Court File: 78550/12
CITATION: Bell v. OPG 2016, ONSC 1263

SUPERIOR COURT OF JUSTICE

B E T W E E N :

SYLVIA BELL

Plaintiff

and

ONTARIO POWER GENERATION

Defendant

R E A S O N S F O R J U D G M E N T

BEFORE THE HONOURABLE JUSTICE MCCARTHY
on November 25, 2015, at Oshawa, Ontario

APPEARANCES:

K. Armagon	Counsel for Sylvia Bell
J. Robinson	Counsel for OPG
M. Thorpe	Counsel for OPG

SUPERIOR COURT OF JUSTICE

T A B L E O F C O N T E N T S

W I T N E S S E S

E X H I B I T S

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WEDNESDAY, NOVEMBER 25, 2015

MCCARTHY, J (Orally):

I am going to give my reasons orally. I want to advise you that I do not have copies of the decision for counsel, or the parties at this time. What I am going to hand the Court Reporter at the end of my reasons, is a copy of my text, which is not a written decision in the sense of – it's for counsel, so if you, and I'm imagining you will need a copy of my decision, you'll have to order the transcript. All right. In the matter *of Bell v. Ontario Power Generation*, Mr. Armagon for the plaintiff, Mr. Robinson, Mr. Thorpe for the defendant.

Nature of the Claim

Michael Shestowsky, hereinafter referred to as "the deceased", was an employee of the defendant, Ontario Power Generation, formally Ontario Hydro, and hereinafter referred to as "OPG", for almost 30 years, from 1975 until his retirement on February the 1st, 2003, hereinafter referred to as the "retirement date". From that date until the date of his death, on May 4, 2011, referred to as the "date of death", the deceased was in receipt of a life pension under OPG's pension plan, hereinafter referred to as "the plan".

The Deceased's Pension Election

On January the 15, 2003 the deceased executed a form entitled "Pension options on retirement, optional form life pension", in which he elected a level income option three, a pension payable for his lifetime only.

The Plaintiff's Position

The plaintiff claims an entitlement to a joint and survivor pension, hereinafter referred to as a "survivor pension" under both the plan and s. 44(1) of the *Pensions Benefits Act*, RSO 1990, c. P8, "the PBA". This claim is advanced on the basis that plaintiff was an eligible spouse as defined in both the plan and the PBA on the retirement date. The fact that the plaintiff was an eligible spouse creates a vested right to a survivor's pension, regardless of the option chosen by the deceased and regardless of the fact that the life pension was paid by OPG until the deceased's demise.

The Defendant's Position

OPG states that the plaintiff was not an eligible spouse on the retirement date. She is therefore not entitled to a survivor's pension under either the plan or the PBA. OPG states that the PBA serves to discharge the administrator of the pension in these circumstances. Finally, OPG asserts that the claim of the plaintiff is statute barred, or in the alternative, that it should be

denied based upon principles of equity.

The Issue

The parties agree that the principle issue for determination is whether, on the evidence before the court, the plaintiff has discharged her onus of proving that she was an eligible spouse on the retirement date as defined in the PBA and the plan. The evidence must establish on a balance of probabilities that the deceased and the plaintiff were in a conjugal relationship for not less than three years prior to the date of the deceased's retirement. Given that the retirement date was February 1 2003, that conjugal relationship would have to had to be continuous from February 1, 2000, the start date, and the retirement date. If the plaintiff can establish this, then she is presumptively entitled to a survivor's pension from the date of death to present, and ongoing subject to other defences put forth. For oral reasons given previously, the defendant's motion to have the plaintiff's claim barred as being out of time under the *Limitations Act* was dismissed.

The PBA

Section 44(1) of the PBA provides as follows:

> Every pension paid under a pension plan to a former member who has a spouse or same sex partner on the date of payment of the first installment of the pension is due, shall be a joint and survivor pension.

"Spouse" is defined in section 1 of the PBA:

> Spouse means, either or a man or a woman who;
> a. are married to each other, or;
> b. are not married to each other,
> (i)and are living in a conjugal relationship 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 parties were not married, and were not the natural or adoptive parents of a child. In order to be eligible for the joint survivor pension then, the plaintiff needs to satisfy the criteria set out in b(ii) under the definition of spouse.

The Evidence

The court received into evidence 46 documents as well as the *viva voce* evidence of 18 witnesses.

The first witness was the plaintiff, Sylvia Bell. She resides at 1467 Whites Road, apartment 603, hereinafter referred to as "the apartment". She entered into a relationship with the deceased beginning in 1998 after meeting him on January 27, 1998. In the weeks that followed, they began dating and soon became intimate. The deceased lived at 14 Watson Street in Scarborough, hereinafter referred to as "Watson Street", with two other men. The plaintiff testified that the couple continued to see each other, attending together at the Royal Canadian Legion in Scarborough, at family events and at work related functions throughout 1998 and 1999. They were

seeing each other exclusively. The deceased began to stay over at the apartment in the summer and fall of 1998. As time went on, the relationship matured. The deceased would stay at the apartment for as much as a week at a time, going to work directly from there in the morning. The plaintiff organized a surprise birthday party for the deceased in January of 1999. Shortly thereafter, the couple took a break, but reunited again in February of 1999, at which time they both agreed to take their relationship to a new level. The deceased began to stay at the apartment for days on end. The deceased began to pay for groceries. The couple slept together regularly. The deceased would return to Watson Street regularly to check on his dog. The couple travelled together in the spring and summer of 1999 to Burk's Falls, Minden, Coboconk, and Huntsville. The plaintiff added the deceased to her homeowner's insurance police with Citadel in October of 1999. The couple continued to live as husband and wife until 2002, when they obtained a storage unit, moved the deceased out of Watson Street, and entered into a cohabitation agreement on September the 12th, 2002. At that time the deceased named the plaintiff as a beneficiary of his life insurance and group benefits. The deceased retired in 2003. The plaintiff continued to work until 2007, in spite of struggling with some health concerns. The couple bought a property on Kushog lake in 2005. The plaintiff stated that she lost all of the pre-

2001 cards and letters exchanged between her and the deceased in a flood at her apartment in 2014. In cross-examination she stated that she did not read the cohabitation agreement that she executed in 2002. She told her landlord about the new living arrangements involving the deceased, by verbally advising a person by the name of Sarah Burgess in 1999. The plaintiff's income tax returns from 1998 to 2002 indicate a status of divorced.

The plaintiff's daughter, Sabrina Cotnam Rideout, referred to as "Sabrina", resided in an apartment at the same complex as her mother, beginning in 1997. In 1998 the deceased was introduced to her as the plaintiff's boyfriend. The deceased began to come around more and more, so that by the end of 1998 Sabrina never saw him leave. The couple were always together. Sabrina could not remember a time that she did not see the deceased. Throughout 1999 the deceased was always present at the apartment, spending six nights out of seven there. In 2000 the deceased moved in his piano and other belongings. Sabrina was never aware that the deceased resided anywhere else. Both Sabrina and her three children enjoyed a good relationship with the deceased. He was a father figure to her Sabrina; her children called him Papa. In September 2011, following the demise of the deceased, Sabrina wrote a letter to OPG stating the couple had moved in together in

February 2001. She explained that this February 2001 date had been the official moving in date; the situation had been unofficial before that.

Deborah Brady was a neighbour of the plaintiff, in apartment 604. She regularly observed the plaintiff and deceased being together and assumed that they were married. She saw the deceased often, for as long as she could remember, both mornings and evenings in the hallway, or in the parking garage.

Diane Sullivan knew both the plaintiff and the deceased through the Legion prior to 2002. She described them as very close, and very much in love. She rented out a storage unit to them in July 2002. She could not comment on their living arrangements prior to July 2002. At that time, the deceased provided her with the apartment as his address information.

Vincent Sheridan was a long time friend of the deceased. He remembers the deceased and plaintiff as a couple beginning in 1998. By the 1999 birthday event, as far he knew, they were living together in an apartment up on Whites Road. He recalls visiting them there on a hot summer night. Throughout 1999 to 2002, they were absolutely partners. In cross-examination, Mr. Sheridan agreed that he was recalling events from between 10 and 17 years ago.

Gail Sheridan felt that as of the January 1999 birthday party, the plaintiff and the deceased were a common law couple, because they were living together. She identified a photograph of a New Years Eve party in 2001. She recalls staying at the apartment on Whites Road on the Y2K New Years, but upon reflection, she felt that it was more likely New Years of 2000-2001. She believed that that plaintiff and the deceased loved each other, and were most certainly a couple.

Bob Downing was a social friend from the Legion who recalled the plaintiff and the deceased as a couple from back around 1998. At the time he knew them, the deceased lived with a couple of buddies on Watson Street in Scarborough. Mr. Downing could not say anything about the living arrangements with the plaintiff, but felt that by 1999 they were coming and going from the Legion together. Downing attended a dinner at the apartment in 1999.

Trevor McIntosh of Intact Insurance introduced an activity summary and data sheets in respect of the plaintiff's policy of tenant's insurance. These documents revealed a change adding the deceased as an insured on the policy effective October of 1999.

The witnesses called by OPG introduced and

reviewed the key documents relating to the issue in question. Those exhibits form part of the evidentiary record.

Susan Brooks advised how pension plan members were asked for spousal information when making their pension election. Brooks would routinely ask about eligible spouse information for survivor benefits and pension purposes. She instructed members that such information needed to be divulged.

Loraine Gagnon-Lacroix knew the deceased and described him as an intelligent man and a reliable employee. He was routinely tasked with difficult maintenance jobs.

Jo-Ann Marcocci explained how the December 17, 2002 cover letter and pension documents package were sent to the deceased. She explained how a life pension option was available for members with no eligible spouse. In contrast, a survivor's pension was mandated under the *Pension Benefits Act*, if the member had an eligible spouse at the time of retirement. If a member indicated that he had an eligible spouse at retirement, then the member was asked to provide proof of eligibility at the date of retirement, in order to create a joint survivor pension. The document that governed the type of pension payable, in this case, was the "Pension options on retirement,

optional form life pension" executed on January the 15th, 2003. The letter confirming the deceased's choice and his pension details was sent out to him on January the 16th, 2003, in advance of his retirement date.

Laurie Wocjik, a pension administrator, gave evidence about the deceased making inquiries in the post retirement period concerning the nature of his pension, and the availability of a survivor pension. Ms. Wocjik stated that because the deceased had elected a life pension at retirement, the creation of a survivor pension for a post retirement spouse would have necessitated both further information as well as the member agreeing to accept an actuarially reduced pension. The deceased did not take any further steps to exercise this post retirement spousal option in either 2006 or 2009.

Ministry of Transportation of Ontario representative, Maureen Rajnauth, filed a certified copy of the deceased driver's license history report. This document showed the deceased reporting, as late as June 2002, his address to be 14 Watson Street, Scarborough. He did not change his address to the apartment until September 11th, 2002.

Solicitors Fleury and Tatham both gave evidence about the information that they received, and the

events leading up to the execution of the cohabitation agreement by the plaintiff and the deceased in September, 2002.

Definitions and Authorities

The term "conjugal" is not defined in either the PBA or the plan. Conjugal is defined in the Dictionary of Canadian Law, Second Edition, Carswell, 1995, as follows:

> "Conjugal – related to the married or marriage like state."

The concise Oxford English Dictionary, 10th Edition, 2002, defines conjugal to mean "of or relating to marriage, or the relationship between husband and wife." Finally, the 7th Edition of Blacks Law Dictionary, 1999, contains the following definition of conjugal:

> "Of, or relating to the married state, often with an implied emphasis on sexual relations between spouses."

In the case of *Steven v. Stawecki*, 2006, Carswell Ontario, 3653, the Ontario Court of Appeal, at paragraph 4, warned against placing too much emphasis on when a couple moves in together in assessing whether conjugal relation exists:

> "in our view, moving in would add no precision to the meaning of live together, and it would not provide the clear and definitive test sought by the appellant. The case law recognizes that given the variety of relationships, and living arrangements, the mechanical bright line test is simply not possible. The jurisprudence interprets live together in a conjugal relationship as a unitary concept, and that the specific

> arrangements made for shelter are properly treated as only one of several factors in assessing whether or not the parties are cohabiting. The fact that one party continues to maintain a separate residence, does not preclude a finding that the parties are living together in a conjugal relationship."

In *Thauvette v. Malyon*, 1996, Carswell Ontario, 1318, a decision from the Ontario Court of Justice, the court held that the fact that a party maintained a separate residence did not in itself mean that the party did not cohabit with another person. The court must look at all the circumstances and consider the reason for maintaining the residence.

In *Campbell v. Szoke*, 2003, Carswell Ontario, 3362, a decision of this court, Karakatsanis, J. as she then was 52 wrote that, "Whether a couple has cohabited continuously is both a subjective and an objective test. Intention of the parties is important. When there is a long period of companionship and commitment, and an acceptance by all who knew them as a couple, continuous cohabitation should be found." (paragraph 52)

It is important for the court to consider the entire circumstances and not to focus too narrowly on the existence of a separate residence; however, the couples living arrangements must be viewed objectively.

Analysis

I am not prepared to place a great deal of weight on the *viva voce* evidence given by, and on behalf of the plaintiff. First, the assertion that the plaintiff and the deceased were in a conjugal relationship as far back as 1999 finds almost no corroboration in the objective documentary evidence. Second, I found the evidence of the plaintiff herself to be unreliable. I simply do not believe that all the greeting cards and notes exchanged between the plaintiff and deceased pre-dating 2001 would have been destroyed beyond repair in the flood of May 2014. The court received no photographs of the flood damage, no damage documentation, no insurance claim forms and heard from no independent witnesses who observed the damage or witnessed the incident. One would have thought that by May 2014, at a time when the present litigation was well advanced and when the plaintiff understood the case that she had to meet, that copies of the greeting cards and notes allegedly lost in the flood would have been safely in the hands of her lawyers. As well, I find it incomprehensible that the plaintiff, as estate trustee of the deceased, would be unable to produce anything from the estate papers that would tend to place the deceased as a resident at the apartment at any time between 1999 through to 2002. Three, the only information that the plaintiff was able to adduce from the building owner was a statement that the parties had resided together at the apartment beginning in 2001. I

find it strange that the plaintiff would have only verbally advised Sarah Burgess that the deceased was moving in given that she understood that her tenancy agreement called for her to advise the landlord of any change in the tenancy and that she seemingly took steps to have the deceased added to her insurance policy around the same time. It is disturbing that no written record of the communication came before the court. Four, the plaintiff's version of when the deceased began to live at the apartment is contradicted by her own daughter's letter to OPG in September 2011 and by the written evidence from the plaintiff's landlord. Five, the evidence offered by the plaintiff's friends and neighbour was not independent, objective, or reliable. Ms. Brady was really unable to place any concrete date on her observations of the plaintiff and deceased as a couple. The Sheridans were both well meaning, but spoke in generalizations. They struck me as anxious to champion the plaintiff's cause. Neither Diane Sullivan nor Bob Downing could offer much insight into the couple's living arrangements before 2002. Six, I find it highly improbable that the plaintiff did not read the draft or final cohabitation agreement in 2002. This is entirely inconsistent with a person employed in a responsible job in an industry where the adoption of statements made in documents is so fundamentally important. I simply do not believe that the plaintiff would not have read and

understood the cohabitation agreement and agreed to what was set out therein. Indeed, I find that the information that she provided to her own solicitor was entirely consistent with what was set out in that document. Seven, no reasonable explanation was offered by the plaintiff as to why the deceased chose to maintain a residence for nearly three years after he supposedly moved in to the apartment. In the absence of some explanation on this front, I find the maintenance of a residence as entirely inconsistent with the deceased living at the apartment in a conjugal relationship. Eight, the plaintiff's own daughter, Sabrina Cotnam, advised OPG following the deceased's demise in 2011 that the parties moved in together in February 2001. She offered this information gratuitously on a date much closer to the events in question than today, and prior to the issuance of the claim. Moreover, that evidence must be afforded a great deal of weight: it represents an admission against the interest of her mother, the plaintiff. I did not find Sabrina's attempt to explain that statement at trial to be credible or compelling. Her distinction between unofficial and official moving dates was artificial to the point of desperate. It is far more likely that Sabrina was giving a truthful answer to OPG in 2011, before the time that formal litigation commenced. As well, I simply do not accept the evidence offered by the plaintiff that she did not speak to Sabrina about

the issue prior to Sabrina contacting OPG in writing in 2011. I have concluded that Sabrina Cotnam's previous statement, which was inconsistent with her testimony at trial, together with her transparent attempt to explain the discrepancy, serves to irreparably damage her credibility and the reliability of her evidence at trial. I would reject her evidence at trial outright. Nine, the property administrator's letter of May 30, 2010 offers February 1st, 2001 as the date that the deceased and plaintiff began residing together. This information from a person on the ground, so to speak, is contrary to the evidence offered by the plaintiff, and her witnesses at trial. Viewed in this light, the entire testimony of these witnesses, as to the date that the deceased moved in with the plaintiff, must be afforded very little weight.

I have no doubt that the plaintiff and deceased met in 1998 through a mutual friend. I accept that they dated, were intimate, and kept company with each other thereafter. I am persuaded that they were, for lack of a better term, boyfriend and girlfriend, beginning in 1998 and beyond. I am not persuaded, however, that the plaintiff was a spouse of the deceased for the purposes of the survivor's pension as of the retirement date. I am not persuaded that they lived together continuously in a conjugal relationship continuously for three years prior to the

retirement date so as to give rise to a presumptive entitlement to a survivor's pension under the plan or the PBA. The preponderance of the evidence simply fails to persuade me in that regard. I find, rather, that their living together in a continuous conjugal relationship can be dated from August or September of 2002. I have arrived at this conclusion by considering the following:

a. The deceased's notification of a change of address to the Whites Road apartment to the MTO, OPG and solicitor Tatham, was not given until September of 2002. Indeed, the evidence suggests that as of June the 25, 2002, the deceased was advising the MTO that his address was 14 Watson Street. I infer from this that the deceased maintained his own residence up until the summer of 2002. While this is not dispositive of the issue, it must be afforded considerable weight. In my view, it cannot be dismissed or explained away by 14 Watson Street's proximity to a place of employment or the deceased's responsibility towards a family member. There is simply no explanation as to why the deceased would have maintained this 14 Watson Street residence if it were not his home and residence.

aa. I infer from the deceased's pension election made on January 15, 2003, that he understood that the plaintiff was not eligible

for a survivor pension because she did not fit within the definition of spouse for the purposes of a pension, payments upon which were scheduled to commence on February 1, 2003. It is difficult to infer anything else but that the deceased recognized himself to be in a common law relationship as of January 15 2003, but also as having no eligible spouse for the purpose of the survivor's pension as of that date. The package sent to the deceased by OPG on December 17, 2002, included an information sheet entitled "Understanding Your Pension Benefit Options", in which eligible spouse is clearly defined. Within weeks of the date of that cover letter, the deceased executed the "Pension on a retirement optional form, life pension form", which included the following wording: "I do not have an eligible spouse, eligible same sex partner, or dependant child as described", and "I understand the definition of eligible spouse as described in understanding your retirement pension option." On that same form, the deceased elected the life annuity option. The declaration section contains the following acknowledgement: "I have chosen the life annuity option in order to receive an increased pension for my lifetime, with no retirement income, or other payments to my beneficiary at my death, after my retirement." I find that these elections and acknowledgments made by the deceased to OPG, at

this critical time, reveal his understanding and belief that the plaintiff was not an eligible spouse at the time of his retirement.

b. OPG's cover letter of December the 17th, 2012, makes it clear that its pension records indicate that the deceased did not have an eligible spouse. The letter invited the deceased to contact pension administration if the information was not correct. There was no evidence that he did so, or provided information to the contrary, prior to his retirement. Again, I would infer from this that at least one of the partners in the relationship understood and acknowledged that the plaintiff and deceased had not been living together in a conjugal relationship continuously for a period of not less than three years.

c. The evidence provided by solicitors Fleury and Tatham supports the finding that the parties only began residing together in the summer of 2002. Tatham was retained by the deceased. His file note dated June 7th, 2002, states that the couple was currently not residing together. Moreover, this solicitor's file reveals an address for his client of 14 Watson Street in Scarborough. In fact, correspondence to the deceased was mailed to 14 Watson Street throughout July and August of

2002. At some later date there is a change of address to the Whites Road apartment; this leads to the solicitor's account being sent to the apartment on September 23rd, 2002. This is entirely consistent with the evidence of solicitor Fleury, who provided independent legal advice to the plaintiff. His file note of September the 12th, 2002, states: "already cohabiting as of August 1st. He no longer had his own residence." This is consistent, as well, with clause 2.1 of the Cohabitation Agreement, executed on August 30th, 2002 which clearly stipulates that the parties to the agreement, "intend to commence cohabiting in Sylvia's home at apartment 603, 1467 Whites Road, Pickering."

d. The income tax returns filed by both the plaintiff and the deceased indicate a marital status of divorced throughout the critical years of 2000 and 2001. The deceased's own marital status converts to "common law" beginning in only 2002. For the plaintiff, the designation as divorced remains in place throughout the entire period, including 2002. The evidence is contemporaneous with the relevant time period. I find that these tax returns support the conclusion that neither party, at the time, thought themselves to be living together in a conjugal relationship. I would take judicial notice of the fact that

most tax returns are filed in the spring following the fiscal year in question. Thus, the 2002 designation by the deceased of common law was most likely made in early 2003. This is entirely consistent with the facts on the ground, namely that the parties had begun living together during the summer of 2002.

e. When presented with the definition of spouse in the package of documents sent to him by OPG in December 2002, at a time when he was living in the very relationship in question, the deceased provided information to OPG that he did not have an eligible spouse. In the absence of proof to the contrary, I must find that the deceased was uniquely placed, not only to consider the definition of spouse and compare it to the relationship that he had been in for the past number of years, but also to provide to OPG information that would contradict the clear statement by OPG on December the 17 2002, that he did not have an eligible spouse. It is common sense that a person of average intelligence and recollection would have been able to apply his mind to such a question, given that he must have been in possession of salient facts which, after all, were personal to him. In my view, this distinguishes the present situation from the trial decision in *Steven v. Stawecki.* There the parties in question were completing a loan

protector application when they declared that they were not spouses. In the case at bar, the pension documentation must have caused the deceased to turn his mind to the specific question, and to address that question at the relevant time, presumably while he was in possession of all of his recollection. Indeed, the survivor pension is described as the "normal" form of pension in the OPG information sheet. The life option is an optional form of pension. In electing a life option, the deceased himself affirmed the information on file at OPG, namely that he did not have an eligible spouse.

f. The deceased's designation of the plaintiff as a beneficiary with a relationship to him of "common law spouse" on the Great West Life group life insurance form dated September 25, 2002, is entirely consistent with contemporaneous developments: the execution of the cohabitation agreement, the deceased's change of residence and the commencement of cohabitation. The deceased's designation of his estate as his pension benefits beneficiary on the very same date makes sense. It is clear that the deceased understood that he now had a common law spouse for the purpose of group life insurance, but did not have an eligible spouse for the purpose of his pension; therefore, he left the spousal information on the pension

benefits form blank.

g. The post retirement inquires and conduct of the deceased support a finding that he recognized that the plaintiff had not been an eligible spouse as of his retirement date. In the letter from the pension administrators dated February 28, 2006, the deceased is advised of how he might go about creating a survivor pension for the plaintiff as a post retirement spouse. In my view, had the deceased believed the plaintiff to have qualified as a spouse at the time of his retirement for the purposes of a survivor's pension, he would have made an effort to furnish OPG with proof that she had been in fact a qualifying spouse at his retirement. He did no such thing even though the correspondence and information provided by OPG make it plainly obvious that, as things stood, the plaintiff was not entitled to survivor's pension.

The 2009 inquires made by the deceased lend support to this conclusion as well. Pursuant to those inquiries, OPG sent the deceased a note via electronic mail as follows: "When an employee retires they choose the pension that they wish to receive. When there is a spouse, they have to provide the pension company with all the information on that spouse to determine

eligibility. Where a common law spouse is concerned, you would have to provide the information about her and satisfactory proof that you were in common law situation for over three years."

Although the deceased had indicated that he and the plaintiff had been "together" since 1999 and "common law" since 2002, no further information was forthcoming. It find it instructive that the expression "together" was employed by the deceased at this time to describe the relationship in 1999 rather than "living together" or the more ubiquitous "common law". Although this email of the deceased is hearsay, no objection to its introduction as evidence was made. In any event, I find this choice of words and descriptions by the deceased to be probative and reliable as to his state of mind. This was the second opportunity afforded to the deceased to rectify the record by providing proof that the plaintiff was an eligible spouse at the time of retirement. He did not do so. I would again infer from his failure to do so that he recognized that the plaintiff was not an eligible spouse at the time of his retirement. This constitutes, in my view, clear and unequivocal evidence of the deceased's state of mind, both in the pre-retirement and post retirement period. Any suggestion that the

deceased did not understand that he in fact had an eligible spouse at the time of retirement is defeated by this re-emergence of the issue in this way several years later.

I received into evidence only one objective independent piece of documentation that might serve as proof that the deceased lived at the Whites Road apartment beginning October 1999, that being the collection of documents from Intact Insurance, formerly the Citadel. However, I choose to give only give limited weight to that evidence. Adding an individual as an additional insured does not indicate that the person has taken up residence at the location. It may simply be that some items belonging to that person were being stored there. We heard that a billiard table and a piano may have been moved over to the apartment at that time. It might also mean that a person is a houseguest from time to time. There is insufficient information to place the adding of the deceased as an insured in any context. One would think that an explanation for the change would have been entered into the file, much like the information we see for later changes to the policy. In addition, the person who entered that information was not a witness in court. Such a person might have been able to assist the court in understanding why the change was made, by whom and when. Mr. MacIntosh, on behalf of Intact, conceded that he did not understand the Citadel

Insurance system. He provided precious little insight into the meaning of many of the codes. He could not assist as to what the insurable interest of the deceased was, or whether the change meant that the deceased was residing at the described location. There is no indication or suggestion that the addition to the coverage was in any way the initiative of the deceased. Lastly, this document is so isolated, and so manifestly devoid of support from other documentary evidence, that I am not able to afford it much weight. Aside from the Intact Insurance information, there was a complete absence of contemporaneous, verifiable, and independent documentary evidence that would support a finding that the plaintiff and the deceased were living together in a conjugal relationship beginning in February, 2000. There were no pieces of mail addressed to the deceased at the Whites Road apartment; no joint bank account or credit card statements; no travel itineraries; no letters or emails from third parties addressed to the couple jointly; no parking pass issued to the deceased, no written record of the plaintiff advising her landlord of a change in the tenancy agreement. The meaningful personal cards and notes produced only date from 2001, with the vast majority dating from after the retirement date. As stated previously, I am simply unable to accept as reliable, the evidence of the plaintiff that notes and cards from earlier dates were destroyed in the flood. Again, there

was no independent evidence of a flood, no insurance claim, no photographs, witnesses, or mention of it in any contemporaneous notes or letters. I must therefore conclude that such cards and letters were never written prior to 2001 or would not contain evidence that would support a finding of a conjugal relationship during that time period.

I have considered the case *Molodowich v. Penttinen*, 1980, CanLii, 1537, (Ontario Superior Court), which although not binding on me, provides a useful approach to a consideration of both cohabitation and conjugality. Having considered the seven criteria set out in that case, I have concluded that there is insufficient evidence that the parties lived under the same roof until 2002. The only evidence that I heard about services prior to that time period was from the plaintiff and her daughter, whose evidence I have rejected as unreliable. The couple had no children. While they appeared to be held in affection by the plaintiff's grandchildren, I find that the evidence of Sabrina Cotnam, in that regard, is not reliable as to timing. At some point, no doubt, her children regarded the deceased as Papa, but I find that this would have commenced well after February 2000. While the small group of friends at the Legion and the one neighbour, may have viewed the two as a couple, the same could be said for many couples who are not in a conjugal

relationship. I have no reason to doubt that the plaintiff and deceased were intimate from an early stage and likely remained loyal to each other in that regard; however, that is only one factor. In my view, a critical consideration in this case is the support and economic factor. This factor weighs heavily against a finding of conjugal relationship. It was not until September 2002 that the deceased first described the plaintiff as his common law spouse on any piece of documentation. Moreover, although he would have had the opportunity to do so at any time between 1999 and 2002, the deceased took no steps to name the plaintiff as his life insurance or group beneficiary. I find that the deceased was in fact attentive to the issue of who is beneficiary was at any particular time. The series of designation cards filed as exhibits indicate that the deceased was inclined to change his beneficiary according to the relationship he found himself in from time to time. That he did not name the plaintiff until 2002 is supportive of the finding that he did not consider himself to be in a conjugal relationship until 2002. The only reliable evidence of any kind of shared expense is the storage unit which the couple took out in 2002. The cohabitation agreement of 2002 refers to a defined property sharing regime to come not one that already existed. There is nothing in the way of financial or economic documentation to support a finding of conjugality prior to 2002, save and except for the

insurance documents, to which I would attach little weight.

Finally, and as a matter of law, I find that s. 45(3) acts as a discharge to the administrator of OPG pension plan in these circumstances. That section reads as follow:

> "45(3) Discharge of administrator. In the absence of actual notice to the contrary, the administrator is discharged on paying the pension or pension benefit in accordance with the information provided by the person in accordance with subsection (2) or, if the person does not provide the information, in accordance with the latest information in the records of the administrator."

Subsections 45(1) and 45(2) are of equal importance.

Subsection 45(1) reads: "Information for payment. Before commencing payment of a pension or pension benefit, the administrator of a pension plan shall require the person entitled to the payment to provide to the administrator the information needed to calculate and pay the pension or pension benefit.

Subsection 45(2) reads: "Person to provide information. The person entitled to the payment shall provide the information to the administrator."

Given the information that OPG had on file, subsequently confirmed by the deceased in his

pension election form and by his election of a life pension, I conclude that the administrator is discharged by its payment of the pension in accordance with that election until the deceased's demise. It would, in my view, be an undue hardship on an administrator to seek additional information, not disclosed by the member, unless the administrator had actual notice of a person entitled to the survivor pension. In this case, it did not. This fact is conceded by the plaintiff. I would be an unreasonable interpretation of the PBA sections in question to read into it some obligation on the part of the administrator to seek information about a person who it does know exists.

I recognize the great diversity and quality of intimate relationships in today's society. Such a mosaic presents challenges at the pension benefits level, given the need for administrators and actuaries to fund and maintain these plans, and to insure their integrity. The task is made especially difficult because persons are justifiably entitled to a measure of privacy in their personal lives. It is therefore understandable that a bar of qualification needs to be set for spousal entitlement in light of a plan's potential liability to pay out a survivor's pension for years or even decades. That bar may be arbitrary but it is statutorily mandated and carries with it a clear definition that is easily

understood. I am satisfied on the evidence that the deceased understood that bar of qualification at the time of making his election in 2003. I am satisfied that the deceased was in possession of the material facts of his own situation to make an informed choice. I am satisfied that the deceased provided information to OPG that was accurate, and upon which OPG acted in good faith.

The plaintiff has failed to satisfy me on a balance of probabilities that she and the deceased were living together in a conjugal relationship continuously for a period of not less than three years from the date of payment of the first installment of the pension. On the contrary, the preponderance of evidence has established that the plaintiff and the deceased began to reside together in the summer of 2002. Prior to that time, they were involved in a relationship to be sure, but not one that would qualify as continuous and conjugal, dating back to February 2000. That the relationship clearly evolved into a conjugal one and went on to be continuous is indisputable; however, it cannot be said that the duration and quality of a relationship can retroactively imbue that relationship with qualities that it did not enjoy at its inception, or for a good deal of time after its inception. That being the case, the plaintiff is not entitled to any survivor pension, or to any declaration in that regard. Given my findings in respect of presumptive entitlement, I

do not have to address the equitable considerations raised by OPG in closing argument.

The plaintiff's claim is dismissed. If the parties are unable to agree on costs, then I order that written submissions on cost be forwarded to me through the trial coordinator at Oshawa according to the following schedule: OPG shall serve and file written submissions on costs, limited to three pages on or before December 31st, 2015. The plaintiff shall serve and file responding submissions on or before January 21st, 2016, limited to two pages. OPG shall serve and file any reply submissions, limited to one page, on or before January the 28th, 2016. Order to go accordingly.

I would like to thank counsel for their able and skillful arguments and for the presentation of their respective cases. I apologize for not having a written copy of the decision available to you right now, but, as you can see, it was a lengthy oral decision, and if you wish to obtain a copy of it, you will have to order the transcript.

FORM 2

CERTIFICATE OF TRANSCRIPT (SUBSECTION 5 (2))

Evidence Act

I, **Sheila Douglas** ,
(Name of Authorized Person)

certify that this document is a true and accurate transcript of the recording of

Bell v. OPG in the **Superior Court of Justice**
(Name of Case) *(Name of Court)*

held at **150 Bond Street East, Oshawa, ON**
(Court Address)

taken from Recording **2812 506 20151125 084113_10_mccartjoh** , which has been certified in Form 1.

March 11, 2016
(Date)

(Signature of Authorized Person(s))