceased member but the Administration Corporation is satisfied,

- (a) that the person is not entitled to receive the benefit by virtue of a judicial decree or a separation agreement or other contractual arrangement between the person and the member that has been received by the Administration Corporation before any payment of the benefit is made to the person;

This section provides that if there is a judicial decree, separation agreement, or other contractual arrangement, between a member and his or her spouse, that disentitles the spouse to the payment of a benefit from the Plan then, for the purpose of the administering the Plan, that spouse is deemed to have pre-deceased the member. This deeming provision operates to disentitle such a spouse to the payment of any spousal survivor benefit.

The Separation Agreement between the Member and the Appellant provides that the Appellant has released any claim that she might have in the Member's pension with OMERS. The Panel therefore finds section 21(9) of the Plan applies and that while the Appellant was the Member's spouse at the date of his death, she is not entitled to payment of a spousal survivor benefit.

As the Panel has concluded that the Respondent was the Member's spouse at the date of his death and that the Appellant is not eligible for payment of a spousal survivor benefit, the Respondent is therefore eligible for payment of a spousal survivor benefit.

Accordingly, the Appellant's appeal is dismissed and the Panel orders that OMERS pay the Respondent a spousal survivor benefit from the Member's OMERS pension.

DATED at Toronto this 22 day of February, 2012.

[signed]

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John Goodwin, Chair

[signed]

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David Carrington, Vice Chair

[signed]

Laurie Nancekivell, Member