

OMERS ADMINISTRATION CORPORATION
APPEALS COMMITTEE

PANEL:	Eugene Swimmer	Panel Chair
	Sheila Vandenberg	Panel Member
	David Tsubouchi	Panel Member

In the matter of an Appeal by "The Appellant"
to the Appeals Committee Panel
December 5, 2016

Introduction

A Panel of the OMERS Administration Corporation's Appeals Committee (the "Panel") considered this appeal on a *de novo* basis with all the information submitted by both of the Appellant and the Respondent (the "Parties"). The hearing was heard in writing on December 5, 2016.

The Panel accepts that the Appellant and the Member were involved in a long-term loving relationship. However, based on all of the evidence before us but in particular on the documentary evidence, the Panel is unable to find on a balance of probabilities (that is, what is more likely than not) that it constituted a common-law spousal relationship according to the requirements outlined in the OMERS Plan text and the *Pension Benefits Act*, R.S.O. 1990 c. P.8. (PBA).

The onus is on someone claiming to have been a common-law spouse to prove cohabitation in a conjugal relationship (that is, like a married couple) continuously for at least the three years prior to the Member's death. This arises from the definition of "spouse" in section 1 of Plan is derived from the PBA, subsection 1(1), which provides as follows:

- "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*.

The Panel has concluded that the Appellant has not met that onus.

Background

The Member became a member of the OMERS pension plan in 2004 when he started working for [Employer 1]. On July 25, 2013 he passed away prior to retirement. On June 21, 2004 the Member designated his sister, the Respondent, as the beneficiary for the purposes of his OMERS pension plan. The PBA makes it clear that if there is an existing spouse at the time of death, that the existing spouse takes precedence over the listed beneficiary.

On June 12, 2014 the Appellant made a statutory declaration to OMERS that she had been the Member's common-law spouse for almost 20 years and claimed spousal survivor benefits. On December 7, 2015 the OMERS Management Review considered all of the information provided and decided to not accept her claim as the Member's common-law spouse. The Appellant subsequently requested a President's Determination of the December 7, 2015 decision. The President's Determination, dated May 30, 2016 found that there was inadequate information to find that the relationship was a common-law relationship according to the OMERS Plan and the PBA, and that she was thus not entitled to spousal survivor pension benefits following the death of the Member. On June 28, 2016 the Appellant appealed the decision of the President's Designate to the Appeals Committee of the OMERS Administration Corporation Board of Directors.

Issues not in dispute

In its review of the materials submitted by the Parties, the Panel noted that a number of issues are not in dispute, such as the following:

1. The Appellant maintained her own apartment on [Address 1] and by choice, the Member maintained his own separate apartment on [Address 2] (the "Address 2 Apartment").
2. The Member paid over \$900 per month rent for the Address 2 Apartment in 2013. He also paid for a land line, internet service, cable TV and insurance for it, costing him about another \$150 monthly. The bills for these services were all sent to the Member at the Address 2 Apartment.
3. For the purposes of his extended health and dental benefits with [Employer], the Member designated the Appellant as his common-law spouse from December 21, 2005.

4. The Member transferred a car to the Appellant and filled out a spousal exemption declaration to the Ministry of Revenue so that no sales tax would be payable.
5. The Member and the Appellant had a spousal auto insurance policy with a group rate since March 31, 2011.
6. Notifications about the Member's Air Miles loyalty points went to the Appellant's email address.
7. The Appellant called the Member's employer to advise of his absences from work.
8. The Member and the Appellant shared a Rogers cell phone plan since November 18, 2011.
9. The Member made numerous late-night phone calls to the Appellant's landline from his cell phone during the required three-year cohabitation period (i.e., the last three years of his life).
10. The Member named his sister, the Respondent, as the beneficiary for the purposes of his OMERS pension plan.
11. The Member and the Appellant filed their income taxes as single people and both used their own separate addresses in correspondence with Canada Revenue Agency.
12. The Appellant was listed as the Member's "special friend" in his obituary and was listed right after his mother.
13. The Member's sister, the Respondent, was the executor of his estate.
14. During the required three-year cohabitation period the Member obtained a Visitor Parking Permit to park at the Appellant's Address 1 apartment in October 2010.
15. The Member used the Address 2 Apartment address on official documents and for receiving mail. For example, the Address 2 Apartment address was used on his Driver's Licence, Master Business Licence, Job application for a position with the [Employer], and Visa, Rogers and Bell bills.
16. There was no evidence that the Member ever used the Appellant's Address 1 address for his mail.
17. Over the years the Member and the Appellant exchanged and kept many signed greeting cards.

18. The Panel was provided with numerous photographs of the Appellant and the Member enjoying themselves as a couple.

Statements from the Appellant's Friends and Relatives

Most of the following is from sworn statements from the Appellant's friends and family members that say the Appellant and the Member lived together in the Appellant's apartment on [Address 1] from 1994 until the Member's death in 2013. Several of the statements mention that the Member looked after the Appellant's cats while she was out of town. This seems an unusual reference, since if the Member was living in the Appellant's apartment on a constant basis, it would be expected and understood that he would look after the cats, and the situation would not merit a special mention. Statements from neighbours say that they saw the Member's cars at the Appellant's apartment on weekends and on some weekdays. This is inconsistent with the claim that they lived together on a constant basis.

These statements are summarized as follows:

1. The "Appellant's Sister", wrote on October 1, 2013 that "the Member mostly lived with [the Appellant] in her apartment". There was no mention of a common-law relationship. In another statement dated December 1, 2014 and sworn on April 22, 2015, the Appellant's Sister said that "to clear up any misunderstanding" that "the Member was living together with [the Appellant] as his common-law partner in her apartment since the year 1995." She also swore another statement on April 22, 2015 that when the Appellant went travelling, the Member drove her to the airport and stayed with her cats.
2. The Appellant's friend, "Appellant's Friend 1", wrote on November 11, 2013 that to her knowledge, the Appellant and the Member both kept their own residences, but spent a lot of time together. She also wrote that the Member would stay at the Appellant's place to look after her cats when she had to go away. The Appellant's Friend 1 later swore on January 17, 2016 that to her knowledge the Appellant and the Member lived together in the Appellant's apartment from 1995 until the Member's death in 2013.
3. The "Appellant's Former Apartment Superintendent" wrote on November 16, 2013 that he recognized that the Member and the Appellant were in a relationship and spent time together on weekends and occasionally during the week.
4. The "Appellant's Neighbour 1", wrote on December 6, 2013 that he saw the Member visiting the Appellant and staying over at her apartment and sometimes saw his truck parked in the visitor spot at the Appellant's apartment.

5. The Appellant made a statutory declaration to OMERS on June 12, 2014 that she lived in the same residence with the Member as a common-law couple from December 1, 1994 with no gaps.
6. The "Appellant's Friend 2", wrote on December 16, 2014 that to the best of her knowledge the Member lived with the Appellant in her apartment for almost 19 years.
7. The Appellant told OMERS in writing on April 9, 2015 that the Member kept his Address 2 Apartment for storage and as a workshop, and that she and the Member shared keys to each other's apartments.
8. The "Appellant's Mother" swore on April 22, 2015 that when she came to Canada in 2000 she stayed with the Appellant at her apartment and that the Appellant was often at the Member's place. In the same sworn statement she said that the Member lived with the Appellant in her apartment, and that he took care of the Appellant's cats when she was away. These facts seem inconsistent with finding that the Member and the Appellant lived together permanently.
9. "Appellant's Neighbour 2" swore on September 4, 2015 that the Appellant's spouse the Member was living with her since he moved in to the Address 1 apartment 19 years ago. His balcony faces the entrance of the building.
10. The "Appellant's Friend 3" swore on October 5, 2016 that to the best of her knowledge the Appellant and the Member lived together at the Appellant's apartment for over 18 years, and that when the Appellant's Friend 3 stayed at the Appellant's apartment, the Appellant and the Member stayed at the Member's apartment.

Statements from the Member's Friends and Relatives

The following sworn statements from various friends and members of the Member's family say that the Member did not live in a common-law relationship with the Appellant. The statements mention the Appellant as a past romantic relationship or an old friend, and some statements mention that the Member was not involved with the Appellant in any way during the last two years of his life. A couple of the statements reference that before the Member's illness the Appellant had been living in or visiting [City] where her boyfriend lived.

The statements from the Member's friends and family are summarized below:

1. The "Member's Nephew 1" swore on May 26, 2015 and again on June 30, 2015 that he resided at the Member's Address 2 Apartment with his uncle for the two

years before his death, and that he [the Member's Nephew 1] never met the Appellant until the Member's funeral when she introduced herself as the Member's friend and said that she had not seen him for two years. The Member's Nephew 1 was certain the Appellant had never lived common-law with his uncle.

2. A "To my family" letter was included in the materials, and although it was not signed by the Member, it was referred to in a statement that was sworn on May 28, 2015 by his sister the Respondent. The letter was ostensibly from the Member and included good-byes to his close family members and thoughts of how he wanted them to hold the family together when he was gone. Many people are mentioned in this letter including in the final paragraph "To ♦, dearest friend, I love you and will miss you." There is no mention of the Appellant in this letter.
3. The Member's sister, the Respondent, swore on May 28, 2015 and on June 30, 2015 that her brother never cohabitated with the Appellant and did not live in a common-law relationship before his passing. Her statement also mentioned that the Appellant did not attend the memorial "Celebration of Life" for the Member.
4. The "Member's Friend" swore on May 29, 2015 that the Member had never lived in a common-law relationship and that he had not been in any relationship for about eight months before his death.
5. The Member's sister, the Respondent, swore on June 30, 2015 that she was close to the Member and that he was never in a common-law relationship and never resided at any other residence during the last two years of his life.
6. The "Member's Mother" swore on June 30, 2015 that her son had special friends, but that he didn't live with any of them. She swore that she met the Appellant at the hospital before the Member died and that the Appellant told her that she had been living in [City] with her boyfriend and had not seen the Member for two years. The Member's Mother also swore that she asked the Member in the hospital why he didn't just marry the Appellant and he replied "We have not been together for over 2 years...."
7. The "Member's Sister 1" swore on June 30, 2015 that the Member never lived common-law with the Appellant, and that for the last two years of his life he had another girlfriend. She further said that the Member designated the Appellant as his spouse on his extended health and dental coverage to help a friend and that he was going to remove her as soon as she found a job and got back on her feet with her own coverage.
8. The "Member's Sister 2" swore on June 30, 2015 that the Member was a bachelor all his life and had never lived in a common-law relationship. She mentioned that he always came to family functions alone, and when the family visited the Address

2 Apartment for dinner, no one was present with him, although many family members brought their significant others.

9. The "Member's Nephew 2" swore on June 30, 2015 that he had never met or seen the Member in the company of anyone he referred to as a partner or common-law spouse. He swore that the Member lived alone and was a single man.
10. The "Member's Niece" swore on June 30, 2015 that "a common law relationship between [the Member] and [the Appellant] did not occur and is not known to me."
11. The Member's Niece wrote in an undated statement that the Member was not in a common-law relationship at the time of his death and that she had never seen him with a girlfriend. She stated that she talked to the Appellant at the hospital and that the Appellant mentioned she was coming from [City] where her boyfriend lived. The Member's Niece stated that she planned the Member's funeral and that her family paid for the funeral and that the Appellant did not assist in any way. She also stated that the Appellant was not mentioned in the Member's will and did not attend his memorial service.

Documentary Evidence Supporting the Appellant

In making its findings and conclusions in this matter, the Panel has taken into account the following documentary evidence that supported the Appellant's position that she was the Member's common-law spouse:

1. The Member designated the Appellant as his common-law spouse on his extended health and dental benefits with the [Employer] from December 21, 2005.
2. The Member transferred a car to the Appellant and completed a spousal exemption declaration to the Ministry of Revenue so that no sales tax would be payable.
3. The Member and the Appellant had a spousal auto insurance policy with a group rate since March 31, 2011.
4. The Member and the Appellant shared a Rogers cell phone plan since November 18, 2011 and it appears that the Member paid the Appellant's cell phone bill.
5. Notifications about the Member's Air Miles loyalty points went to the Appellant's email address.
6. The Appellant called the Member's employer to advise of his absences from work.

7. The Appellant was listed as the Member's "special friend" in his obituary and was listed right after his mother.
8. It was clear from the numerous photos, signed greeting cards and testimonials from family and friends that the Appellant and the Member were in long-term loving relationship.

Documentary Evidence Supporting the Respondent

The Panel has also taken into account the following documentary evidence that supports the Respondent's position that the Appellant and the Member were not in a common-law relationship:

1. On June 21, 2004 the Member designated his sister, the Respondent, as the beneficiary of his OMERS pension plan.
2. OMERS asked the Appellant on various occasions to supply the following primary documents to support her claim as the Member's common-law spouse. Most documents were not provided. Specifically,
 - bank statement from a joint account (not provided)
 - joint lease for a shared residence (not provided)
 - property tax statements in both names (not provided)
 - health benefits statement (was provided)
 - the member's last will and testament (not provided)
 - insurance policies (proof of shared auto policy was provided)
 - household bills in both names or in each name for the same address (not provided)
3. No documentary evidence was provided that the Member and the Appellant shared household expenses.
4. The Member made numerous late-night phone calls to the Appellant's landline from his cell phone during the required three-year cohabitation period. Some of the Rogers cell phone bills included calling information that detailed lengthy phone calls made from the Member's cell phone to the Appellant's landline from May 2012 to January 2013. None of the bills in the evidence after January 2013 provided detailed calling information. The call details showed that at least two or three nights a week on weeknights in the times between about 11:00 p.m. and 1:00 a.m., the Member called the Appellant on her landline. The call details also showed that he did not call her on weekends. This pattern suggested to the Panel that the Member usually stayed at the Address 2 Apartment during the week and

stayed with the Appellant on weekends. This is not consistent with continuous cohabitation.

5. Both the Member and the Appellant filed their income taxes as single people and both had their paperwork from Canada Revenue Agency forwarded to their separate individual addresses.
6. During the last couple of years of the Member's life he paid over \$900 per month rent for his Address 2 Apartment and about \$150 a month for cable, internet, a land line and property liability insurance. Over \$1000 a month would have been a significant amount to pay for a person whose taxable income was about \$50,000 a year to just store materials and use as a workshop. This fact strained credulity for the Panel to believe that the Member was permanently living elsewhere if he continued to pay for these services at the Address 2 Apartment.
7. The Member had official documents and bills forwarded to the Address 2 Apartment.
8. The Member obtained a Visitor Parking Permit to park at the Appellant's Address 1 apartment from October 26-28, 2010, during the required three-year cohabitation period.
9. The Member's sister, the Respondent, was the executor of his estate. All funeral arrangements were made by the Respondent and other members of the Member's family.

Findings and Conclusions

The Panel considered all the information provided by both Parties in making its decision.

As a result of the inconsistencies and contradictions in the sworn statements, the Panel finds it impossible to make a judgment on the accuracy or the validity of the statements provided by the Parties. The Panel was thus forced to base its decision on the objective and reliable documentary evidence provided by the Parties. Ultimately, this evidence led the Panel to conclude that the Appellant and the Member were not in a common-law relationship according to the definition required by the OMERS Plan text and the PBA.

The Panel also questioned why, if the Appellant had a key to the Member's apartment, she didn't just pick up her photos, cards, trinkets, blanket and laptop using her keys after his death. The Member's sister, the Respondent, wrote OMERS on August 30, 2015 saying the locks were not changed at his apartment and suggested that the Appellant could have just used her key to get her possessions after his death. On March

24, 2016 the Appellant wrote OMERS in response to the Respondent's letter and mentioned that the Respondent had taken all the items and put them in the locker.

In a written statement to OMERS the Appellant said that the Member supported her financially and gave her cash to pay some bills. The Panel questioned why the Member and the Appellant didn't have a joint bank account, so that either one of them could just withdraw the required funds to pay bills. There was no evidence of a joint bank account.

The Panel understood that the Member put the Appellant on his extended health and dental benefits as his common-law spouse, transferred a car to her where he completed a spousal exemption declaration, and that they shared a cell phone plan and had a spousal auto insurance policy.

But the facts that influenced the Panel's decision that the Appellant and the Member were not in a common-law relationship during the last three years of his life were that the Member paid over \$1000 a month to maintain the Address 2 Apartment, that all his mail went there, that the Appellant and the Member did not have a joint bank account, that there was no documentary evidence of any shared household expenses, that the Member phoned the Appellant at her apartment late on many weeknights, and that in 2004, about ten years after he was supposedly living with the Appellant in her apartment, the Member named his sister as beneficiary of his OMERS pension plan.

The Panel was convinced that the Member and the Appellant were in a long-term loving relationship and recognized that the Appellant was listed as the Member's "special friend" in his obituary, after his mother and before his sisters. But the Panel was not convinced on a balance of probabilities, based on the evidence available that it found reliable, that the Appellant and the Member were common-law spouses for the required three-year continuous cohabitation period according to the definition in the OMERS Plan text and the PBA.

The Appellant's appeal is therefore dismissed.

DATED at Toronto this _____ day of December, 2016.

I, Eugene Swimmer, sign this Decision as Chairperson of the panel and on behalf of the panel members listed below.

Signed: _____

Eugene Swimmer, Chair

Sheila Vandenberg

David Tsubouchi