

**Automobile Injury Compensation Appeal Commission**

**IN THE MATTER OF an Appeal by [the Appellant]  
AICAC File No.: AC-09-089**

**PANEL:** Mr. Mel Myers, Q.C., Chairperson  
Dr. Sheldon Claman  
Dr. Neil Margolis

**APPEARANCES:** The Appellant, [text deleted], was represented by [text deleted];  
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka and Mr. Andrew Robertson.

**HEARING DATES:** August 28, 29 and 30, 2012.

**ISSUE(S):** Entitlement to indemnity benefits as a common-law partner.

**RELEVANT SECTIONS:** Sections 70(1)(b)(i), 120(1) of The Manitoba Public Insurance Corporation Act ('MPIC Act')

**AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE PERSONAL HEALTH INFORMATION OF INDIVIDUALS BY REMOVING PERSONAL IDENTIFIERS AND OTHER IDENTIFYING INFORMATION.**

**Reasons For Decision**

This is an appeal by [the Appellant] from a decision of the Internal Review Officer on June 4, 2009 who determined that the Appellant was not a common-law partner of [the Deceased] within the meaning of Section 70(1)(b)(i) of the MPIC Act.

The Appellant was employed as a long distance transport driver with [text deleted]. In 1998, he met the Deceased while training her for a period of three months as a long distance transport driver. At that time the Appellant was [text deleted] years of age and the Deceased was [text

deleted] years of age. After the training period, the two of them commenced operating a [text deleted] truck jointly on long distance trips and during this time they established a dating relationship. [Text deleted] did not approve of that relationship and in 1998, they both left [text deleted] and started employment jointly as long distance transport drivers with [text deleted]. In 2003, after a five year dating relationship, the Appellant testified that he and the deceased became common-law partners.

On November 23, 2008 the Deceased was involved in a motor vehicle accident and died as a result of her injuries. On January 14, 2009 the Appellant's solicitor, on behalf of the Appellant, applied to MPIC for an indemnity as a common-law partner of the Deceased.

**Case Manager's Decision:**

MPIC's case manager issued a decision on January 22, 2009 and rejected the Appellant's claim on the grounds that he was not cohabitating with the deceased for a period of at least 3 years immediately preceding the accident and as a result he did not meet the definition of a common-law partner pursuant to Section 70(1)(b) of the MPIC Act and therefore he was not entitled to a death benefit entitlement.

The Appellant's legal counsel made an Application for Review of the case manager's decision on March 13, 2009.

**Internal Review Officer's Decision:**

On June 4, 2009, the Internal Review Officer issued a decision rejecting the Appellant's Application for Review and confirmed the case manager's decision of January 22, 2009.

In her decision, the Internal Review Officer reviewed the Appellant's submission as follows:

1. "Your client and the Deceased had two residences at the time of the accident but they both spent a significant amount of time at each others (sic) residence. You said that not all couples live with their spouse and spouses may make a choice to have separate houses.
2. Your client and the Deceased were intimate and they had an "attitude of fidelity" in that they were not dating anyone else.
3. You submitted that your client and the Deceased drove a truck together and took many meals together.
4. You submitted that your client and the Deceased held themselves out as a common-law couple to both their employer and to their friends. You said that everyone that met them knew your client and the Deceased as a "common-law" couple.
5. You told me that there is no co-mingling of bank accounts.
6. Your client was listed as the beneficiary on insurance documents.
7. Lastly, you submitted that the only difference between your client's relationship with the Deceased and a person who is married with children is that your client had a separate residence from the Deceased."

After setting out the definition of "common-law partner" under Section 70(1)(b)(i) of the MPIC Act, the Internal Review Officer stated that:

1. This provision requires that the Appellant must have cohabitated with the Deceased prior to the motor vehicle accident.
2. The Internal Review Officer stated:

"The evidence before me is that your client did have a relationship with the Deceased but it is clear that he did not cohabitate with her within any of the time frames set out in the definition. As a result, I must uphold the case manager's decision and dismiss the Application for Review."

**Appeal:**

On July 15, 2009 the Appellant's legal counsel filed a Notice of Appeal on behalf of the Appellant and stated:

"The ground for appeal is that the appellant was "co-habiting" with the deceased at the time of her death and is entitled to benefits."

The relevant provisions of the MPIC Act are:

[70\(1\)](#) In this Part,

**"common-law partner"** of a victim means

(b) a person who, not being married to the victim, cohabited with him or her in a conjugal relationship

(i) for a period of at least three years immediately preceding the accident,

### **Computing indemnity under schedules**

[120\(1\)](#) The spouse or common-law partner of a deceased victim is entitled to a lump sum indemnity equal to the product obtained by multiplying the gross income that would have been used as the basis for computing the income replacement indemnity to which the victim would have been entitled if, on the day of his or her death, the victim had survived but had been unable to hold employment because of the accident, by the factor appearing opposite the victim's age in Schedule 1 or, where the spouse or common-law partner is disabled on that day, Schedule 2.

### **Appeal Hearing:**

The appeal hearing commenced on August 28, 2012.

The Appellant testified that:

1. He was a long distance transport driver and had been employed by [text deleted].
2. In 1998, after training the Deceased as a driver over a period of three months, they began to jointly operate a truck on behalf of [text deleted] as long distance transport operators and subsequently were both employed by [text deleted] as long distance transport operators.
3. Their driving duties required that they travel long distances in Canada and the United States delivering and picking-up cargo in various North American cities.

4. Each long distance trip was for continuous a period of 25 to 31 days after which they returned to [text deleted] for approximately 5½ days before starting the next long distance trip.
5. In the front portion of the truck where they were seated, there is a small area located behind the driver's seat which contains a bunk that permitted each driver to sleep while the other driver was operating the truck.
6. Each driver drove for a period of six hours and then slept in the bunk while the other driver assumed the driving duties.
7. The employing truck company limited the number of hours each driver would undertake during a 24 hour period.
8. They prepared their meals in the bunk behind the driver's seat and ate in the truck.
9. After their long distance trip they would return to [text deleted] for a 5½ day rest period before starting another long distance trip.

The Appellant further testified that:

1. At the time they commenced dating the Deceased had broken up from a relationship with [previous common-law partner] and the Appellant had divorced in 1994 and neither had any other relationship at the time.
2. In 1998 during the training period at [text deleted] they started a dating relationship.
3. [Text deleted] did not approve of that relationship and as a result they terminated their employment at [text deleted] and began working together as long distance drivers at [text deleted].
4. They dated for a period of 5 years before they became common-law partners in 2003 and continued that relationship until the Deceased's death.

The Appellant further testified that:

1. While they were dating they would see each other for approximately 1½ days during their 5½ day break from their driving duties.
2. Once they commenced their common-law relationship they started having sexual relations during rest periods in the bunk area of the truck behind the driver's seat while they were off duty.
3. When they returned to [text deleted] for their 5½ day break they began seeing each other for approximately 3½ days out of the 5½ work break period and continued to have sexual relations at each other's residences.

The Appellant testified that when they started their common-law relationship in 2003 he was the owner of a house and the Deceased was renting a house. Since they were sleeping together during that period of time, they each left personal clothing and toiletries in each other's homes. On occasion he would spend nights at the Deceased's home and she would, spend nights at his home.

The Appellant further testified that:

1. The Deceased was born in [text deleted], Manitoba, on a farm and left home when she was [text deleted] and came to live in [text deleted].
2. She supported herself by becoming a bookkeeper and subsequently became a long distance driver.
3. She was a self-reliant and independent person.
4. When he met the Deceased she was in debt and he indicated that she wished to buy her own home to develop equity in that home so that she could become financially secure.

5. Although he requested that they live together, she wished to have her own residence and he respected her desire in this respect.
6. Notwithstanding that they had separate residences, they continued to cohabit while on the road and in [text deleted].
7. In 2008 the Deceased purchased a home and the Appellant loaned her \$5,000 for the deposit, which the Deceased repaid in due course.
8. He purchased a garage door, dishwasher and freezer for her new home.
9. They were committed to each other and had an exclusive relationship.
10. Throughout their relationship he was faithful to her and the Deceased was faithful to him.
11. They loved each other and would express their feelings publicly by hugging and kissing when they met and communicated with each other on a personal level at work and while they were off duty.
12. They would openly express their feelings towards each other in the presence of other members of the family and friends by hugging, kissing and holding hands.

The Appellant further testified that:

1. The Deceased would prepare the initial meal when they started their trip and then they would eat their meals together during the 25 to 31 day trip.
2. When they returned to [text deleted] during their 5½ day work break, they shopped together for groceries and ate together at each other's residences.
3. When they stayed at his residence he would do the cooking and the Deceased would assist in the cooking and do the preparation. When they stayed at her residence the Deceased did the cooking and he did the preparation.

4. He purchased a freezer for the Deceased which was used for storing of food and meat gifts which they received from the Deceased's family.

The Appellant further testified that:

1. They shared many of the domestic duties jointly.
2. While she did his laundry, he did all of her yard work and vacuumed her home.
3. She assisted in cleaning his home by dusting and rearranging the books on the shelves.
4. In respect of dishwashing they alternated washing and drying depending on whose residence they were in.
5. He did the snow clearing and the lawn mowing at her home.
6. When he was replacing his roof, she insisted on climbing onto the roof and removing the shingles.
7. The Deceased liked a certain antique [text deleted], which he purchased for approximately \$500 and spent the sum of \$8,000 restoring it and presented it to her as a gift.
8. When the Deceased bought her home he attended with her and the real estate agent and provided her with advice in respect of purchasing the home. The Appellant had investments in rental properties and had some knowledge of real estate and shared his advice with the Deceased when she bought her home.
9. The Appellant kept all his business records and income tax documents in the Deceased's home.
10. She did all the bookkeeping in respect of his rental properties.



The Appellant further testified that:

1. When the Deceased broke her leg, the Appellant stayed with her and nursed her during her recovery.
2. When the Appellant had [surgery], the Deceased stayed at his home and nursed him.
3. During his recovery, she cooked, shopped and did his laundry.

The Appellant testified that:

1. He was interested in [text deleted].
2. The Deceased also became interested in [text deleted] and they often travelled together at [text deleted] where they displayed the Appellant's [text deleted] and where they had an opportunity to meet new people and develop friendships.
3. On one occasion, they took a trip together to [text deleted].
4. They never took any holidays alone, with the exception of one trip the Deceased went on with her aunt to [text deleted] for a period of 40 days. At that time, the Appellant took care of her lawn and flowers.

The Appellant testified that:

1. They had discussed marriage but the Appellant indicated that she did not object to marriage but was not ready to take the step at that time.
2. Having regard to their age and the Appellant's need to have financial independence, they decided not to have children.
3. The Deceased had a relationship with the children of her siblings and doted upon her nieces and nephews.

The Appellant testified that:

1. The Deceased was raised in a [text deleted] home in [text deleted], Manitoba, [text deleted].
2. The Deceased's father was separated from her mother and he had little or no contact with his children.
3. The Deceased's mother was considered the matriarch of the family and the Appellant's and Deceased's social activities revolved around attending the mother's home in [text deleted] and participating in family weddings, funerals, and holidays such as Christmas and Easter.
4. The Appellant was very respectful of the culture of the Deceased's family and he became part of the family and was accepted by them.
5. Having regard to the Appellant's and Deceased's work schedule, the primary social contact they had when they were at home from work was to travel to [text deleted] to visit with the Deceased's mother and her siblings.
6. Since the Appellant and the Deceased were on the road for 25 to 31 days per month, the ability to develop social relationships in [text deleted] was limited.
7. He developed a strong bond with the Deceased's mother, brothers and sisters who resided in the [text deleted] area and he was accepted as a member of the family.
8. In order to be accepted in the family, he learned to speak [text deleted] in order to communicate with the Deceased's mother and siblings in their native language.
9. He was respectful of the family's culture and religion and when they stayed over at the Deceased's mother's they would sleep in separate beds.
10. When the Deceased's brother married, as a member of the family, he participated in the preparation of the wedding ceremony by running errands, painting a car and sprucing it up for the wedding and then chauffeured the groom to and from the wedding.

11. When one of her brothers [text deleted] had problems with the refrigeration unit [text deleted], the Appellant volunteered to pick up the refrigeration part in [text deleted] and drove it to [text deleted], Manitoba, [text deleted].

### **[The Deceased's Brother]**

[The Deceased's Brother] testified:

1. He resided in the [text deleted] area [text deleted].
2. He had known the Appellant for a period of 10 years.
3. He noted that the Appellant had learned to understand and speak [text deleted] because he wanted to be accepted by the family.
4. On many occasions he was able to observe the Appellant together with the Deceased and testified that they were very close and inseparable and demonstrated affection for each other in the presence of him and other members of the family.
5. When he was getting married, the Appellant spruced up one of his cars for the wedding and acted as a chauffeur for him during the wedding.
6. The Appellant attended the Jack and Jill showers with the Deceased in respect of family and friends weddings.
7. On one occasion the Appellant prepared a song that the Deceased's mother liked and he sang it to her at a party.
8. He stated that the Appellant and the Deceased appeared to be just like a married couple.

### **[The Deceased's Sister]**

[The Deceased's Sister] testified:

1. She met the Appellant 10 years prior to the death of the Deceased.
2. In her view they were partners in every sense of the word.

3. They signed cards “[the Appellant and the Deceased]” just as any couple would and sent out gifts to members of the family.
4. She testified that they attended family functions together, Christmas, Easter, birthdays, funerals and weddings.
5. They were very intimate and when they were together they would hold hands and kiss each other.
6. The Appellant was very respectful of their mother, who is sensitive to her religious views.
7. That he gifted a [text deleted] to the Deceased.

She further testified that:

1. She prepared the long form obituary and consulted with the Appellant as to how he would be described and it was determined that he would be described as a special friend.
2. Out of respect to the Deceased’s mother they described him as a special friend and not as a common-law partner, which the mother would find to be in bad taste.
3. She also confirmed that when they slept over at their mother’s house, the Appellant and the Deceased slept in separate bedrooms.

**[The Deceased’s Cousin’s Wife]:**

[The Deceased’s Cousin’s Wife] has been married for 44 years to a cousin of the Deceased and lives and works in [text deleted]. She grew up in the town of [text deleted], and knew the Deceased’s family. She was always invited to family affairs and always saw the Appellant and the Deceased together. She observed them hugging and kissing like married couples would. They both attended at her house on several occasions. She assisted [the Deceased’s Sister] in removing items from the Deceased’s house after her death and observed that the Appellant’s

clothes and toiletries were located in the Deceased's house. She also observed that the Appellant's business files and documents were located in a desk near the computer in the Deceased's house.

**[The Deceased's Real Estate Agent]:**

[The Deceased's Real Estate Agent] testified that:

1. He knew the Deceased while they were students at [text deleted] in Grade 9.
2. He met her again in 2007 when he was a real estate agent and a friend of the Appellant.
3. He acted on behalf of the Deceased when she purchased her house and that the Appellant had attended at the house for inspection prior to the house purchase.

He further testified that:

1. He had met the Appellant in a professional capacity when the Appellant wanted to purchase rental properties and he assisted him in that respect.
2. They became friends and on occasion, the Appellant and the Deceased socialized with him and his wife.
3. They appeared to be just like a married couple, held hands and were very close.
4. He also confirmed that the Appellant loaned the Deceased (sic) \$5,000 to purchase the house.

**[The Appellant's and Deceased's Co-worker]**

[The Appellant's and Deceased's Co-worker] testified that:

1. He is a fleet manager with [text deleted] and was employed with them since April 2006.
2. Both the Appellant and the Deceased were employed by [text deleted] as transport operators and operated a truck together.

3. He noted that they acted as a couple, just like the married couples who operated trucks jointly at [text deleted].
4. The Appellant and the Deceased attended the company's Christmas party together and appeared to act just like any other married couple.

### **[The Deceased's Cousin]**

[Text deleted] is the Deceased's first cousin and lives in [text deleted]. She married into the family in 1965 and her husband was a [text deleted]. The Appellant and the Deceased attended Jack and Jill showers together and acted like a couple. They appeared to have a mature relationship rather than a dating relationship. She further testified that the Appellant was very fond of her children.

MPIC did not call any witnesses.

### **Submissions:**

Legal counsel for the Appellant submitted that he had established on a balance of probabilities there existed a common-law relationship between the Deceased and the Appellant for a period of more than 3 years prior to the Deceased's death. He reviewed the legal authorities in respect of common-law relationships, the documentary evidence filed in the proceedings, and the testimony of the Appellant and the witnesses that were called by the Appellant at the hearing. He submitted that this testimony corroborated the Appellant's testimony that he had cohabitated for a period of approximately 5 years with the Deceased prior to her death.

The Appellant's legal counsel further submitted that while the Appellant and the Deceased lived in separate residences, having regard to the nature of their work and social activities, they were

in continuous contact most of the time and asserted that the Appellant had sexual relations with the Deceased while they were off duty, during the 25 to 31 days they were working as truck operators, and during their work break in [text deleted] at their separate residences.

The Appellant's legal counsel also reviewed the testimony of the Deceased's siblings and cousins, as well as that of the real estate agent and fleet manager, who all testified that the Appellant publicly demonstrated affection to each other and acted like a married couple. He also asserted that in their common-law relationship the Appellant and the Deceased slept together, ate together, and shared domestic duties together. They jointly engaged in social activities, primarily with the Deceased's family, attending and displaying the Appellant's [text deleted] at various [text deleted] shows.

The Appellant's legal counsel therefore submitted that the appeal should be allowed and the Internal Review Officer's Decision of June 4, 2009 be dismissed.

MPIC's legal counsel submitted that the evidence did not establish on a balance of probabilities that there was a common-law relationship between the Appellant and the Deceased in excess of 3 years on the following grounds:

1. The Appellant and the Deceased had separate residences, and although this is not conclusive it is a factor that the Commission should consider on the issue of cohabitation.
2. In respect of their financial arrangements, there was no comingling of funds and each had their own separate bank account.
3. The Appellant's beneficiary in his Will was not the Deceased, but his friend's children.
4. The Deceased's beneficiary in her Will was not the Appellant, but her previous common-law partner, [text deleted]

5. The Deceased had an opportunity during her long-standing relationship with the Appellant to change the beneficiary on her Will and she did not.
6. In response to the Appellant's request to marry, the Deceased indicated that she was not ready at the time.
7. When completing their Income Tax returns, the Appellant and the Deceased designated themselves as single rather than in a common-law relationship.
8. There was limited evidence, of a narrow nature, in respect of the societal acceptance by the community that the Appellant and the Deceased were in a common-law relationship. The only testimony put forth in this respect by the Appellant was from the Deceased's family, a real estate agent and a fleet manager at [text deleted]. There was no evidence from neighbours or other members of society that the Appellant and the Deceased represented themselves in public as common-law partners.

Having regard to the documentary evidence, MPIC's legal counsel submitted that:

1. In respect of the legal authorities, the separate financial arrangements between the Appellant and the Deceased, and the separate beneficiaries on their Wills, and separate residences clearly demonstrated that the Appellant and the Deceased did not have a common-law relationship.
2. The documentary evidence was inconsistent with the testimony of the Appellant and his witnesses and demonstrated that no common-law relationship existed.

MPIC's legal counsel therefore submitted that the appeal should be dismissed and the Internal Review Officer's decision dated June 4, 2009 should be confirmed.



**Discussion:**

The Commission rejects MPIC's submission and finds that the Appellant has established on a balance of probabilities that he and the Deceased cohabitated in a conjugal relationship for a period of at least 3 years immediately preceding the death of the Deceased in a motor vehicle accident.

**Legal Authorities:**

A review of the legal authorities indicates there is no precise definition of the term cohabitation. Court decisions have indicated that there are a number of factors for the Commission to consider in determining the issue of cohabitation. The question of whether or not there was cohabitation is to be determined by the facts of each individual case. As a result the Courts have concluded there is no one factor which is necessarily conclusive in deciding the issue of cohabitation and that the totality of the evidence must be considered in arriving at a decision in this respect.

The Manitoba Court of Appeal in *Steffen v. Bryer*, 2004 MBCA 83, 184 Man.R. (2d) 310, addressed the meaning of 'cohabitation' in a common-law relationship pursuant to the provisions of the *Fatal Accident Act*, RSM [1987], C. F50 (the "Act"). The Plaintiff's main claim pursuant to the *Fatal Accident Act* (supra), alleged that the death of her "common-law spouse" was caused by the negligence of the Defendant. The Defendant sought a judgment dismissing the claim on the ground that the Plaintiff did not come within the definition of "common-law spouse" in the Act. In March of 2000 the deceased died as a result of injuries sustained while working for the defendants, his employers. At the time of the death of the deceased, when the cause of action arose, the Act created the same cause of action for a "common-law spouse" as for a married spouse. "Common-law spouse" was defined as:

## Common-law spouse

- 3(5) Where the deceased
- (a) Cohabitated with a person continuously for a period of not less than five years immediately preceding death in a relationship in which that person was substantially dependent upon the deceased;...

In *Steffen* (supra) the Court stated:

That person has the same rights as a husband or wife under this Act and shall, subject to subsection (6), be included in the action under subsection (1).

The Plaintiff maintained that she and the Deceased were “common-law spouses” and cohabited in a common-law relationship. In discussing the meaning of ‘cohabitation’ the Court stated:

...the term “cohabit” does not have a precise meaning, but it has received considerable judicial interpretation to assist courts in determining, on the facts, whether two people cohabited. In the case of *Tanouye v. Tanouye*, [1994] 2 W.W.R. 735 (Sask. Q.B.), the court considered many of the authorities and concluded (at para. 36):

The authorities seem to indicate that a common-law relationship or marriage requires perhaps not all but at least a majority of the following characteristics: economic interdependence including an intention to support; a commitment to the relationship, express or implied, for at least an extended period of time; sharing of a common principal residence; a common desire to make a home together and to share responsibilities in and towards that home; where applicable, shared responsibilities of child rearing; and a sexual relationship. As well, it appears that, superimposed on the relationship, there should be the general recognition of family, friends, and perhaps to some extent the larger community, that the particular man and woman appear as a “couple”, i.e., a family unit. (Underlining added)

Again, the case of *Molodowich v. Penttinen*, (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), Kurisko D.C.J. adopted the same approach. He canvassed a number of decisions concerning the interpretation of the word “cohabit” and consolidated the factors into seven descriptive components, no single component being determinative (at pp. 381-82):

- (2) shelter;
- (3) sexual and personal behaviour;
- (4) services;
- (5) social;
- (6) societal;
- (7) support (economic); and
- (8) children.

Taking those factors and applying them to the plaintiff's affidavit, and accepting those facts as true, the evidence establishes that the plaintiff and the deceased were certainly in a relationship of some kind, but not a relationship where the parties cohabited together.

In the case of *Wright-Watts v. Watts*, 2005 ABQB 708, the Court stated:

(18) In *M. V. H.*, [1999] 2 S.C.R. 3 at para. 59, a majority of the Supreme Court of Canada, per Cory and Jacobucci JJ., said that the Molodowich factors are the "generally accepted characteristics of a conjugal relationship" and that not all are necessary to establish a conjugal relationship. At para. 60, they further said that the weight to be accorded the factors to be considered in determining whether a conjugal relationship exists will vary widely and almost infinitely. The *Molodowich* factors have been cited with approval by this Court in *Spracklin v. Kichton* (2000), 278 A.R. 27, 2000 ABQB 812; *Diebert v. Calder* (2001), 289 A.R. 228, 2001 ABQB 187; *Medora v. Kohn* (2003), 336 A.R. 163, 2003 ABQB 700; and *Spracklin* (2003). (Underlining added)

The Commission has applied the *Molodowich* (supra) factors in determining whether a common-law relationship existed.

### 1. Shelter:

The Commission finds that although the Appellant and the Deceased maintained separate residences, this does not prevent the finding of cohabitation. In *Campbell v. Szoke*, 2003 CanLII 2291 (ON SC), the Court stated:

(52) The fact that parties maintain separate residences does not prevent the finding of cohabitation. The court must look at all of the circumstances and consider the reasons for maintaining another residence, such as to facilitate access with one's children: *Thauvette v. Malyon* (1996), 23 R.F.L. (4<sup>th</sup>) 217 at 222 (Ont. Gen. Div.). Continuous daily cohabitation is not a necessity for a finding under s. 29 of the *Family Law Act*. A couple who lived together only on weekends was found to be cohabiting in *Hazelwood v. Kent*, [2000] O.J. No. 5263 at 8 (Ont. S.C.J.). 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: *McEachern v. Fry Estate*, [1993] O.J. No. 1731 at para 21 (Ont. Gen. Div.). In *Macmillan-Dekker v. Dekker*, [2000] O.J. No. 2957 at 22, Wilson J. Said: "Objective contemporaneous evidence is more probative of the nature of the parties' relationship than the *viva voce* evidence of the parties in the midst of acrimonious and bitter proceedings." (Underlining added)

In *Wright-Watts v. Watts*, (supra), the Court stated:

[19] A common law relationship can exist, albeit atypically, in the absence of a shared residence. For example, in *McEachern v. Fry Estate*, [1993] O.J. No. 1731 (Gen. Div.), the parties met later in life and were constant companions for 15 years before one of them died. Although they spent much time in each other's residences, they maintained separate residences. In all the circumstances, Sheppard J. Found continuous cohabitation...

In the case of *Stephen, Ribera, Routledge, Stephen, Pinder v. Stawecki and Stawecki*, 2006 CanLII 20225 (ON CA), the Court stated:

[4] The appellant submits that we should impose a bright line test and conclude that as the respondent had not "moved in" with the deceased as of May 6, they were not living together at that time. We disagree. 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, a mechanical bright line test is simply not possible. In our view, to accept the appellant's argument would be inconsistent with the flexible approach taken by the Supreme Court of Canada in *M. v. H.* [1999] 2 S.C.R. 3 in this area. We agree with the respondent that 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: see *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.); *Thauvette v. Malyon*, [1996] O.J. No. 1356 (Ont. Ct. Gen. Div.); *Campbell v. Szoke* [2003] O.J. No. 3471 (S.C.). (Underlining added)

The Supreme Court of Canada discussed the meaning of `cohabitation` in *Hodge v. Canada* (Minister of Human Resources Development), (2004), 125 C.R.R. (2d) 48. In this case the Court was dealing with a Respondent's claim seeking a survivor's pension under the Canada Pension Plan. The Respondent lived in a common-law relationship with the deceased, a CPP contributor, between 1972 and February 1993, at which point, because of an alleged verbal and physical abuse, she left and, after a brief reconciliation failed, she ended the relationship in February 1994 finally and permanently.

The Court referred to the relevant statutory provisions under the Canada Pension Plan as follows:

*Canada Pension Plan*, R.S.C. 1985, c. C-8

2. (1) ...

``spouse``, in relation to a contributor, means,

...

(ii) a person of the opposite sex who is cohabiting with the contributor in a conjugal relationship at the relevant time, having so cohabited with the contributor for a continuous period of at least one year, and

and, in the case of a contributor`s death, the `relevant time`, for greater certainty, means the time of the contributor`s death.

The Court defined cohabitation as follows:

The respondent terminated cohabitation and cohabitation is a constituent element of a common law relationship. “Cohabitation” in this context is not synonymous with co-residence. Two people can cohabit even though they do not live under the same roof and, conversely, they may not be cohabiting in the relevant sense even if they are living under the same roof... (Underlining added)

The Appellant testified at the proceedings, and Commission finds that his testimony in his examination in chief and cross-examination was direct and unequivocal. The Commission determines that he was a candid witness and accepts his testimony in all issues under dispute between himself and MPIC. The Commission further finds that the testimony from the Deceased’s relatives was impressive and the Commission finds they were all credible witnesses and their testimony corroborated the evidence of the Appellant.

## **2. Sexual and Personal Behaviour:**

The Appellant testified that although he and the Deceased had separate residences they lived together in a conjugal relationship.

The Appellant also testified that:

1. Although he and the Deceased maintained separate residences they cohabited jointly on a rotation basis in each residence during their work breaks and in the cab area of the truck during their 25 to 31 day long distance trip.
2. The only time they did not sleep together is when they were at the Deceased's mother's home and slept in separate beds.
3. Both he and the Deceased kept personal clothing and toiletries at each other's home.
4. He owned several rental homes and he kept his business records and his Income Tax documents at the Deceased's home. This testimony was corroborated by the Deceased's sister, [text deleted], and the Deceased's cousin, [text deleted], when they visited the Deceased's home after her death.

The Appellant further testified that:

1. They ate their meals together during the course of their 25 to 31 day road trips and during the time they were on work breaks in [text deleted], or when visiting the family farm in [text deleted], Manitoba.
2. They assisted each other in time of illness. When the Deceased broke her leg, the Appellant stayed with her and nursed her during her recovery. When the Appellant had [surgery] the Deceased stayed at his home and nursed him.
3. When one person was short of cash, the other person would provide funds to deal with the cash shortage.
4. When the Deceased bought her home, the Appellant loaned her \$5,000 as a deposit, which she subsequently repaid.
5. The Appellant had experience in the real estate market and advised the Deceased on the purchase of her home.

6. For her new home he bought her a garage door, dishwasher, freezer and computer.
7. The Deceased liked a certain [text deleted], which the Appellant purchased for approximately \$500 and spent \$8,000 restoring it and presented it to her as a gift.
8. The Appellant was a [text deleted] and the Deceased developed a love of [text deleted] and they often attended [text deleted] shows where the Appellant displayed his [text deleted] to the public.

The Commission accepts the Appellant's testimony that he and the Deceased maintained an attitude of fidelity to each other and that his description of his daily life was based on loving feelings and mutual respect.

### **3. Services:**

The Appellant testified that:

1. They shared their domestic duties jointly while she did his laundry, he did the yard work and vacuumed her home. He did all of the snow clearing and lawn mowing.
2. They shopped together for food and when they stayed at her home she did the cooking and he did the preparation, and when they stayed at his home he did the cooking with her assisting and doing the preparation.
3. The Deceased had a background in bookkeeping and she maintained the Appellant's business and Income Tax records.

### **4. Social:**

The Commission finds that since the Appellant and the Deceased were away from [text deleted] for 25 to 31 days at a time, they were unable to participate in many neighbourhood and

community activities, or establish many friendships with their neighbours or members in the community. The Appellant testified that:

1. Having regard to their work schedule, the only opportunity they had to socialize was on their days off, which they primarily spent with the Deceased's family in [text deleted].
2. On their days off they would often drive out to [text deleted] and stay at the Deceased's mother's home and socialize with members of the Deceased's family living in the area.
3. They attended all of the family celebrations, including Christmas, Easter, and weddings.
4. He wished to be part of the Deceased's family and therefore learned to understand and speak [text deleted] so he could communicate with them in the [text deleted] language.

The Commission finds that the Appellant was accepted as a member of the Deceased's family and the Appellant's testimony in this regard was corroborated by the testimony of the Deceased's siblings and cousin.

#### **5. Societal:**

The Deceased's brother, [text deleted], her sister, [text deleted], and cousin [text deleted] all testified that:

1. The Appellant and the Deceased demonstrated a close and loving relationship while in their company.
2. They were often observed hugging and kissing like married couples.
3. Since the primary social activities of the Appellant and the Deceased were with her family, they attended the family weddings, funerals and the various activities over the holidays, such as Christmas and Easter.



The Deceased's family had ample opportunity to observe the relationship between the Appellant and the Deceased. The close relationship was also corroborated by [text deleted], the real estate agent, and by [text deleted], the fleet manager at [text deleted].

#### **6. Support (Economic):**

The Commission notes that no one criteria as set out in *Molodowich* (supra) is conclusive as to whether there was a common-law relationship. The Commission rejects MPIC's submission that since the Appellant and the Deceased maintained separate bank accounts, did not name each other as beneficiaries under their separate Wills, and had separate residences, that this demonstrated that the Appellant and the Deceased were not in a common-law relationship.

In *Jensen v. Schevelik*, 2010 MBQB 144 (CanLII) the Court stated:

(48) The parties agree that they maintained separate finances from the beginning through to the end of their relationship. The respondent argues that this fact is extremely important to, if not virtually determinative of, disposition of the case.

(49) Keeping their financial affairs independent of each other is demonstrative of, he says, a broader common intention not to engage in a conjugal relationship.

(50) I disagree

(51) While this fact is of significance it is not conclusive; and, in any event, it must be examined contextually, not in isolation from all of the surrounding circumstances, before any conclusions can be reached or inferences drawn about intentions.

The Commission rejects MPIC's legal counsel's submission that because the Deceased did not accept the Appellant's proposal of marriage at that time, this demonstrated she did not intend to be in a common-law relationship with him. The Commission notes that when the Appellant met the Deceased they were both mature adults and not teenagers. The Appellant was [text deleted] years old and the Deceased was [text deleted] years old. They dated for a period of 5 years until 2003 when they entered into a common-law relationship. At this time the Appellant would have

been approximately [text deleted] years old and the Deceased [text deleted] years of age. They both had many life experiences which informed their mature relationship.

The Commission finds, having regard to the evidence submitted at the hearing, that over a period of 10 years the Appellant and the Deceased not only cohabited together but maintained an attitude of fidelity to each other and a loving and respectful relationship. The Commission finds that this was more than a dating relationship and is consistent with a common-law relationship. The decision of the Deceased, at this stage in the relationship, to defer the Appellant's proposal of marriage is consistent with the Deceased being content maintaining a common-law relationship. For these reasons the Commission rejects MPIC's legal counsel's submission that since the Deceased did not accept the Appellant's proposal of marriage at that time, this demonstrated that she did not intend to be in a common-law relationship with him.

The Commission also rejects MPIC's legal counsel's submission that there was no existing common-law relationship because the Deceased had her own bank account, owned her own home, and had designated her previous boyfriend as the beneficiary in her Will. The Commission finds that in today's society it is not unusual for married couples or common-law couples, who are both working and earning separate incomes to maintain separate bank accounts, separate investments and to designate persons other than each other as beneficiaries in their Wills.

The Commission accepts the Appellant's testimony that:

1. The Deceased had a difficult upbringing.
2. She left home at the age [text deleted].
3. She had to support herself at a very early age.

4. She did so by training to become a bookkeeper and then a transport truck driver.
5. At the time she met the Appellant she was [text deleted] years of age, she was in debt and she was determined to become financially independent, own her own home and be financially secure. The Commission finds that in these circumstances it is not unreasonable to conclude that the Deceased desired to have her own bank account and not have a joint financial arrangement with the Appellant, and this is not inconsistent with her common-law relationship with the Appellant.

The Commission also finds it is not inconsistent of the common-law relationship between the Appellant and the Deceased to have named each other as beneficiaries in their respective company pension plans and at the same time designated persons other than themselves as beneficiaries in their respective Wills.

The Commission notes that the Appellant met the Deceased when he was [text deleted] years old and she was [text deleted] years old and they commenced a dating relationship. Prior to meeting each other, it would not have been unreasonable for the Appellant to develop friendships with other people and to have named the children of his best friend as beneficiaries in his Will.

Prior to meeting the Appellant, the Deceased had a relationship with a boyfriend and during that relationship she had designated him as beneficiary in her Will. After the break-up of her relationship with her boyfriend, she commenced a dating relationship with the Appellant. The Commission accepts the submission of the Appellant's legal counsel that it is not uncommon for people to forget they have drawn up a Will. The Commission also finds that it is not unreasonable to conclude that the Deceased, being a healthy young person, did not expect to die

in an automobile accident in her [text deleted] and perhaps did not consider it necessary to change her Will at that time.

As a result, the Commission finds that although the parties designated persons other than themselves as beneficiaries in their respective Wills, this does not establish that they were not in a common-law relationship.

## **7. Children**

The Commission accepts the Appellant's testimony that, having regard to the fact that the Deceased was [text deleted], it was not desirable to have children.

### **Decision:**

The Commission adopts the language of the Ontario Court of Appeal in the case of *Stephen, Ribera, Routledge, Stephen, Pinder* (supra) describing the relationship between the Appellant and the Respondent that:

...Their relationship was an exclusive one, neither party being unfaithful. They slept, shopped, gardened, cooked, cleaned, socialized, and lived together as a couple and were treated as such by their friends, family and neighbours. While they may not have finalized any joint financial arrangements and continued to maintain separate residences, they lived together under the same roof.

In determining that there was a common-law relationship between the Appellant and the Deceased, the Commission applied the criteria as set out in *Molodowich* (supra). The legal authorities established that having separate residences is not inconsistent with a common-law relationship.

The Commission finds that the criteria for sexual and personal behaviour, services, social and societal clearly establish that the Appellant and the Deceased were involved in a common-law relationship. The Commission further finds that the evidence in respect of these criteria trumps the criteria in respect of support (economic) in establishing a common-law relationship.

For these reasons, the Commission finds, having regard to the totality of the evidence, that the Appellant has established on a balance of probabilities that there was a common-law relationship between himself and the Deceased for a period in excess of three years. The Commission therefore allows the Appellant's appeal and rescinds the decision of the Internal Review Officer dated June 4, 2009.

Dated at Winnipeg this 12<sup>th</sup> day of October, 2012.

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**MEL MYERS, Q.C.**

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**DR. SHELDON CLAMAN**

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**DR. NEIL MARGOLIS**