

Citation : *Estate A.B.C. v. Respondent 1 and the Superintendent of Pensions*, 2016 NBFCST 1

PROVINCE OF NEW BRUNSWICK
FINANCIAL AND CONSUMER SERVICES TRIBUNAL
IN THE MATTER OF THE *PENSION BENEFITS ACT*, S.N.B. 1987, c P-5.1.

Date: 2016-02-23
Docket: PE-001-2014

BETWEEN:

Estate A.B.C.,

Applicant,

-and-

Respondent 1 and Superintendent of Pensions,

Respondents.

DECISION

Restriction on publication: This Decision has been anonymized to comply with the *Right to Information and Protection of Privacy Act*, S.N.B. 2009, c R-10.6.

PANEL: Monica L. Barley, Panel Chair
Enrico Scichilone, Panel Member
Gerry Legere, Panel Member

DATE OF HEARING: February 17-19, April 20-21, and June 1, 2015

WRITTEN REASONS: February 23, 2016

APPEARANCES: Marylène Pilote and Chantal Moreau for Estate A.B.C.
Robert J. Peters and Jennifer Hanson for Respondent 1
Brian Maude for the Superintendent of Pensions

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I. OVERVIEW

- [1] This is the sad story of a man who passed away suddenly and the battle that ensued between his loved ones for the death benefit under his pension plan. On September 29, 2010, that man, a millwright by trade, passed away of a massive heart attack while at work.
- [2] The Estate is made up of the deceased's three adult children. These three children had unfortunately lost their mother in 1999 when they were teenagers. Three years later in 2002, their father started a relationship with Mrs. C (Respondent 1). The deceased's children had difficulty accepting their father's new girlfriend.
- [3] Mrs. C is a 58-year-old mother of three grown children. She comes from a big family and stopped school to stay home and help take care of her younger siblings. She has a grade 9 education. Mrs. C married, had three children, and separated from the father of her children in 1994. From 1994 to 2002, she lived a very modest life with her children in government subsidized housing provided by NB Housing.
- [4] This is an appeal of the decision of the Superintendent of Pensions dated January 28, 2014 finding that Mrs. C was entitled to the death benefit under the pension plan. This appeal was brought pursuant to subsection 73(1) of the *Pension Benefits Act*, S.N.B. 1987, c P-5.1 [*Pension Benefits Act*] and proceeded by way of a hearing de novo. As such, there is no appellate burden, nor is there any judicial review involved.
- [5] The proceedings before the Superintendent of Pensions were a review requested by the Estate of the March 21, 2012 decision of the pension plan administrator, Morneau Shepell, finding that Mrs. C was entitled to the death benefit under the deceased's pension plan.
- [6] The Estate maintains that it is entitled to the death benefit as the designated beneficiary under the pension plan. According to the Estate, Mrs. C is not entitled to the death benefit as she does not come within the definition of spouse for two main reasons: (1) their father and Mrs. C cohabitated for only 1 year and 8 months, which is less than the 3 years required by the *Pension Benefits Act*; and (2) Mrs. C was not substantially dependent upon their father for support.
- [7] The Estate also maintains that regardless of whether Mrs. C was their father's spouse, their claim to the death benefit has priority over Mrs. C's claim pursuant to subsection 1(2) of the *Pension Benefits Act*.
- [8] On the other hand, Mrs. C maintains that she was the deceased's spouse as defined in the *Pension Benefits Act* and is alone entitled to the death benefit. Mrs. C maintains that she and the deceased cohabited continuously for about seven years. She states that in the early years of their relationship, this cohabitation was between the deceased's home and her rental home, but that by late 2006 or at the latest February 2007, they were living at the deceased's home. Mrs. C maintains that they maintained two residences until January 2009 to avoid conflicts with and between their respective children.
- [9] The Superintendent of Pensions, who is a party to this appeal pursuant to subsection 75(1) of the *Pension Benefits Act*, takes no position regarding the merits of this appeal other than to provide an explanation of the context in which the decision was made and drawing the attention of the Tribunal to those considerations rooted in the Superintendent of Pensions' specialized jurisdiction and expertise in pensions law.

- [10] The evidence on this appeal consists of the Record of the decision-making process of the Superintendent of Pensions as required by paragraph 11(4) of the Tribunal's procedural rules, Local Rule 15-501: *Proceedings before the Tribunal*, [Tribunal's procedural rules], an Agreed Statement of Facts, 11 additional Exhibits, and the testimony of 13 witnesses including the parties.
- [11] For the reasons that follow, we conclude that Mrs. C is entitled to the death benefit from the deceased's pension plan.

II. PRELIMINARY MATTERS

A. Witnesses

- [12] At the start of the hearing, Mrs. C sought leave of the panel to amend her witness list. She sought to delete one witness, Witness S.L., from her witness list and add two additional witnesses, Witness D.L. and Mrs. C's Sister 1, to her witness list. Both Witness D.L. and Mrs. C's Sister 1 had previously written letters detailing the relationship between the deceased and Mrs. C and these letters are contained in the Record.
- [13] We also point out that the Estate did not submit a witness list and, as such, was not in compliance with the Tribunal's procedural rules. That being said, the Estate had obtained Summons to Witness for all the witnesses it intended to call at the hearing.
- [14] Subsection 8(4) of the Tribunal's procedural rules requires parties who intend to call witnesses to testify at a hearing to provide to every other party and to the Registrar of the Tribunal, at least 10 days before the hearing, a list of the witnesses the party intends to call to testify together with a summary of the evidence that the witness is expected to give.
- [15] Given that at least part of the substance of the testimony of Witness D.L. and Mrs. C's Sister 1 was disclosed in the Record such that the Estate would not be taken by surprise, we granted Mrs. C leave to call these two additional witnesses.
- [16] We also granted the Estate leave to call all witnesses for which Summons to Witness had been obtained.

B. Admissibility of Evidence

- [17] At the start of the hearing, the Estate requested that certain documents be removed from the Record on the basis that (1) the authors of these documents would not be present to testify and, as such, these documents constitute hearsay; and (2) that the Estate did not have the benefit of these documents in the proceeding before the Superintendent of Pensions. These documents are all found in Binder 1, Tab C of the Record and are:
- A letter of May 15, 2012 from the mother of the deceased to the Superintendent of Pensions;
 - A letter of May 10, 2012 from the niece of the deceased to the Superintendent of Pensions;
 - A letter of June 20, 2012 from Mrs. C's brother to the Superintendent of Pensions;

- An undated letter from Mrs. C's Sister 3 to the Superintendent of Pensions;
- A letter of June 16, 2012 from Mrs. C's Sister 2 to the Superintendent of Pensions; and
- A letter of June 20, 2012 from F.F. to the Superintendent of Pensions.

[18] Mrs. C opposed the Estate's request on three grounds: (1) the documents had been provided to the parties months in advance of the hearing; (2) the documents were admissible pursuant to Rule 38(6); and (3) the proceeding before the Tribunal is a hearing de novo.

[19] We note that the reference to Rule 38(6) should be a reference to subsection 38(6) of the *Financial and Consumer Services Commission Act*, S.N.B. 2013, c 30 [FCSC Act] which grants the Tribunal a fair amount of latitude in admitting evidence and states:

38(6) The Tribunal may receive in evidence any statement, document, record, information or thing that, in the opinion of the Tribunal, is relevant to the matter before it, regardless of whether the statement, document, record, information or thing is given or produced under oath or would be admissible as evidence in a court of law.

[20] We allowed the documents into evidence on the basis of subsection 38(6) of the *FCSC Act* as the documents appeared relevant to the issues. We stated that the documents would be given the weight deemed necessary, after having heard all of the evidence and arguments of the parties.

C. Hearing Closed to the Public

[21] At the start of the hearing, we raised the issue of whether this hearing should be closed to the public given the confidential nature of the testimony and the documentary evidence which involved much personal information and intimate details of the relationship between the deceased, the Estate and Mrs. C. The Record contained tax returns, employment records, bank records, letters and documents providing intimate details of the relationship between the deceased and Mrs. C. The testimony at the hearing canvassed these documents.

[22] It should be noted that this Tribunal is subject to the *Right to Information and Protection of Privacy Act*, S.N.B. 2009, c R-10.6 [*Right to Information and Protection of Privacy Act*] and as such has the obligation, amongst others, to limit the disclosure of personal information.

[23] The Tribunal's procedural rules state as follows regarding public access to proceedings:

16(3) Public access to Proceedings – Subject to the provisions in Part 9 and to subsections 16(2) and 16(2.1), a hearing is open to the public unless the Panel orders that some or all of the hearing be held in private to protect a substantial and compelling privacy interest of one or more of the persons attending the hearing and that to do so would not be prejudicial to the public interest.

[24] Noting the consent of the parties and the confidential nature of the testimony that would be given and the documents contained in the Record, we ordered that the hearing be closed to the public.

D. Exclusion of Witnesses

[25] The Estate also requested that witnesses be excluded from the hearing room until it was their turn to testify in order to avoid tainting of their testimony, following which they would be permitted to remain in the hearing room.

[26] Mrs. C opposed this request without providing further argument in support.

[27] Considering that several witnesses had familial ties, we granted the Estate's request.

E. Sealing Order

[28] The Superintendent of Pensions also requested an order sealing the documentary evidence, the pleadings and any evidence tendered during the hearing in this proceeding pursuant to subsection 16(2) of the Tribunal's procedural rules. In the Superintendent of Pensions' view, a sealing order was appropriate given that the hearing would deal with very private matters and also due to the personal nature of the evidence which would be covered by privacy legislation.

[29] Subsection 16(2) of the Tribunal's procedural rules deals with requests for confidentiality and stipulates:

16(2) Request for confidentiality – On the application of a Party and after providing the Party with an opportunity to be heard, the Panel may order that any document filed with the Registrar, any document received in evidence or any transcript of a Proceeding be kept confidential.

[30] After having considered the intimate nature of the personal information contained in the pleadings, the oral testimony, and documentary evidence and having regard to the Tribunal's obligations under the *Right to Information and Protection of Privacy Act*, we are of the view that a sealing order is appropriate and we issued a sealing order on June 1, 2015 [*Estate A.B.C. v. Respondent 1 and the Superintendent of Pensions*, 2015 NBFCST 4].

III. ISSUES

[31] This appeal raises one ultimate issue: Who is entitled to the death benefit under the deceased's pension plan pursuant to subsection 43(2) of the *Pension Benefits Act*?

[32] In order to provide an answer to this issue, we must analyze the following three sub-issues:

(a) Credibility

(b) Was Mrs. C the spouse of the deceased?

(c) Does the priority in subsection 1(2) or subsection 43(5) of the *Pension Benefits Act* apply?

IV. ANALYSIS

[33] Subsection 43(2) of the *Pension Benefits Act* sets out entitlement to the pre-retirement death benefit under a pension plan. That subsection states:

43(2) Subject to subsections (7) and (8), if a member of a pension plan is entitled to a deferred pension under section 35 on termination of employment and dies while employed, the spouse of the deceased member is entitled to,

(a) if the member dies before the commencement of this subsection, a payment equal in amount to not less than sixty per cent of the commuted value of the deferred pension, or

(b) if the member dies on or after the commencement of this subsection, a payment equal in amount to the commuted value of the deferred pension.

[34] We conclude that pursuant to subsection 43(2) of the *Pension Benefits Act*, Mrs. C is entitled to the death benefit under the deceased's pension plan. She was his spouse at the time of his death and her claim has priority over that of the Estate.

A. Credibility

[35] Turning now to the issue of credibility, we note that this appeal hinges on credibility. For the reasons that follow, where there are inconsistencies or contradictory evidence between the evidence of the Estate and Mrs. C and Mrs. C's daughter, we prefer the evidence of Mrs. C and Mrs. C's daughter. We also accept the testimony of Mrs. C and Mrs. C's daughter regarding their explanation for the inconsistencies in Mrs. C's recollection of dates.

(i) Conflicting Evidence between the Parties

[36] There was conflicting testimony between the Estate on the one hand and Mrs. C and her daughter on the other hand regarding (1) when Mrs. C moved into the deceased's home; (2) whether Mrs. C had personal belongings at the deceased's home before January 2009; (3) the financial arrangement between Mrs. C and the deceased; (4) the number of nights per week the couple spent together before Mrs. C moved into the deceased's house; and (5) the deceased's daily routine after work.

[37] In all instances, we prefer the evidence of Mrs. C and her daughter to that of the Estate. The following facts support our position on credibility:

- Mrs. C's daughter provided a concrete timeline of her mother and the deceased's cohabitation based on major events in her life, which are undisputed by the Estate. These major events include the dates she was away at college, her move back home to await the birth of her son, the birth of her son, and her move to another town to attend university.
- The deceased's oldest son moved out of his father's home in July 2005.
- Between September 2005 and April 2006, September 2006 and April 2007, and August 2008 to December 2008, the deceased's daughter was not living in her father's home.
- The deceased's daughter admitted that she was antisocial and spent most of the time in her bedroom when she was living in her father's home.
- The deceased's oldest son contradicted himself on multiple occasions regarding whether Mrs. C cooked supper for his father before she moved into his father's home.

- The deceased's children were not privy to the intimacies of their father's relationship with Mrs. C.
- The deceased's daughter admitted that she did not have personal knowledge of whether her father was financially supporting Mrs. C.
- The deceased's daughter admitted that she complained to her father that he was too often at Mrs. C's house and that she needed him.
- The deceased's children were not friendly towards Mrs. C.
- Mrs. C and her daughter alone had personal knowledge of the contents of Mrs. C's home.
- The deceased's oldest son admitted that he did not know whether his father had clothes at Mrs. C's home.
- Mrs. C alone had knowledge of the personal belongings she had at deceased's home. Both the deceased's oldest son and daughter admitted they did not go into their father's bedroom or closet respectively.

(ii) Inconsistencies in the Evidence of Mrs. C

[38] We also note that there were inconsistencies relating to dates in the documentary evidence prepared by Mrs. C., and in particular the January 31, 2011 letter to Morneau Shepell, the April 26, 2011 questionnaire she filled for Morneau Shepell, the May 4, 2011 letter she sent to Morneau Shepell, and her Affidavit of November 15, 2011.

[39] We find that in the months following the deceased's passing, Mrs. C. was going through a difficult and stressful time and was not thinking clearly such that this affected her recollection of dates.

[40] We accept Mrs. C's and her daughter's testimony regarding Mrs. C's state of mind and her confusion surrounding dates. Mrs. C's daughter describes her mother's mental state as follows:

2622.Q. [...] what was your mother's mental state after [the deceased's] death?

A. She had none. She-- She wouldn't even have been able to put a grocery list together. Like she-- she would-- she didn't have a logical process to which she rationalized things. She couldn't put things together. She was a mess. She had lost everything.

[41] Mrs. C explained her memory gaps as follows at the hearing:

[TRANSLATION]

2092 Q. Then suddenly [the deceased] suddenly he - he was dead. I suffered a shock – I was empty. I had nothing left inside me. I was just empty. I was like an object, I had no more life. So how did you want me to remember this date and that date. No one can do that.

[42] We also accept Mrs. C's explanation that she swore her November 15, 2011 Affidavit to correct discrepancies in the dates she had provided in previous letters to Morneau Shepell:

8. I do not now know how it is that I erred in my answers to Morneau Shepell. I do know that in April, 2011, I was still very upset and in shock with having lost [the deceased] and in dealing with such a substantial change in my circumstances. I can only surmise that my memory failed me as to where we had been living between 2007 and 2010.

[43] We also accept Mrs. C's daughter's explanation of her role in correcting the discrepancy in dates in the documents prepared by her mother. In helping her mother prepare a response to the Affidavits filed by the Estate in September 2011, she noted a number of serious inaccuracies as regards dates in previous documents prepared by her mother which needed to be corrected. Not long after this, Mrs. C and her daughter swore their November 15, 2011 Affidavits correcting the errors in Mrs. C's previously mentioned letters and provided a corrected chronology.

[44] We are particularly impressed by the testimony of Mrs. C's daughter. She was very forthright and direct. We find Mrs. C's daughter's evidence regarding dates particularly convincing for two reasons: (1) she provides concrete points of reference for dates based on the events in her life – events which are not disputed by the Estate; and (2) she does not stand to gain anything directly from this matter.

[45] Finally, we note that although Mrs. C may have been inconsistent in her dates, she has never wavered in her indication to Morneau Shepell, the Superintendent of Pensions and this Tribunal that before she moved into the deceased's home, she and the deceased lived together in two homes, spent their nights together, and slept in the same bed.

B. Was Mrs. C the Spouse of the Deceased?

[46] We find Mrs. C was the deceased's spouse within the meaning of subsection 1(1) of the *Pension Benefits Act*.

[47] At the time of the deceased's passing, he and Mrs. C were not married. The *Pension Benefits Act* defined "spouse" for individuals who were not married to each other as follows:

1(1)

"spouse" means either of a man and a woman who

[...]

(d) not being married to each other, have cohabited

(i) continuously for a period of not less than three years in a conjugal relationship in which one person has been substantially dependent upon the other for support, [...].

[48] Mrs. C has the burden of proving what we see as the four elements that make up the definition of spouse. These are:

(i) Did Mrs. C and the deceased cohabit?

(ii) Was the cohabitation continuous for not less than 3 years?

(iii) Did the couple have a conjugal relationship?

(iv) Was Mrs. C substantially dependent upon the deceased for support?

[49] We turn now to our analysis of these four elements.

(i) Did Mrs. C and the Deceased Cohabit?

[50] We find that Mrs. C and the deceased cohabited from early 2003 to September 29, 2010.

[51] The decisions of *Molodowich v. Pettinen*, [1980] O.J. No. 1904 at par. 16, and, more recently, *Thauvette v. Malyon* (1996), 23 R.F.L. (4th) 217 [*Thauvette v. Malyon*] set out a list of seven factors to consider in determining if two people cohabited. The extent to which these factors are taken into consideration varies with the circumstances of each case. These factors are:

1. Shelter

- a) Did the parties live under the same roof?
- b) What were the sleeping arrangements?
- c) Did anyone else occupy or share the available accommodation?

2. Sexual and personal behavior

- a) Did the parties have sexual relations? If not, why not?
- b) Did they maintain an attitude of fidelity to each other?
- c) What were their feelings toward each other?
- d) Did they communicate on a personal level?
- e) Did they eat their meals together?
- f) What, if anything, did they do to assist each other with problems or during illness?
- g) Did they buy gifts for each other on special occasions?

3. Services

What was the conduct and habit of the parties in relation to:

- a) Preparation of meals ,
- b) Washing and mending clothes,
- c) Shopping ,
- d) Household maintenance,
- e) Any other domestic services.

4. Social

- a) Did they participate together or separately in neighbourhood and community activities?
- b) What was the relationship and conduct of each of them towards members of their respective families and how did such families behave towards the parties?

5. Societal

- a) What was the attitude and conduct of the community towards each of them and as a couple?

6. Support (economic)

- a) What were the financial arrangements between the parties regarding the provision of or contribution towards the necessities of life (food, clothing, shelter, recreation, etc.)
- b) What were the arrangements concerning the acquisition and ownership of property?

- c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

7. Children

- a) What was the attitude and conduct of the parties concerning children?

[52] We now assess each factor.

1. Shelter

[53] We find that Mrs. C and the deceased lived together and shared a bedroom at either the deceased's home or Mrs. C's home from sometime in 2003 to September 29, 2010.

[54] The Estate argues that Mrs. C and their father did not live together throughout their relationship because to cohabit both persons must be living in a single house. The Estate maintains that the cohabitation began in January 2009, the date which the Estate maintains Mrs. C moved into their father's house.

[55] We reject the Estate's position. The fact that Mrs. C and the deceased maintained two residences for part of their relationship does not bar a finding of cohabitation. As stated in *Thauvette v. Malyon* at par. 35-36, cohabitation can occur in two residences and the court or tribunal must "look at all of the circumstances and consider the reason for maintaining another residence".

[56] We find that the relationship between the deceased's children and Mrs. C played a determining role in the couple's decision to maintain two residences in the earlier years of their relationship. This finding is based on the following evidence:

- Mrs. C testified that she and the deceased maintained two homes in the earlier years of their relationship because they couldn't take their respective kids and put them under the same roof. She testified that they sacrificed for their kids and that it was difficult living in two homes. Mrs. C testified that she and the deceased tried hard to please all the children and create one large family out of the two families, but the children did not cooperate.
- The deceased's oldest son testified that he did not have a relationship with Mrs. C in the first years of her relationship with his father.
- The deceased's daughter also testified that she and Mrs. C did not really have a relationship and that Mrs. C was in her father's life but not hers.
- Mrs. C's daughter confirmed that the deceased's children displayed a cold feeling towards her mother and her.

[57] We also consider the following facts supportive of the conclusion that Mrs. C and the deceased cohabited before 2007:

- Mrs. C had keys to the deceased's home and the deceased had keys to Mrs. C's home well before 2007.
- Mrs. C received mail at the deceased's home as early as 2006.

- Mrs. C would pick up the mail for the deceased from time to time in the early years of the relationship; in the later years of the relationship, she had her own key to the mailbox.
- As of 2003, Mrs. C drove the deceased's vehicles.
- Between 2003 and 2005, Mrs. C on several occasions picked up the deceased's daughter at university following her night classes. Mrs. C would drive the deceased's vehicle and would bring the deceased's daughter back to her father's home.
- In his Affidavit, the deceased's oldest son admits that from December 2002 to January 2009, his father would spend nights at Mrs. C's house and vice versa. He also admits that he cannot state with certainty whether they spent each night together.
- The deceased's daughter testified that she often complained to her father that he was too often at Mrs. C's house and that she needed him.
- The deceased's daughter admitted that her father spent two to three nights and sometimes more at Mrs. C's house.
- The deceased's daughter testified that when people called for her father, depending on who it was, she would provide the phone number at Mrs. C's house.
- The deceased's sister testified that starting in 2003, if she couldn't reach her brother at his home, she would call Mrs. C's house. She related a conversation with the deceased's daughter in 2003 when she called her brother's house and her niece said that her father was pretty much always at Mrs. C's house.
- The deceased's sister testified that when she came to visit, her brother and Mrs. C would offer their bedroom and go sleep at Mrs. C's house.
- Mrs. C's daughter testified that her mother and the deceased were always together and when they weren't at her mother's house, they were at the deceased's house.
- Mrs. C's daughter testified that when she moved back home in February 2007 (after being gone since September 2005) her mother was living at the deceased's house and her mother's house was unoccupied.

[58] We do not accept the testimony of the deceased's children that before 2009, Mrs. C did not have any belongings, not even a toothbrush, at their father's house and that when she spent the night, she brought an overnight bag.

[59] We find the deceased's children were not fully aware of the relationship between their father and Mrs. C. Both children admit to not going into their father's bedroom and cannot say whether Mrs. C had clothes in that closet before she fully moved into the house. The children were also not aware of the contents of the closets of Mrs. C's house and could not say whether their father had clothes there.

- [60] We reiterate that the deceased's oldest son had not lived in his father's house since July 2005. As for the deceased's daughter, she did not live in her father's house from September 2005 to April 2006, September 2006 to April 2007 and August 2008 to December 2008.
- [61] We find that as early as 2003, Mrs. C had clothes, shampoo, a brush and toothbrush at the deceased's house and that the deceased also had clothes and personal belongings at Mrs. C's house.
- [62] In short, Mrs. C has established that she and the deceased shared shelter.

2. Sexual and personal behavior

- [63] There is no doubt that Mrs. C and the deceased were in a committed, loving relationship. The Estate brought no evidence to suggest otherwise. In fact, the Estate admits in its written submissions that the couple were in a loving relationship without interruption from December 2002 to September 29, 2010.
- [64] We accept Mrs. C's testimony that she and the deceased had sexual relations and maintained an attitude of fidelity to each other. Mrs. C's daughter confirms that her mother and the deceased were "love birds" who slept in the same room. She also confirms that they never dated anyone else while they were together.
- [65] As for personal behavior, there was conflicting evidence between the Estate and Mrs. C regarding whether the couple shared meals. We find that Mrs. C and the deceased shared meals together whenever possible.
- [66] The deceased's son testified regarding their father's routine during the work week. According to him, if his father worked and the weather was nice, he would golf after work and come back home around 6 or 6:30 p.m., after which he would spend the evening in the garage. According to the oldest son, Mrs. C would call around 9-9:30 p.m. and his father would decide whether he would go over to Mrs. C's for the night. The oldest son also testified that on weekends, Mrs. C would spend the night, but that in the morning she would get up, have breakfast and return to her apartment.
- [67] However, the oldest son also testified during the hearing that when Mrs. C spent the night at his father's house, she would make supper for herself and his father. This is inconsistent with his later testimony that when Mrs. C spent the night at his father's house, she would only arrive around 10:30 p.m. He later admitted on cross-examination, that on weekends when Mrs. C was at his father's house, she would make him supper.
- [68] The deceased's daughter described a different routine for her father. She testified at the hearing that on the nights that her father would spend the night at Mrs. C's house, he would first come home, have a nap, eat supper, make his lunch and then go to Mrs. C's.
- [69] We previously found that the deceased's children were not fully aware of the intimate details of their father's relationship with Mrs. C and we repeat it here.
- [70] We accept the testimony of Mrs. C when she says that when the kids describe their father's routine as eating supper alone, they are referring to the period following their mother's death and the beginning of her relationship with their father. Mrs. C maintains that by the end of 2003 or the beginning of 2004, the deceased's routine had changed and he would often call her from work

to see what she was making for supper and if it was something he liked, he would ask her to make extra so that he could bring some in his lunch the following day.

[71] The Estate does admit that starting in 2003 Mrs. C prepared family suppers for the major holidays such as Thanksgiving, Easter, and Christmas.

[72] We also accept the testimony of the sister of the deceased that she visited her brother four to five times per year, and that Mrs. C was always at his house and would prepare supper.

[73] The deceased also provided assistance to Mrs. C by adding her to his Blue Cross medical insurance that he had through his work. Typically, this type of medical insurance is restricted to family members such as children and spouses.

[74] Mrs. C and the deceased also bought each other gifts. Mrs. C's daughter testified that she saw her mother buy gifts for the deceased. She recalls that in the earlier years, she remembered the deceased giving her mother money to buy the kids Christmas gifts and her mom used some of that money to buy him a present and she felt horrible because she was using his money to buy him a gift.

3. Services

[75] The deceased and Mrs. C had adopted a separation of tasks typical of a spousal relationship.

[76] Mrs. C would cook most meals, wash the dishes, sweep the floors and do laundry. The deceased would take out the garbage, mow the lawn, and take care of snow removal.

[77] We also find that when he had time, the deceased would do the maintenance on his vehicles, including the car that he had purchased for Mrs. C. However, when he was busy working overtime at work, the deceased would have his vehicles serviced by a mechanic. The Tribunal does not accept the oldest son's evidence that it was "impossible" that his father had his cars serviced by a mechanic because his father was an industrial mechanic.

4+5. Social and Societal

[78] We find that Mrs. C and the deceased presented as a couple to their families and in public. The community also viewed them as a couple. The following evidence supports this finding:

- They hosted family meals for the major holidays, such as Thanksgiving, Easter, and Christmas.
- Starting in 2002, the deceased spent Christmas Eve with Mrs. C's family and she spent New Year's Eve with his family.
- The couple attended mass together.
- The deceased attended all of Mrs. C's family functions.
- The couple had a very active social life according to the deceased's son.

- When Mrs. C's mother passed away, the deceased took time off work. Mrs. C testified that she believes the deceased obtained the number of days off work permitted for a member of the immediate family.
- Mrs. C accompanied the deceased to his work functions such as Christmas parties, dances, and Christmas suppers. Witness D.L. who worked with the deceased testified that these functions were reserved to employees and their spouses.
- Mrs. C's brother viewed the deceased as his brother-in-law.
- Mrs. C's Sister 2 says the deceased was part of their family.
- The deceased's union recognized Mrs. C as the common-law spouse of the deceased from 2003 until his death.

6. Support (economic)

- [79] We find that between approximately 2003 and 2006, before Mrs. C moved into the deceased's house, the arrangement between her and the deceased was that they assumed the expenses associated with their respective residences and that the deceased would provide additional financial assistance to Mrs. C.
- [80] In particular, the deceased helped Mrs. C with her expenses such as buying some groceries for her home, paying her phone bill on occasion, paying for gas for her vehicle on occasion, arranging and paying for snow removal for her home, providing financial support to her daughter while she was at college, and generally helping her when money got tight. We find that the deceased also paid for all the couple's social outings, recreational activities, and numerous trips.
- [81] We find that this financial arrangement changed when Mrs. C moved into the deceased's home around the end of 2006. At this time, Mrs. C continued to pay the rent for her rental home, buy the occasional groceries and pay gas for her car, but she generally contributed very little financially to the household expenses.
- [82] By the end of 2006, the deceased was paying almost all household and maintenance expenses for his house. He also paid for all the couple's social outings, recreational activities, and trips. The deceased wanted Mrs. C to use her income to spoil herself, her children and her grand-children.

7. Children

- [83] When Mrs. C and the deceased started their relationship, they each had three children, ranging in age from teens to twenty-something.
- [84] There is a real distinction in the relationship between Mrs. C's children and the deceased and Mrs. C's relationship with the deceased's children.
- [85] Mrs. C's daughter testified that by the time she graduated high school in 2005, the deceased was like a stepfather to her. In fact, the deceased attended her high school graduation and took family pictures with her and her mother.

- [86] Mrs. C's daughter would give the deceased a card for father's day. She remembers his last father's day as she had prepared a lobster boil and bbq to get both families together. She recalls none of the deceased's children showed up.
- [87] Mrs. C's daughter attended the deceased's family functions including the New Year's Eve get together in another town. She also spent some time with the deceased's youngest son and introduced him to her friends as a stepbrother.
- [88] Mrs. C's daughter testified that the deceased supported her in every way. He provided her financial assistance when she attended college and university.
- [89] In the summer of 2010, Mrs. C's daughter had planned to work at a pub. The deceased called her one evening upset because he wanted at least one of his children to apply to the summer work program at his work for children of employees before it came to an end. He wanted his youngest son to go, but he did not apply. The deceased wanted Mrs. C's daughter to apply. In order to please him, she applied and was hired. She spent that summer at the deceased's house with her son and worked at the deceased's workplace.
- [90] As for the deceased's children, they did not have the same kind of loving relationship with Mrs. C. This was evident by the testimony of the deceased's oldest son that in the first years, he did not have a relationship with Mrs. C. He did not even invite Mrs. C to his wedding in 2009. However, he admitted to buying Mrs. C a Christmas present in the last three years that she was with his father.
- [91] The deceased's daughter also testified that she did not have a relationship with Mrs. C and that Mrs. C was in her father's life, not hers. While this may have been what the daughter wanted, Mrs. C did assume some parental roles in respect to the deceased's daughter, notably by picking her up after her night classes at university.

(ii) Was the cohabitation continuous for not less than 3 years?

- [92] Mrs. C and the deceased's relationship is the story of a couple who tried to make the best of their situation while trying to keep everyone happy. Due to the friction between the deceased's children and Mrs. C, the couple chose to keep their respective homes for their children. Despite this, we find that Mrs. C and the deceased cohabited continuously for about 7 years from 2003 to September 29, 2010. The couple did not have any separations during this period and this is admitted by the Estate.
- [93] The Estate argues that in order to have cohabitation, the couple had to be living under a single roof. According to the Estate, continuous cohabitation for not less than three years is not proven as Mrs. C only moved into their father's house in January 2009.
- [94] We accept that January 2009 may be when Mrs. C completed moving the remainder of her belongings into the deceased's house as she had let go of her rental home. However, we do not accept the Estate's version that this is when Mrs. C began continuously cohabiting with the deceased. As previously indicated, it is well recognized in law that cohabitation can be under two roofs.
- [95] The oldest son also swore in his September 16, 2011 Affidavit that he cannot state with certainty that his father and Mrs. C were not together every night between December 2002 and January 2009.

[96] We find that starting in 2003 until the end of 2006, Mrs. C and the deceased cohabited between the deceased's home and Mrs. C's home. While there may be inconsistencies in Mrs. C's evidence when it comes to dates, she has never wavered in her position that before she moved into the deceased's home, she and the deceased always lived together in two homes starting in 2003. We accept this evidence.

[97] We find that Mrs. C moved into the deceased's home in late 2006 or at the latest early 2007. The following evidence supports this finding of fact:

- In February 2007, Mrs. C's daughter moved back to her mother's house which was unoccupied although her mother and the deceased still had belongings there. Mrs. C's daughter lived there alone until the birth of her son on May 21, 2007.
- Towards the end of May 2007, Mrs. C's daughter moved into an apartment, but returned to her mother's house at the end of July 2007 and lived there alone with her son until January 2009 when she left to attend university in another town.
- Witness J.T. visited Mrs. C's daughter several times a week from February 2007 to January 2009. She confirms that Mrs. C's daughter lived alone in her mother's house from February 2007 until shortly after the birth of her son on May 21, 2007 and then moved to an apartment to return to her mother's house again in the summer of 2007 where she remained until January 2009.
- Mrs. C testified that she started spending more time at the deceased's house in 2005 and 2006 when her daughter was away at college. The deceased's daughter was also attending university in another town during those school years.
- Mrs. C's Sister 1 testified that she remembers a specific visit to the deceased's house in 2007. She had just bought her first brand new car and had driven to the deceased's house to show it to her sister and the deceased. She recalls that by this time, her sister was fully moved into the deceased's house.

[98] We find that the deceased and Mrs. C cohabited continuously at the deceased's house from late 2006 or early 2007 until September 29, 2010. In making this finding, we considered the following evidence which depicts who had knowledge of the occupation of both residences:

- Between 2002 and the end of August 2005: On the weekends, the deceased's daughter was staying with her grandparents who lived in proximity to Zellers, where she had a job. Her grandparents would pick her up on Friday and bring her back home Sunday. The daughter therefore has no direct knowledge of who was staying at her father's house on the weekends during this period.
- Between 2003 and July 2005: The deceased's oldest son was only living at his father's house on the weekends as he was attending college. The oldest son therefore does not have direct knowledge of who was staying at his father's house during the week nor of his father's routines.
- Between 2003 and June 2005: Mrs. C's daughter was in high school and living at her mother's house. She has direct knowledge of who was staying at her mother's house during this period.

- In July 2005: the deceased's oldest son moved out of the house to live with his future wife. He never returns in the time his father is alive. From July 2005, the oldest son has limited direct knowledge of who is staying in his father's house.
- September 2005 to April 2006: Mrs. C's daughter is living in another town to attend college. She has no direct knowledge of who is staying at her mother's house during this period.
- September 2005 to April 2006: The deceased's daughter is living in another town attending university. She has no direct knowledge of who is staying at her father's house during this period, nor her father's routine during this period.
- May 2006 to August 2006: The deceased's daughter is living at the house.
- May 2006 to early February 2007: Mrs. C's daughter is living in another town. She has no direct knowledge of whether anyone is living at her mother's house during this period.
- September 2006 to April 2007: The deceased's daughter is living in another town attending university. She has no direct knowledge of who is staying at her father's house during this period nor of her father's routines during this period.
- Early February 2007 to end of May 2007: Mrs. C's daughter moves back home where she is living alone. She is pregnant and awaiting the birth of her child. She has direct knowledge that her mother is no longer living in the home.
- End of May 2007 to July 2007: Mrs. C's daughter is living in an apartment with her son.
- May 2007 to August 2008: The deceased's daughter is living at home.
- July 2007 to January 2009: Mrs. C's daughter is living with her son in her mother's house. She has direct knowledge that her mother is not living there.
- June 2008: The deceased's daughter starts going out with D.C.
- August 2008 to December 2008: The deceased's daughter is living with her grandparents. She has no direct knowledge of who is living at her father's house.
- December 2008 to September 2009: The deceased's daughter is living at home, however she makes several visits out of town to meet with D.C.
- January 2009: Mrs. C hands in the keys to her subsidized housing and moves the remainder of her belongings into the deceased's home.

(iii) Did the couple have a conjugal relationship?

[99] This element is not in dispute as the Estate admits that their father and Mrs. C were in a conjugal relationship. We are also satisfied that this is true and find that the couple slept in same bed, had sexual relationships, and had an attitude of fidelity towards each other.

(iv) Was Mrs. C Substantially Dependent upon the Deceased for Support?

- [100] We find that Mrs. C was substantially dependent upon the deceased for support during their relationship.
- [101] The parties did not provide any caselaw dealing directly with the interpretation of “substantially dependent” in the *Pension Benefits Act*. Rather, they provided caselaw dealing with interpretation of substantial dependence in spousal support applications. While we are not bound by these cases, we find they do provide guidance on what constitutes substantial dependence.
- [102] *Hedan v. Mallet*, [1991] N.B.J. No. 529 (N.B.C.A.) [*Hedan*] is the leading case on the meaning of “substantial dependence” in the family law context. In that matter, the court stated that substantial dependence means a dependence that is “important”, “essential”, “considerable in quantity” and “significantly large”. In the *Hedan* matter, the Court of Appeal stated that Ms. Hedan had not proven substantial dependence as (1) she had owned property; (2) she had not brought any evidence establishing the respective incomes of herself and Mr. Mallet during the cohabitation; (3) Mr. Mallet’s income at the time of trial did not much exceed Ms. Hedan’s income; and (4) Mr. Mallet could no longer work due to illness and had two handicapped children to support.
- [103] In *McCormick v. The Estate of Gilles Doiron and Hilda Power*, 2009 NBCA 19 [*McCormick*], the Court found there was no substantial disparity in the incomes of the parties and therefore no substantial dependence.
- [104] In *Morin v. Valotaire* (1993), 140 N.B.R. (2d) 316, the parties cohabited for 16 years. When they first met, Ms. Morin was 19 and had a Grade 11 education. Mr. Valotaire had a good job working at a mill. During the cohabitation, Ms. Morin looked after the house and had a series of jobs, but nothing long term. The evidence revealed that when she wanted anything, she went and bought it. Ms. Morin enjoyed a good standard of life while living with Mr. Valotaire. In Mr. Valotaire’s words, she was the best-dressed girl in Dalhousie. After the separation, Ms. Morin was living on social assistance. The Court concluded that during the cohabitation, Ms. Morin was substantially dependent upon Mr. Valotaire.
- [105] In *Duguay v. Noël*, 2010 NBBR 297 (N.B.Q.B.), the Court reviewed the question of substantial dependence where the income of Ms. Duguay, while high, was derived from employment with Mr. Noël. The Court found that Ms. Duguay’s income was sufficient to allow her to share the cost of the couple’s personal, social and domestic needs. Despite this, the Court concluded that Ms. Duguay was substantially dependent upon Mr. Noël as Ms. Duguay’s income during an important period of the cohabitation derived from employment in Mr. Noël’s business. The Court found that Ms. Duguay’s income was nothing more than a sharing of Mr. Noël’s income for personal, social and domestic purposes as well as a probable fiscal advantage. Consequently, the greater part of Ms. Duguay’s income derived from Mr. Noël’s income such that she was substantially dependent on him during the cohabitation.
- [106] One must not confound the elements of length of cohabitation with substantial dependence as the Estate appears to do in their written submissions. These are distinct elements that must be independently assessed in determining whether Mrs. C was the deceased’s spouse. [*McCormick* at par. 41]
- [107] Turning now to this matter, the facts clearly demonstrate that Mrs. C was substantially dependent upon the deceased for support during their cohabitation.

Mrs. C's Financial Situation before the Relationship

- [108] Before meeting the deceased, Mrs. C was the single mother of three children, two of whom were still teenagers. She was living in government subsidized housing for low income individuals provided by NB Housing. She was barely getting by and had accrued arrears of \$1,656 to NB Housing in unpaid rent.
- [109] Mrs. C testified at the hearing that she accrued these arrears before she met the deceased when her eldest daughter became ill and she had to take time off work. She explained that she did not have medical insurance and she had to make a choice between paying her rent or paying for her daughter's costly medication and she chose to pay the medication.
- [110] She also testified that sometimes the fridge was quite bare because she did not have enough money.
- [111] According to Mrs. C's Sister 3, her sister had financial hardship and she and her children lived with the strict minimum.
- [112] We find that before her relationship with the deceased, Mrs. C was living very modestly, barely able to meet her family's needs. She did not have money for trips, medical insurance, nor such hobbies as golf.

Mrs. C's Financial Situation during Cohabitation with the Deceased

- [113] Mrs. C's financial situation vastly improved during the time she and the deceased cohabited. In the years that they were together, she did not have money concerns. Mrs. C testified and we accept that in the years she was with the deceased, her lifestyle did not reflect her income because the deceased paid for essentially everything.
- [114] Mrs. C's income was significantly lower than the deceased's income during their cohabitation. The following chart illustrates that the deceased consistently earned easily twice Mrs. C's income and sometimes almost three times her income between 2007 and 2010:

	<u>Mrs. C</u>	<u>Deceased</u>
2007	\$29,113	\$65,017.78
2008	\$26,300	\$66,087.01
2009	\$21,303	\$67,844.69
2010	\$15,623	\$61,471.85

- [115] The Estate contends that despite these figures, there is no substantial dependence as Mrs. C earned a "good" income and could see to her needs. We disagree. The evidence reveals that Mrs. C was not making ends meet – this was clear from her testimony as discussed below.
- [116] Mrs. C further testified that during her relationship with the deceased, she did not give him money towards the household expenses and was never asked to do so. The deceased wanted her to spoil her grand kids with her money.
- [117] Mrs. C worked during the years she was with the deceased. She would use her income to pay the rent while she had her subsidized housing, buy clothes for her grand kids, buy brand name clothing for herself at an exclusive women's clothing store, buy gifts for the deceased, pay for gas

for her car (although the deceased sometimes paid for her gas), pay for the occasional groceries, and help her daughter who was pursuing post-secondary studies.

- [118] Mrs. C's daughter confirms that before her relationship with the deceased, her mother never had the means to spoil herself or her kids. She states that when her mom was with the deceased, she was able to buy herself nice clothes and shower her children and grandchildren with gifts.
- [119] Mrs. C's testified that the deceased wanted her to leave her job so that they could spend more time together. By 2007, she was working less and her plan was to stop working at the end of November 2010, but the deceased passed away before then.
- [120] On the other hand, the deceased gave Mrs. C money for gas, for the phone at her home, for groceries, cigarettes, clothing and haircuts.
- [121] In addition to the disparity in income, the following chart of expenses illustrates that the deceased paid for the vast majority of the couple's expenses, recreational activities, social outings, and trips.

	<u>Mrs. C</u>	<u>The deceased</u>
Purchase of a car for Mrs. C		✓
Medical insurance		✓
Car insurance for all vehicles		✓
Registration for all vehicles		✓
Gas for all vehicles	✓ (on occasion)	✓
Repairs to all vehicles		✓
Groceries	✓ (on occasion)	✓
Household expenses		✓
Maintenance of the deceased's home		✓
Renovations to the deceased's home		✓
Snow removal – Mrs. C's home		✓
Mrs. C's haircuts	✓	✓
Mrs. C's clothing	✓	✓
Mrs. C's cigarettes	✓	✓
Purchase of appliances		✓

- [122] The deceased also provided financial assistance to Mrs. C's daughter when she attended college and university. He co-signed loans with her, paid for books and groceries, gave her money for rent, and paid for and drove the U-Haul when she moved to attend school.
- [123] The deceased's daughter testified that after Mrs. C moved into her father's house, she had a discussion with her father regarding Mrs. C's financial contribution and told her father that Mrs. C appeared to be on easy street. The daughter testified that her father assured her that Mrs. C was doing her part.
- [124] However, the deceased's daughter later admitted at the hearing that she did not have personal knowledge of whether her father was financially supporting Mrs. C.
- [125] The deceased's oldest son testified as follows at the hearing regarding the sharing of expenses between his father and Mrs. C:

- After Mrs. C moved into the house, his father purchased new appliances and he asked his father if he had paid for them alone, to which his father allegedly replied that Mrs. C was paying her share.
- His father told him that when Mrs. C was living in her subsidized housing she assumed all her expenses alone (relating to her car, her children, and the repair and maintenance of the property) without his help.
- His father told him that from December 2002 to January 2009, Mrs. C did not help with laundry, housekeeping, garbage, yard work, or snow removal at his house and likewise his father did not help out at her rental property.
- His father did not provide financial support to Mrs. C from January 2009 to September 2010 and he and Mrs. C each separately assumed their own expenses.

[126] We find the oldest son's testimony self-serving and lacking in credibility and contradicted by the evidence of Mrs. C and her daughter, which we prefer.

[127] As with the *Morin* case cited above, we find that Mrs. C's quality of life when she cohabited with the deceased was greatly superior to her quality of life before and after her relationship with the deceased.

[128] There is ample evidence to support this finding. Mrs. C's Sister 2 states her sister's quality of life changed for the better during her relationship with the deceased. Mrs. C's Sister 3 also indicates that the deceased provided her sister with a superior lifestyle which included many travels and luxuries. Mrs. C's sister-in-law (not related to the deceased) states that her sister-in-law's quality of life was increased immensely during her years with the deceased and that he spoiled her.

[129] The deceased and Mrs. C took several trips in the years they were together. They travelled to Acapulco, the Dominican, Punta Plata, Punta Cana, Varadero, Cancun, Florida, PEI, and Shediac. The deceased paid for all these trips.

[130] Mrs. C also learned to golf during her relationship with the deceased. He bought or provided her golf equipment and also bought her golf passes.

[131] The couple also had a very social active life and the deceased paid for all their social outings.

Mrs. C's Financial Situation after the Deceased's Death

[132] Mrs. C's situation after the deceased's passing is very similar to her situation before her relationship with the deceased. She was back to having difficulty meeting her basic needs.

[133] Shortly after his father's passing, the deceased's oldest son advised Mrs. C that she could not remain in the house. She was essentially homeless.

[134] Within a short period of time, Mrs. C found herself with no medical insurance, no savings account, no investments, and no real property.

[135] She was no longer able to golf, go on trips, shop at exclusive women's clothing stores, or spoil her grand kids.

[136] Mrs. C's brother states that his sister's quality of life changed drastically for the worse financially and morally after the deceased's passing. Mrs. C's Sister 2 indicates that her sister was left with nothing and put into the street. Mrs. C's Sister 3 also states that her sister's quality of life greatly lowered.

[137] It is perhaps Mrs. C's sister-in-law who best explains the impact of the deceased's passing on Mrs. C's quality of life. According to the sister-in-law, after the deceased's passing, the deceased's children left Mrs. C homeless. She took her sister-in-law into her home for a couple of months and with the help of friends and family, arrangements were made to secure an apartment for Mrs. C. Since the deceased's passing, Mrs. C's life is limited to the strict minimum and she can no longer afford to do any activities with her family and friends.

[138] In conclusion, the *Hedan and McCormick* matters are easily distinguishable from Mrs. C and the deceased's relationship. Mrs. C's hardships and quality of life before and after her relationship with the deceased clearly demonstrate her substantial dependence upon him for support during their relationship.

C. Does the priority in subsection 1(2) or subsection 43(5) of the *Pension Benefits Act* apply?

[139] We find that the priority established in subsection 43(5) rather than the one in subsection 1(2) of the *Pension Benefits Act* applies such that Mrs. C's claim has priority over the claim of the Estate.

[140] Subsection 1(2) of the *Pension Benefits Act*, on which the Estate relies in support of its argument that their claim has priority over the claim of Mrs. C, sets out the following general priority:

1(2) The entitlement under a pension plan of any person as a spouse of a member or former member of the pension plan shall not diminish the entitlement of any person who is lawfully married to the member or former member or of a child of that marriage.

[141] However, subsections 43(4) and 43(5) of the *Pension Benefits Act* provides a different priority:

43(4) A member or former member may designate a beneficiary and the beneficiary is entitled to the payment referred to in subsection (1), (2) or (3), as the case may be.

43(5) A designation under subsection (4) has no effect if the member or former member has a spouse at the date of death.

[142] At first view, there appears to be a conflict between subsections 1(2) and subsection 43(5) of the *Pension Benefits Act*.

[143] To resolve this conflict, we must turn to statutory interpretation principles. As a starting point, statutes are presumed to be coherent. In other words, it is presumed that a statute does not contain contradictions and that each provision is capable of operating without conflicting with other provisions [Ruth Sullivan, *Driedger on the Construction of Statutes* (3d ed.), at p. 176].

[144] However, sometimes, as in the present matter, statutes contain what appear to be conflicting provisions. One way of dealing with these potential conflicts is the implied exception principle. The author Ruth Sullivan succinctly explains this principle:

[w]hen two provisions are in conflict and one of them deals specifically with the matter in question while the other is of more general application, the conflict may be avoided by applying the specific provision to the exclusion of the more general one. The specific prevails over the general; it does not matter which was enacted first. [Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed (Ottawa: Butterworths, 2002) at p. 273]

- [145] *Frankowski v. Canada (Minister of Citizenship and Immigration)* (2000), 187 F.T.R. 92 provides a good example of the application of the implied exception principle to provisions within the same statute. In that matter, the applicant had applied for Canadian citizenship. There was an apparent conflict between provisions of the *Citizenship Act*, R.S.C. 19895, c. C-29 in that one provision provides for the granting of citizenship “notwithstanding any other provision of this Act” and another provision prohibits the granting of citizenship “notwithstanding anything in this Act”. The Federal Court resolved this conflict by applying the implied exception rule and stating that the specific provision prohibiting the grant of a citizenship to a person within three years of a conviction for an offence referred to in that section is an implied exception to the general discretion conferred on the Governor in Council in the general provision to direct the Minister to grant citizenship.
- [146] In this matter, subsection 1(2) is found in the opening section of the *Pension Benefits Act* which also contains definitions. Subsection 43(5) on the other hand is found in the part of the *Pension Benefits Act* entitled “PRE-RETIREMENT DEATH BENEFIT”, which is specifically the subject of this appeal. In addition, subsection 43(5) is found in the same section as subsection 43(2) which sets out the entitlement to a pre-retirement death benefit.
- [147] Applying the implied exception technique to resolve the conflict between subsection 1(2) and subsection 43(5) and considering subsection 1(2) the more general provision and subsection 43(5) the more specific provision, we conclude that the priority set out in subsection 43(5) applies and is an implied exception to the general priority in subsection 1(2).

V. DECISION AND ORDER

- [148] Pursuant to paragraph 76(1)(b) of the *Pension Benefits Act*, we affirm the decision of the Superintendent of Pensions dated January 28, 2014 and state that Mrs. C is entitled to the death benefit under the deceased’s pension plan.

DATED at Saint John, New Brunswick, this 23rd day of February, 2016.

“original signed by”

Christine M. Bernard
Registrar

Signed for panel members Monica Barley, Enrico A. Scichilone and Gerry Legere
pursuant to subsection 40(3) of the *Financial and Consumer Services Commission Act*