Automobile Injury Compensation
Appeal Commission

Annual Report
2016-2017

Manitoba

ATTORNEY GENERAL
MINISTER OF JUSTICE

Room 104
Legislative Building
Winnipeg, Manitoba CANADA
R3C 0V8

Her Honour The Honourable Janice C. Filmon, C.M., O.M.
Lieutenant Governor of Manitoba
Room 235 Legislative Building
Winnipeg MB R3C OV8

May it Please Your Honour:

I have the privilege of presenting, for the information of Your Honour, the Annual Report of the Automobile Injury Compensation Appeal Commission for the year ended March 31, 2017.

Respectfully submitted,

original signed by

Honourable Heather Stefanson
Minister of Justice and
Attorney General

Manitoba

Justice

Automobile Injury Compensation Appeal Commission
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Honourable Heather Stefanson
Minister of Justice
Attorney General of Manitoba
Room 104 Legislative Building
Winnipeg MB R3C 0V8

Dear Minister:

Section 180(1) of the Manitoba Public Insurance Corporation Act states that within six months after the end of each fiscal year, the Chief Commissioner shall submit an annual report to the Minister respecting the exercise of powers and the performance of duties by the Commission, including the significant decisions of the Commission and the reasons for the decisions.

I am pleased to enclose herewith the Annual Report of this Commission for the fiscal year ending March 31, 2017 which includes a summary of significant decisions.

Yours truly,

original signed by

LAURA DIAMOND
CHIEF COMMISSIONER

RAPPORT ANNUEL DE LA COMMISSION D'APPEL DES ACCIDENTS DE LA ROUTE POUR L'EXERCICE 2016-2017

Généralités

La Commission d'appel des accidents de la route (« la Commission ») est un tribunal administratif spécialisé indépendant qui a été constitué en vertu de la *Loi sur la Société d'assurance publique du Manitoba* (« la *Loi* »). Elle est chargée d'instruire les appels interjetés relativement aux révisions internes de décisions sur les indemnités du Régime de protection contre les préjudices personnels (« le Régime ») de la Société d'assurance publique du Manitoba (« la Société »).

L'exercice 2016-2017, qui a débuté le 1er avril 2016 et s'est terminé le 31 mars 2017, marquait la 23e année complète de fonctionnement de la Commission. Celle-ci compte un personnel de 11 personnes : un commissaire en chef, un commissaire en chef adjoint, un commissaire en chef adjoint à temps partiel, un directeur des appels, trois agents des appels, un secrétaire du commissaire en chef, deux secrétaires administratifs et un employé de bureau. En outre, 19 commissaires à temps partiel siègent à des comités d'appel selon les besoins.

Le processus d'appel

Pour recevoir des indemnités du Régime, le demandeur doit présenter une demande d'indemnisation à la Société. Si le demandeur n'est pas d'accord avec la décision du gestionnaire de cas sur son admissibilité à des indemnités du Régime, il a 60 jours pour demander une révision de la décision. Un agent de révision interne de la Société examine la décision du gestionnaire de cas et rend par écrit une décision motivée.

Le demandeur qui n'est pas satisfait des conclusions de l'agent de révision interne peut interjeter appel devant la Commission dans les 90 jours qui suivent la date de réception de la décision interne révisée. La Commission peut, à sa discrétion, accorder une prolongation de délai.

En 2016-2017, 152 appels ont été interjetés devant la Commission, comparativement à 217 en 2015-2016.

Le Bureau des conseillers des demandeurs

Le Bureau des conseillers des demandeurs a été constitué en 2004 par une modification apportée à la partie 2 de la *Loi*. Son rôle est d'aider les appelants qui comparaissent devant la Commission. En 2016-2017, 55 % des appelants ont été représentés par le Bureau des conseillers des demandeurs. En 2015-2016, ce nombre s’élevait à 62 %.

Procédures préalables à l'audience et projet pilote de médiation

Depuis février 2012, le formulaire d'avis d'appel indique que les appelants ont la possibilité de participer à la médiation de leur appel. Les services de médiation sont fournis par le Bureau de

médiation relative aux accidents de la route, un organisme gouvernemental indépendant. Une feuille de renseignements sur la médiation est également jointe au formulaire d'avis d'appel. Sur les 152 nouveaux appels interjetés durant l'exercice 2016-2017, 128 appelants ont demandé des services de médiation.

Si des services de médiation sont demandés au moment du dépôt d'un avis d'appel, la Commission est chargée de réunir dans une trousse de renseignements les documents d'appels importants qui seront utilisés pendant la médiation.

Procédure lors des audiences

À la fin du processus de médiation, les questions qui ne sont pas réglées ou qui ne sont réglées que partiellement sont renvoyées à la Commission pour la tenue d'une audience visant à trancher l'appel. Les agents des appels de la Commission ne préparent des dossiers indexés que pour les appels non réglés que le Bureau renvoie à la Commission. Si des services de médiation ne sont pas demandés au moment du dépôt de l'avis d'appel, un dossier indexé sera préparé. Le dossier indexé regroupe les preuves documentaires jugées pertinentes pour les questions en litige. Il est fourni à l'appelant ou à son représentant ainsi qu'à la Société. De plus, on s'y reporte à l'audience. Lorsque les parties ont examiné le dossier indexé et présenté tout autre élément de preuve qu'elles jugent pertinent, la date d'audition de l'appel est fixée.

Conférences préparatoires

Les conférences préparatoires contribuent à la gestion du déroulement des appels et elles demeurent donc un élément important du calendrier des audiences de la Commission. Au cours des six derniers exercices, celle-ci a constaté que, pour de nombreux appels, un commissaire devait fournir du soutien supplémentaire pour la gestion de cas. Comme par le passé, la Commission a continué de convoquer des conférences préparatoires en 2016-2017. Elle estime que ces conférences préparatoires aident à déterminer où en sont les appels, à établir la cause des retards, à résoudre les obstacles qui empêchent de fixer une date d'audience, à faciliter la médiation et à fixer les dates d'audience.

Activités

Ci-après se trouve un tableau récapitulatif des audiences des six derniers exercices.

Exercice	Audiences	Conférences préparatoires	Total
2016-2017	27	117	144
2015-2016	37	80	117
2014-2015	47	150	197
2013-2014	66	141	207
2012-2013	87	157	244
2011-2012	94	102	196

Ci-après se trouve un tableau récapitulatif du nombre de jours nécessaires pour les audiences des trois derniers exercices.

Exercice	Nombre de jours d'audience	Nombre de jours de conférence préparatoire	Nombre total de jours d'audience
2016-2017	39	117	156
2015-2016	52	80	132
2014-2015	50	150	200

Audiences

Lorsqu'un appel n'est pas entièrement réglé durant la médiation ou lorsqu'un appelant décide de ne pas recourir à la médiation, la Commission tient une audience afin de se prononcer sur l'appel.

Comme la Commission n'est pas strictement liée par les règles de droit concernant la preuve applicable aux procédures judiciaires, les audiences sont relativement informelles. Les appelants et la Société peuvent y appeler des témoins et y présenter de nouveaux éléments de preuve. Toutefois, les lignes directrices de la Commission exigent des parties qu'elles divulguent à l'avance leurs éléments de preuve documentaire et orale. La Commission peut aussi délivrer des assignations de témoins, qui obligent des personnes à comparaître à l'audience pour témoigner et à apporter les documents pertinents avec elles.

Au besoin, la Commission se rend à l'extérieur de Winnipeg pour tenir une audience ou, si les circonstances s'y prêtent et si cela est dans l'intérêt d'un appelant qui vit ou travaille ailleurs, une audience peut avoir lieu par téléconférence.

Le ou les commissaires qui entendent un appel évaluent la preuve et les représentations de l'appelant et de la Société. Conformément à la *Loi*, après la tenue de l'audience, la Commission peut, selon le cas :

(a) confirmer, modifier ou rescinder la décision de la Société;
(b) rendre toute décision que la Société aurait pu rendre.

La Commission rend des décisions écrites et en communique les motifs par écrit. Les décisions et les motifs sont envoyés à l'appelant et à la Société. Les décisions rendues par la Commission ainsi que les motifs les justifiant peuvent être consultées au bureau de la Commission ou sur son site Web, au www.gov.mb.ca/cca/auto/decisions.html (décisions en anglais seulement). Les décisions rendues publiques sont modifiées de manière à protéger la vie privée des parties, conformément à la législation manitobaine en matière de protection de la vie privée. La Commission s'est engagée à mettre à la disposition du public la preuve et les motifs de ses décisions tout en veillant à ce que les renseignements personnels concernant les appelants et d'autres personnes, notamment les renseignements sur la santé, soient protégés et demeurent confidentiels.

En 2016-2017, les appelants ont eu gain de cause – partiellement ou complètement – dans 14 % des appels entendus par la Commission.

Statistiques

La Commission entend et tranche des appels de façon équitable, exacte et rapide. C'est dans cette optique qu'elle a établi les paramètres de niveau de service ci-dessous.

- Dans les cas où l'appelant n'a pas recours à la médiation et demande une audience pour le règlement de l'appel, le personnel de la Commission prépare le dossier indexé qui sera utilisé à l'audience cinq semaines après la réception du dossier de la Société et de tout document supplémentaire.
- Pour les appels où l'appelant demande des services de médiation, le personnel de la Commission prépare le dossier indexé cinq semaines après que la Commission a été avisée par le Bureau que la médiation est terminée et que l'appel sera renvoyé à la Commission en vue d'une audience.
- La Commission a l'intention de fixer la date d'audience six à huit semaines après que les parties l'avisent qu'elles sont prêtes à aller de l'avant.
- La Commission a l'intention de remettre la décision écrite six semaines après la tenue de l'audience et la réception de tous les renseignements requis.

La Commission continue d'enregistrer un nombre constant d'avis d'appel, ce qui s'est traduit par les délais de traitement moyens suivants en 2016-2017.

- Les dossiers ont été indexés dans un délai de 4,6 semaines après la réception du dossier de la Société et des documents supplémentaires, comparativement à 9,72 semaines en 2015-2016 et à 7,34 semaines en 2014-2015.
- Les dossiers ont été indexés dans un délai de 3,93 semaines après la réception par le Bureau de l'avis indiquant que la médiation était terminée mais que l'appel non réglé ou partiellement réglé ferait l'objet d'une audience. Le délai était de 7,6 semaines en 2015-2016 et de 6,84 semaines en 2014-2015.
- Les audiences ont été tenues dans un délai moyen de 1,47 semaine après la date où les parties ont dit être prêtes, comparativement à 1,79 semaine en 2015-2016 et à 2,33 semaines en 2014-2015.
- La Commission a rédigé 21 décisions en 2016-2017, comparativement à 25 décisions en 2015-2016. Le délai moyen entre la date de conclusion d'une audience et la date où la Commission a rendu sa décision était de 6,33 semaines en 2016-2017, comparativement à 5,93 semaines en 2015-2016 et à 5,28 semaines en 2014-2015.
- La Commission a indexé 84 dossiers en 2016-2017, comparativement à 102 en 2015-2016 et à 95 en 2014-2015.

Les agents des appels de la Commission continuent d'apporter un soutien administratif considérable pour la gestion des appels. Bien qu'il y ait eu une baisse du nombre de dossiers indexés préparés en 2016-2017, les agents des appels de la Commission ont dû préparer un plus grand nombre de dossiers indexés supplémentaires, soit 99 au total - un chiffre qui s'élevait

à 85 en 2015-2016 et 111 en 2014-2015. La préparation de ces dossiers s'est avérée nécessaire notamment pour les conférences préparatoires et les audiences relatives à une question de compétence, ainsi que pour les dossiers existants après la réception de documents supplémentaires.

Si on tient compte des dossiers indexés supplémentaires, les agents des appels ont préparé en tout 183 dossiers indexés en 2016-2017, comparativement à 187 en 2015-2016 et à 206 en 2014-2015.

Au 31 mars 2017, il y avait 380 dossiers actifs à la Commission, par rapport à 399 au 31 mars 2016 et à 355 au 31 mars 2015.

Appels interjetés devant la Cour d'appel du Manitoba

Les décisions de la Commission sont exécutoires, sous la seule réserve du droit d'interjeter appel devant la Cour d'appel du Manitoba sur une question de droit ou de compétence et, le cas échéant, uniquement avec l'autorisation du tribunal.

Trois demandes d'autorisation d'appel ont été présentées en 2016-2017. L'autorisation a été refusée pour toutes ces demandes. Il y a également eu une demande d'autorisation d'appel déposée en 2015-2016 qui a été refusée en 2016-2017. Ce cas présentait un intérêt particulier, dans la mesure où la Cour d'appel du Manitoba a précisé que « le droit a essentiellement établi que la question de l'interprétation par un tribunal d'une de ses propres dispositions législatives sera examinée en se basant sur le critère de raisonnabilité ». La Cour a également déclaré qu'une « norme de contrôle qui justifie la retenue... serait appliquée à la question » de l'interprétation de la *Loi sur la Société d'assurance publique du Manitoba* par la Commission.

Au 31 mars 2017, la Cour d'appel avait accordé une autorisation d'appel dans 14 cas sur les 1 697 décisions rendues par la Commission au cours de ses 23 années d'existence.

Développement durable

La Commission s'est engagée à suivre le plan de pratiques d'approvisionnement durable de la Province du Manitoba. Le personnel de la Commission est conscient des avantages associés aux pratiques d'approvisionnement respectueuses du développement durable. La Commission utilise des produits écologiques autant que possible et participe à un programme de recyclage des déchets non confidentiels.

Loi sur les divulgations faites dans l'intérêt public (protection des divulgateurs d'actes répréhensibles)

La *Loi sur les divulgations faites dans l'intérêt public (protection des divulgateurs d'actes répréhensibles)* est entrée en vigueur en avril 2007. Cette loi donne aux employés une marche à suivre claire pour communiquer leurs inquiétudes au sujet d'actes importants et graves (actes répréhensibles) commis dans la fonction publique du Manitoba et les protège davantage contre les représailles. La *Loi* élargit la protection déjà offerte dans le cadre d'autres lois manitobaines, ainsi que par les droits à la négociation collective, les politiques, les règles de pratique et les processus établis dans la fonction publique du Manitoba.

Aux termes de la *Loi*, on entend par acte répréhensible une infraction à la législation fédérale ou provinciale; une action ou une omission qui met en danger la sécurité publique, la santé publique ou l'environnement; les cas graves de mauvaise gestion; ou le fait de sciemment ordonner ou conseiller à une personne de commettre un acte répréhensible. La *Loi* n'a pas pour objet de traiter des questions courantes liées au fonctionnement ou à l'administration.

Conformément à la *Loi*, une divulgation est considérée comme telle si elle est faite de bonne foi par un employé qui aurait des motifs raisonnables de croire qu'il possède des renseignements pouvant démontrer qu'un acte répréhensible a été commis ou est sur le point de l'être, que la situation constitue ou non un acte répréhensible. Toutes les divulgations font l'objet d'un examen minutieux et approfondi visant à déterminer si des mesures s'imposent en vertu de la *Loi*. En outre, elles doivent être déclarées dans le rapport annuel du ministère conformément à l'article 18 de la *Loi*. L'ombudsman a accordé une exemption à la Commission en vertu de l'article 7 de la *Loi*. En conséquence, toute divulgation reçue par le commissaire en chef ou un supérieur est renvoyée à l'ombudsman, selon l'exemption prévue.

Voici un résumé des divulgations reçues par la Commission pendant l'exercice 2016-2017.

Renseignements exigés annuellement (en vertu de l'article 18 de la *Loi*)	Exercice 2016-2017
Nombre de divulgations reçues et nombre de divulgations auxquelles il a été donné suite et auxquelles il n'a pas été donné suite. Alinéa 18(2)a)	Aucune

ANNUAL REPORT OF THE AUTOMOBILE INJURY COMPENSATION APPEAL COMMISSION FOR FISCAL YEAR 2016/17

General

The Automobile Injury Compensation Appeal Commission (the "Commission") is an independent, specialist administrative tribunal established under The Manitoba Public Insurance Corporation Act (the "MPIC Act") to hear appeals of Internal Review Decisions concerning benefits under the Personal Injury Protection Plan ("PIPP") of Manitoba Public Insurance Corporation ("MPIC").

Fiscal year 2016/17, which is April 1, 2016 to March 31, 2017, was the 23rd full year of operation of the Commission. The staff complement of the Commission is 11, including a chief commissioner, one deputy chief commissioner, one part-time deputy chief commissioner, a director of appeals, three appeals officers, a secretary to the chief commissioner, two administrative secretaries and one clerical staff person. In addition, there are 19 part-time commissioners who sit on appeal panels as required.

The Appeal Process

In order to receive PIPP benefits, a claimant must submit an Application for Compensation to MPIC. If a claimant does not agree with their case manager's decision regarding an entitlement to PIPP benefits, the claimant has 60 days to apply for a review of the decision. An Internal Review Officer will review the case manager's decision and issue a written decision with reasons.

If a claimant is not satisfied with the Internal Review Decision, the claimant may appeal the decision to the Commission within 90 days of receipt of the Internal Review Decision. The Commission has the discretion to extend the time by which an appeal must be filed.

In fiscal year 2016/17, 152 appeals were filed at the Commission, compared to 217 in the fiscal year 2015/16.

The Claimant Adviser Office

The Claimant Adviser Office was created in 2004 by an amendment to Part 2 of the MPIC Act. Its role is to assist Appellants appearing before the Commission. In the 2016/17 fiscal year, 55% of all appellants were represented by the Claimant Adviser Office, compared to 62% in 2015/16.

Pre-hearing procedures & the mediation pilot project

Since February 2012, the Notice of Appeal has indicated that appellants have the option to participate in the mediation of their appeal. Mediation services are provided by the Automobile Injury Mediation Office (AIM), an independent government agency. A mediation information sheet is also provided with the Notice of Appeal. Of the 152 new appeals that were filed during the 2016/17 fiscal year, 128 appellants requested the option of mediation.

If mediation is requested at the time an appellant files a Notice of Appeal, the Commission is responsible for assembling the package of information containing the significant appeal documents which will be utilized in the mediation process.

Hearing Procedure

Once the mediation process concludes, unresolved or partially resolved appeals are returned for adjudication at a hearing before the Commission. The Commission's appeals officers prepare indexed files only for those unresolved appeals returned to the Commission from the AIM Office. If mediation is not requested at the time the Notice of Appeal is filed, an indexed file will be prepared. The indexed file is the compilation of documentary evidence considered relevant to the issues under appeal. It is provided to the appellant or the appellant's representative and to MPIC and will be referred to at the hearing of the appeal. Once the parties have reviewed the indexed file and submitted any further relevant evidence, a date is fixed for hearing the appeal.

Case Conference Hearings

Management of appeals by case conference continues to be an important part of the Commission's hearing schedule. Over the last six fiscal years, the Commission's experience has been that many appeals require additional case management by a commissioner. In keeping with past practice, the Commission continued to initiate case conference hearings in 2016/17. The Commission finds that these case conference hearings continue to assist in determining the status of appeals, identifying sources of delay, resolving parties' impediments to scheduling a hearing date, facilitating mediation, and scheduling hearings.

Hearing Activity

The following identifies the number of hearings held in the last six fiscal years.

Fiscal Year	Hearings Held	Case Conference Hearings	Total Hearings
2016/17	27	117	144
2015/16	37	80	117
2014/15	47	150	197
2013/14	66	141	207
2012/13	87	157	244
2011/12	94	102	196

The following identifies the number of days required for hearings held in the last three fiscal years.

Fiscal Year	Days of Hearings Held	Days of Case Conference Hearings	Total Hearing Days
2016/17	39	117	156
2015/16	52	80	132
2014/15	50	150	200

Hearings

For appeals that are not fully resolved at mediation, or where an appellant does not elect the option of mediation, the Commission will adjudicate appeals by hearings.

Hearings are relatively informal in that the Commission is not strictly bound by the rules of evidence followed by the courts. Appellants and MPIC may call witnesses to testify and may also bring forward new evidence at appeal hearings. The Commission's hearing guidelines require each party to disclose documentary and oral evidence in advance of the hearing. The Commission may also issue subpoenas, which require persons to appear at the hearing to give relevant evidence and to bring documents with them.

If required, the Commission will travel outside of Winnipeg to conduct a hearing or, if it is appropriate and of benefit to an appellant who lives or works elsewhere, a hearing may be conducted by teleconference.

The commissioner(s) hearing an appeal weigh the evidence and the submissions of both the appellant and MPIC. Under the MPIC Act, following an appeal hearing the Commission may:

(a) confirm, vary or rescind MPIC's review decision; or
(b) make any decision that MPIC could have made.

The Commission issues written decisions and provides written reasons for the decisions. The decisions and reasons are sent to the appellant and to MPIC. The Commission's decisions and reasons are publicly available for review at the Commission's office and on the Commission's web site, http://www.gov.mb.ca/cca/auto/decisions.html. Decisions made available to the public are edited to protect the privacy of the parties, in compliance with privacy legislation in Manitoba. The Commission is committed to providing public access to the evidentiary basis and reasons for its decisions, while ensuring that personal health information and other personal information of the appellants and other individuals are protected and kept private.

In fiscal year 2016/17, appellants were successful in whole or in part in 14% of the appeals heard by the Commission.

Statistics

The Commission hears and decides appeals fairly, accurately and expeditiously. With this in mind, the Commission has established the following service level parameters:

- For those appellants who do not request the option of mediation and request a hearing for the adjudication of the appeal, Commission staff prepares the indexed file of material to be used at the hearing five weeks after receipt of MPIC's file and all other additional material.
- For those appeals that request the option of mediation, Commission staff prepares the indexed file five weeks after the Commission is notified by AIM that mediation is concluded and the appeal will continue to proceed at the Commission to hearing.
- The Commission's expectation is to schedule hearings within six to eight weeks from the time the parties notify the Commission of their readiness to proceed.
- The Commission's expectation for rendering written decisions is six weeks following the hearing and receipt of all required information.

The Commission continues to experience a consistent volume of appeals filed resulting in the following average turnaround times for 2016/17:

- Files were indexed within 4.6 weeks of receipt of MPIC's file and additional material compared to 9.72 weeks in 2015/16 and 7.34 weeks in 2014/15.
- Files were indexed within 3.93 weeks of receipt of notification by AIM that mediation was concluded but the unresolved or partially resolved issues will proceed to hearing, compared to 7.6 weeks in 2015/16 and 6.84 weeks in 2014/15.
- Hearing dates were scheduled, on average, within 1.47 weeks from the time the parties are ready to proceed to a hearing. This compares to 1.79 weeks in 2015/16 and 2.33 weeks in 2014/15.
- The Commission prepared 21 written decisions in 2016/17, compared to 25 written decisions in 2015/16. The average time from the date a hearing concluded to the date the Commission issued an appeal decision was 6.33 weeks in 2016/17, compared to 5.93 weeks in 2015/16 and compared to 5.28 weeks in 2014/15.
- The Commission completed 84 indexes in 2016/17, compared to 102 indexes in 2015/16 and compared to 95 indexes in 2014/15.

The Commission's appeals officers continue to provide substantial administrative support to the case management of appeals. Although there was a decrease in the number of indexes prepared in 2016/17, the Commission's appeals officers experienced an increase in the preparation of supplementary indexes to 99, compared to 85 supplementary indexes in 2015/16 and 111 in 2014/15. Supplementary indexes include the preparation of additional indexes for case conference hearings and jurisdictional hearings, and preparing additional indexes on existing files where additional material is received.

Including supplementary indexes, appeals officers prepared a total of 183 indexes in 2016/17, as compared to 187 indexes in 2015/16 and 206 indexes in 2014/15.

As of March 31, 2017, there were 380 open appeals at the Commission, compared to 399 open appeals as of March 31, 2016 and 355 open appeals as of March 31, 2015.

Appeals to the Manitoba Court of Appeal

A decision of the Commission is binding, subject only to a right of appeal to the Manitoba Court of Appeal on a point of law or a question of jurisdiction, and then only with leave of the court.

There were 3 applications for leave to appeal in 2016/17. Leave to appeal was denied in all of the applications. In addition, there was one application for leave to appeal which had been made in 2015/16, which was denied in 2016/17. That case was of particular interest, as the Manitoba Court of Appeal noted that "[t]he law is essentially settled that a question of statutory interpretation by a tribunal of its own statute will be reviewed on the standard of reasonableness". The Court further held that a "deferential standard of review ... would apply to th[e] question" of how the Commission interprets the MPIC Act.

In the Commission's 23 years of operation, as of March 31, 2017, the Court of Appeal has granted leave to appeal in a total of 14 cases from the 1,697 decisions made by the Commission.

Sustainable Development

The Commission is committed to the Province of Manitoba's Sustainable Procurement Practices plan. Commission staff is aware of the benefits of Sustainable Development Procurement. The Commission uses environmentally preferable products whenever possible and takes part in a recycling program for non-confidential waste.

The Public Interest Disclosure (Whistleblower Protection) Act

The Public Interest Disclosure (Whistleblower Protection) Act came into effect in April 2007. This law gives employees a clear process for disclosing concerns about significant and serious matters (wrongdoing) in the Manitoba public service, and strengthens protection from reprisal. The Act builds on protections already in place under other statutes, as well as collective bargaining rights, policies, practices and processes in the Manitoba public service.

Wrongdoing under the Act may be: contravention of federal or provincial legislation; an act or omission that endangers public safety, public health or the environment; gross mismanagement; or, knowingly directing or counselling a person to commit a wrongdoing. The Act is not intended to deal with routine operational or administrative matters.

A disclosure made by an employee in good faith, in accordance with the Act, and with a reasonable belief that wrongdoing has been or is about to be committed is considered to be a disclosure under the Act, whether or not the subject matter constitutes wrongdoing. All disclosures receive careful and thorough review to determine if action is required under the Act,

and must be reported in a department's annual report in accordance with Section 18 of the Act. The Commission has received an exemption from the Ombudsman under Section 7 of the Act. As a result, any disclosures received by the Chief Commissioner or a supervisor are referred to the Ombudsman in accordance with the exemption.

The following is a summary of disclosures received by the Commission for the fiscal year 2016/17.

Information Required Annually (per Section 18 of The Act)	Fiscal Year 2016/17
The number of disclosures received, and the number acted on and not acted on. Subsection 18(2)(a)	NIL

Significant Decisions

The following are summaries of significant decisions of the Commission and the reasons for those decisions that were issued in 2016/17.

1. Extension of Time Limits

The MPIC Act provides time limits to file claims for compensation for bodily injuries and to appeal MPIC Internal Review Decisions to the Commission. However, the MPIC Act also gives MPIC and the Commission the ability to extend these time limits. While subsection 141(1) states that a claim for compensation shall be made within two years after the day of the accident, subsection 141(4) allows MPIC to extend the time if it is satisfied that the claimant has a reasonable excuse for failing to make the claim within the two years. Subsection 174(1) of the MPIC Act states that a claimant may appeal an Internal Review Decision to the Commission within 90 days after receiving notice of the decision or within such further time as the Commission may allow.

a) Extension of the time limit to file a claim with MPIC

The Appellant was involved in a motor vehicle accident (MVA) in 2004. Despite having significant injuries and a lengthy hospital stay due to these injuries, the Appellant did not make a claim for compensation with MPIC until she contacted MPIC by telephone in 2014, nearly 9½ years after the MVA. MPIC found that the Appellant was not entitled to PIPP benefits because she had failed to report her claim within the two year limitation period in the MPIC Act and had not provided valid reasons for the delay in reporting the claim.

The Appellant's representative submitted that the Appellant had provided a reasonable excuse for failing to contact MPIC within the time limits. The Appellant was seriously injured and has had difficulties with her cognitive abilities since the MVA. She was also in an abusive relationship and her husband's abusive behaviour continued for some period after their separation in 2008. The Appellant was told false information by her husband's family

that she could not pursue a claim for compensation for her bodily injuries with MPIC because her vehicle was not adequately insured at the time of the MVA. The Appellant's representative submitted it was reasonable for the Appellant to believe she was not covered given the complexity of the insurance situation. The Commission was asked to consider the Appellant's circumstances as a whole and find that the Appellant provided a reasonable excuse for the late filing of her personal injury claim.

Counsel for MPIC submitted that the length of the delay in this case was substantial, causing prejudice to MPIC. Information gathering, case management opportunities, and the beneficial effects of dealing with MVA injuries in a timely manner had all been lost. Regarding the issue of decline in cognitive function as a reason for the Appellant not filing a claim in a timely manner, counsel submitted that there was limited medical evidence pointing to a decline in executive function such that the Appellant was unable to report a claim to MPIC. Rather, the evidence showed that, between her own efforts and those of her family, the Appellant was clearly able to attend to her own needs and pursue her own well-being.

Regarding the abusive relationship, counsel for MPIC was clear that he did not, in any way, want to minimize the effects of the abuse on the Appellant or suggest that the Appellant was not in a difficult situation when she was living with her husband. However, counsel for MPIC noted that the Appellant left the abuse in 2008, only two years after the expiry of the time period within which to come forward to MPIC. Counsel submitted it would have been reasonable for the Appellant and her own family, in the many years after leaving the abuse, to double check the information given by the husband and his family given their history.

The Commission found that making a claim with MPIC 7½ years after the expiry of the two-year period within which to make a claim was a very lengthy delay and that there was inherent prejudice to MPIC given this lengthy passage of time. The Commission found that the Appellant's conduct in failing to pursue her claim in a timely manner was, as a whole, unreasonable.

Regarding the Appellant's report of cognitive difficulties such as memory loss, the Commission did not accept that the Appellant's memory difficulties impaired her to such a degree that she could not have contacted MPIC to inquire about filing a personal injury claim. Regarding the submission that the Commission must consider the complexity of the insurance situation as a factor, the Commission found that the complexity of the insurance coverage supported the need for the Appellant to directly contact MPIC herself.

While the Commission accepted the Appellant's evidence that she was in an abusive relationship at the time of the MVA, the evidence was also that the Appellant went to live in a supportive environment after the separation from her husband. Given the nature of her relationship with her husband, the Commission found it would have been reasonable for the Appellant to make her own inquiries with MPIC regarding her personal injuries. It was unreasonable for the Appellant not to have made inquiries until more than 6 years after her separation given that she lived in a supportive environment with family members who would have assisted the Appellant if she needed them to. The Commission noted that its conclusion

may have been different had the Appellant pursued her claim within a reasonable amount of time after the separation from her husband. The Appellant's appeal was dismissed.

b) Extension of the time limit to file an appeal to the Commission

The Appellant was injured in an MVA in 2009. The Appellant's case manager issued a decision regarding entitlement to PIPP benefits related to nasal injury and surgeries. The Appellant sought a review of this decision within the 60 day time limit under the MPIC Act. In August 2013, an Internal Review Officer from MPIC dismissed his application for review and upheld the case manager's decision. The Appellant did not make application in writing to appeal the Internal Review Decision within 90 days from the date the decision was received by the Appellant in early 2014. Rather, in August 2014, the Appellant provided a letter to MPIC indicating that he wished to appeal the Internal Review Decision. The Appellant did not file his Notice of Appeal with the Commission until January 2016.

The Appellant made application to the Commission for an extension of time for filing the Notice of Appeal pursuant to section 174 of the MPIC Act.

Counsel for the Appellant submitted that the main criteria to consider in this case are the actual length of the delay and the reasons provided. Counsel submitted that the Appellant has had a great deal of personal and medical problems since the MVA, including significant financial struggles and periods of homelessness. Counsel submitted that the Appellant did his best, under the circumstances, to push his appeal forward and explain himself.

Counsel for MPIC agreed with counsel for the Appellant that the actual length of the delay and the reasons provided are the main factors in this case but submitted that the Appellant's reasons for delay did not constitute a reasonable excuse. Rather, the evidence showed that the Appellant chose to prioritize other matters in his life rather than pursue his appeal. Counsel submitted that the steps to file an appeal are not onerous; the Notice of Appeal form is a one page form. The Appellant did not seek out resources to help him navigate. The resources are there; the Appellant simply didn't access them.

The Commission found that the Appellant had not provided a reasonable excuse for his failure to appeal the Internal Review Officer's decision to the Commission within the 90 day time limit set out in the MPIC Act. At the time the Appellant received the Internal Review Decision, he was living with family out of province and was having his mail kept for him by a friend in Winnipeg. The Appellant testified that he received so much mail from his friend that he likely didn't read the Internal Review Decision when he first received it. The Commission found that it was not reasonable for the Appellant, knowing that the Internal Review Decision was pending, not to make efforts to locate the Internal Review Decision in his bag of mail. Further, the Commission found that when the Appellant finally read the Internal Review Decision, he was so upset with the decision that he did not read it to the end. The Commission found that it was unreasonable for the Appellant not to have read the full decision because, had he done so, he would have read the pages which outlined his right of appeal, the timeline under which to appeal, the contact information for the Commission, and the contact information for the Claimant Advisor Office. It was not until August 2014,

some eight months after having received the Internal Review Decision in the bag of mail being held by his friend, that the Appellant wrote his letter of appeal to MPIC. The Commission declined to exercise its discretion to extend the time within which the Appellant could appeal.

2. <u>Whether there is a Causal Connection between the MVA and the Appellant's Symptoms</u>

In order to be entitled to benefits under the MPIC Act, an Appellant must establish, on a balance of probabilities, that his or her injuries were caused by the MVA. In the following cases, the Commission carefully considered the evidence and the reports of the medical experts to determine whether there was a causal connection between the MVA and the Appellant's injuries and symptoms, in order to determine the Appellant's entitlement to benefits.

<u>Case #1</u>

In this case, the Commission found that the Appellant did not meet the onus of establishing, on a balance of probabilities, that her right knee, neck, back and hand complaints were caused by the MVA.

The Appellant was injured in 2009 when she was riding her bicycle and she collided with the open door of a parked vehicle. She was thrown from her bicycle. She received physiotherapy treatments and was discharged in early 2010. She contacted MPIC to request further physiotherapy in late 2011 and again in late 2012. No treatments were authorized at that time. The Appellant advised MPIC of her knee pain in early 2013 and in March and April of 2015. She requested physiotherapy and was again denied by MPIC.

At the appeal hearing, the Appellant acknowledged that she had some pre-existing injuries prior to the MVA. In fact, she had had spinal surgery in 1969, which had fused the vertebrae in her neck. However, the Appellant argued that the MVA made the pre-existing injuries in her neck and back worse, and caused her additional injuries and pain. She noted that right after the MVA, early in the physiotherapy treatment, there was a great focus on her neck and that as a result, there was a lack of appropriate treatment of her knee. However, she still does have pain in her knee and that pain was as a result of the MVA.

Counsel for MPIC acknowledged that at the time of the MVA the Appellant suffered injuries to her neck, left shoulder and low back and an abrasion to her left elbow. However, he pointed out that as of August 24, 2010, the Appellant's physician reported that she had made a satisfactory recovery. The report from the Appellant's physiotherapist also said that she had made an improvement through physiotherapy treatment and supported the conclusion of her physician. MPIC's medical consultant was of the opinion that her MVA-related injuries had ample time to heal within one year after the MVA. With respect to physical therapy, the medical consultant opined that it was probable that the Appellant was at maximum medical improvement with respect to in-clinic treatment. Counsel also noted the first mention of any injury to the Appellant's right knee was more than three years after the MVA.

The Commission accepted the medical evidence that the Appellant had made a satisfactory recovery and was at maximum medical improvement with respect to physical therapy. There was no medical evidence before the Commission to the contrary. The Commission concluded that the Appellant had failed to establish, on a balance of probabilities, that her current symptoms were caused by the MVA. She was therefore not entitled to PIPP benefits.

Case #2

This case is similar to case #1, in that the Commission also found that the Appellant did not meet the onus of establishing, on a balance of probabilities, that his right shoulder injury was caused by the MVA.

The Appellant in this case was also injured in 2009, when he was thrown from his bicycle when it was struck by a vehicle. In March, 2010, he advised MPIC that he may require surgery to his right shoulder. MPIC denied PIPP benefits to the Appellant, on the basis that there was no mention of right shoulder pain until nine months following the accident date and no medical documentation to relate that pain to the MVA.

At the appeal hearing, it was not disputed that there was evidence, in 2012, that the Appellant had suffered an earlier right shoulder injury, specifically a rotator cuff tear. The dispute was whether the tear was caused by the MVA. The Appellant argued that it was. Counsel for MPIC argued that that the tear was a result of degenerative changes.

The Appellant argued that immediately after the MVA, he was focused on pain in other areas of his body and that is why he did not mention the right shoulder pain for nine months. However, he also argued that he did mention the pain, and that his care providers failed to record it, so his evidence on this point was slightly inconsistent. After reviewing all of the documentary evidence, including medical reports and clinical chart notes from the Appellant's medical providers, the Commission found that the Appellant had reported many other areas of injury during the nine months after the MVA and concluded that it was unlikely that the Appellant would mention all of those other areas, but fail to report his right shoulder injury. The Commission found that it was equally unlikely that the Appellant's medical providers would have recorded all of the other areas of injury but would have failed to record his right shoulder injury.

The Commission further found that the Appellant did not establish that his right shoulder injury was caused by the MVA. In support of his position, the Appellant submitted a medical report from his physician, who relied on the Appellant's narrative that his right shoulder pain stemmed from the MVA. Counsel for MPIC noted that the Appellant had been employed for many years as an autobody technician doing manual labour, which involved significant use of his arms. Counsel argued that the Appellant's rotator cuff tear was likely caused by degenerative changes, common in people of his age and line of work. Counsel also relied on reports from MPIC's medical consultants, in which the consultants reviewed all of the other medical reports on file, including diagnostic imaging, and concluded that the rotator cuff tear was degenerative in nature. The Commission found that MPIC's medical consultants were thorough and comprehensive in their analyses. The Commission preferred the evidence provided by MPIC's medical consultants,

to that of the Appellant, whose evidence was inconsistent, and to that of the Appellant's physician, who did not have an opportunity to review all of the file material. Accordingly, the Appellant was not entitled to PIPP benefits.

Case #3

The Appellant's chin hit part of the steering wheel during an MVA. He later felt pain in his teeth and consulted a dentist who examined him and was of the view that he did not damage any of his teeth in the MVA. A second dentist believed it was possible that the MVA had caused damage to the Appellant's tooth. The Appellant admitted that there had been some pre-existing damage to that tooth but that the MVA caused further damage resulting in pain. MPIC denied payment for this dental treatment.

MPIC submitted that the Appellant's tooth was compromised and in very poor condition prior to the MVA and that there was no evidence supporting the Appellant's position that the tooth was damaged in the accident. Dental reports on the Appellant's files established that the condition of the tooth was inconsistent with fresh damage. The damage had occurred before the MVA and taken some time to develop.

The Commission noted that the onus is on the Appellant to show, on a balance of probabilities, that the injury he described was caused by the MVA. While the Appellant believed that the pain in the tooth was caused by the accident, there was no medical evidence supporting a casual relationship between the accident and the damage to the tooth. Rather, the evidence showed that the tooth was already a broken and compromised tooth that had been prepared for further dental treatment, even prior to the MVA. The panel found that neither of the dentists who examined the Appellant's teeth provided an opinion connecting the damage to the tooth to the MVA. The opinion of MPIC's dental consultant, which included a review of the file and models and photographs of the tooth, concluded that the tooth had been fractured for a long time prior to the accident. There was no medical information before the panel to contradict this conclusion.

While the panel recognized that the Appellant strongly believed that the MVA caused his already damaged tooth to cause him further pain, it noted that although the Appellant had indicated he would be seeking another medical report, he had not provided a medical report supporting his belief. Therefore, after a careful review of all the documentary evidence and the testimony of the Appellant and submissions of counsel, the Commission concluded that the Appellant had not met the onus of establishing that, on a balance of probabilities, the damage to his tooth was caused by the accident.

3. Whether the Appellant is Entitled to Income Replacement Indemnity (IRI) Benefits

Under the MPIC Act, an Appellant may be entitled to IRI benefits if he or she is unable to work for a period of time. Pursuant to paragraph 110(1)(a) of the MPIC Act, an Appellant ceases to be entitled to IRI benefits when he or she is able to hold employment that was held at the time of the accident. Manitoba Regulation 37/94 provides that an Appellant is unable to hold employment when a physical or mental injury that was caused by the accident renders him or her entirely or substantially unable to perform the essential duties of the pre-accident employment.

Case #1

In this case, the Appellant argued that injuries caused by the MVA rendered her unable to perform the duties of her pre-accident employment for a certain period of time. MPIC argued that the Appellant's inability to work was not caused by the MVA, and therefore she should not be entitled to IRI benefits.

On June 26, 2010, the Appellant was in the parking lot outside her place of employment (a convenience store) when she was struck by a vehicle that was backing up. She was knocked down and suffered various injuries as a result of this MVA. She received PIPP benefits, including IRI benefits, as she was off work for approximately five weeks, returning on August 5, 2010. She returned to work on a part-time basis (two days per week), as she felt that was all she could manage due to her ongoing injuries.

Subsequent to her return to work, and while the Appellant was present in the store, the convenience store was robbed on August 21, 2010 and again on September 3, 2010. The Appellant went to see her family physician. He was of the view that she may be suffering from post-traumatic stress disorder (PTSD), and he advised her to stay off work until September 28, 2010, when he saw her again and advised her to remain off work until further notice. She did not return to work at the convenience store. The Appellant remained off work until December 6, 2012, when she became an employee at a personal care home.

The Appellant argued that the MVA caused her to suffer depression and PTSD, which were exacerbated by the robberies, and this rendered her unable to work during the period in question. MPIC did not dispute that the Appellant suffered from depression and PTSD, but argued that the MVA had no impact on the Appellant. MPIC argued that the robberies were the sole cause of the Appellant's psychological injuries.

The credibility of the Appellant was a significant issue in this case. In addition, there was conflicting testimony from the Appellant's long-time physician and MPIC's psychological consultant. The Appellant's treating psychologist did not testify but provided medical reports and clinical chart notes; each party had a different interpretation of those documents.

Regarding the credibility of the Appellant, the Commission considered her testimony in light of the requirement identified in case law that to be considered reliable, the testimony must be "in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable". The Commission considered all of the evidence and found the Appellant to be credible.

The Appellant testified that the MVA was traumatic for her, far more so than the subsequent robberies. She acknowledged that the robberies had an impact on her, but it was her position that the MVA's impact on her was greater, and it was the initial traumatic event. It caused her to have psychological symptoms, and these were noted by her in her Application for Compensation provided to MPIC prior to the robberies. The Appellant's family physician, who diagnosed her with depression and referred her to a psychologist, provided a medical opinion in which he identified that the MVA likely played the larger role in causing the Appellant's PTSD. The

Appellant also relied on clinical chart notes and reports from her treating psychologist, which related the Appellant's PTSD to the MVA and identified that the PTSD and depression occurred subsequent to the MVA and became more full-blown after the robberies.

Counsel for MPIC argued that the MVA was not a likely cause of the Appellant's psychological symptoms; rather, robberies are traumatic events and therefore the robberies must have been traumatic for the Appellant. MPIC's psychological consultant opined that the robberies were the sole cause of the Appellant's psychological symptoms.

The Commission carefully considered all of the evidence, and determined that it preferred the evidence of the Appellant's treating physician and psychologist to that of MPIC's psychological consultant, who had not had an opportunity to personally assess the Appellant but had only reviewed the file material. Both the Appellant's physician and psychologist had the opportunity to personally examine and treat the Appellant, assessing her credibility and obtaining her medical history. They were both consistent in their view that the Appellant's depression and PTSD were caused by the MVA, with the PTSD becoming full-blown after the robberies. The Commission held that it was not a reasonable position to take, that the MVA made no contribution to the Appellant's psychological condition. The Commission found that the Appellant had established, on a balance of probabilities, that her psychological injuries were caused by the MVA.

The Appellant further established that those injuries rendered her substantially unable to perform the duties of her pre-MVA employment during the period in question. The Commission accepted a medical report from her treating physician which provided an opinion to that effect and determined she was entitled to IRI.

Case #2

The issue on appeal was whether the Appellant's IRI benefits were correctly terminated and whether he was functionally capable of holding his determined employment as of June 1, 2012.

The Appellant was involved in an MVA in August of 2006 and sustained a number of injuries. He was unable to work and participated in a work hardening reconditioning program. MPIC found that he was fit for immediate return to work in June of 2007. However, based on further reports from a psychologist and a psychiatrist, the Appellant's IRI benefits were reinstated in January of 2008, as MPIC determined that he suffered from a psychological condition causally related to the MVA which prevented him from working. Various attempts at psychiatric treatment were unsuccessful and psychological assessments followed. In May of 2012, MPIC found that the Appellant had regained the functional ability to return to his pre-accident employment effective June 1, 2012. In reviewing the medical and psychological reports on the Appellant's file, the Internal Review Officer for MPIC also considered video surveillance of the Appellant performing various activities in December of 2011 and compared those with reported levels of function which the Appellant had provided in September of 2011. The Internal Review Officer agreed the Appellant was functionally capable of returning to his employment.

The Commission reviewed numerous medical reports from the indexed file. These included reports from his general practitioner, a physiatrist and specialist in vocational rehabilitation,

neurologists, psychologists, neuropsychologists, and psychiatrists. The Appellant was diagnosed with chronic pain, major depression disorder, anxiety and PTSD. The panel heard testimony from the Appellant and his wife regarding an earlier history of trauma he had suffered, his work history and the physical and psychological difficulties he encountered following the MVA. The Commission also heard testimony from his general practitioner, two treating psychiatrists and from a neuropsychologist. Overall, the expert evidence showed a difference between the opinions and approach of the psychological experts and those of the psychiatrists involved.

The panel also reviewed videotaped surveillance of the Appellant which showed clear physical capabilities in the relevant time period. However, physical capabilities were not the issue in the appeal before the panel. In June of 2012, the Appellant was not in receipt of IRI benefits due to any physical condition or disability. MPIC had found much earlier that he was physically able to work, but both parties agreed that MPIC had initially accepted a causal relationship between the Appellant‘s psychological condition and the MVA. MPIC took the position that by November or December of 2011, the Appellant had recovered from the psychological effects of the MVA and that the cause of any psychological difficulties which he might have had at that point was to be found in the termination of his MPIC benefits and not from physical or psychological injuries stemming from the MVA.

While the Appellant seemed physically capable in the videotape evidence, the Commission noted that he did not seem outwardly engaged, communicative or socially outgoing. Many of the physical exercises and activities in which the Appellant was shown participating were recommended as an important part of a rehabilitation plan even for those with mental illness. The panel also considered testimony from the Appellant’s caregivers that with conditions like PTSD and depression, the Appellant is not in a constant state and symptoms can wax and wane, depending on many factors. The panel found the psychiatric evidence established that the Appellant met the criteria for a diagnosis of PTSD, with PTSD symptoms happening most days and most parts of the day for a period of up to six months.

The panel weighed the evidence of the Appellant’s caregivers and the psychiatrists who treated or assessed him against the views of some of the psychologists who assessed him. The psychiatrists found that the Appellant suffered from psychological conditions, including PTSD symptoms, which had been triggered by the MVA and were preventing him from working. After viewing surveillance videotapes, reviewing the medical reports and considering the evidence of the Appellant, his wife, caregivers, and expert witnesses, the panel found that the weight of evidence supported the Appellant’s position that he was unable to work due to a psychological condition arising out of or triggered by the MVA. Weight was placed upon the consistent opinions of the various psychiatrists who assessed the Appellant and concluded that he continued to suffer from symptoms of PTSD and depression triggered by the MVA. The Commission found that the Appellant had met the onus of showing, on a balance of probabilities, that he suffered from psychological conditions arising out of the MVA which prevented him from working. The Commission determined the appellant’s IRI benefits should not have been terminated.

Case #3

The Appellant suffered injuries in an MVA, including fractures to his ribs, pelvis and vertebrae. As a result of these injuries, the Appellant received PIPP benefits, including IRI benefits. Relying in large part on a functional capacity evaluation (FCE) completed by an occupational therapist, MPIC terminated the Appellant's IRI benefits when it found that the Appellant was physically able to return to work in his determined employment. At issue on appeal was whether MPIC's determination of employment was correct and whether the Appellant was able to return to work in that determined employment.

The Appellant submitted that MPIC had failed to fully consider his employment history when determining his employment. Had MPIC properly considered his full work history, they would have found that his occupation has a strength rating of "heavy" rather than the "medium" strength category of the employment determined by MPIC. The Appellant submitted that he could not return to work in a heavy strength category of employment.

The Appellant argued that the FCE conducted by the occupational therapist was inadequate in that it lacked in-depth physical testing and was, in general, not thorough. He submitted that he still suffered pain, cramping and burning in his right leg and that his IRI benefits should not have been terminated.

Counsel for MPIC submitted that the Appellant's employment was correctly determined and the strength category of this employment is medium. Regarding ability to return to work, counsel submitted that there was an absence of any objective medical evidence supporting the Appellant's inability to perform in his determined employment. The Appellant's evidence was that he returned to work with his former employer shortly after MPIC terminated his IRI benefits and the job he returned to was more physically demanding than the job he did prior to the MVA. While the Appellant stated that he asked to move to a different work station because he was finding the work physically difficult, he didn't make this request until almost a year after being back at work. Ultimately, the Appellant was laid off when hundreds of other employees were laid off at the end of a project. There was no evidence that the Appellant left his job due to injury. Counsel submitted that the Appellant's ability to work in his determined employment for over a year after the termination of IRI benefits was all the evidence necessary to show that the Internal Review Officer was correct in deciding that the Appellant could return to his determined employment.

Based on the evidence concerning the Appellant's work history, the Commission found that the Appellant's employment was correctly determined. With respect to the strength level for the Appellant's determined employment, the Commission accepted the documentary and viva voce evidence that the strength level for the Appellant's determined employment is medium.

The Appellant reported that he experiences pain in his daily functioning as a result of the MVA injuries. However, the occupational therapist explained that when testing for ability to return to

work, the issue is not "maximum ability", but rather "safe ability" to return to work. This does not mean that the Appellant must be symptom-free to safely return to work.

The Commission accepted the evidence of the occupational therapist that the Appellant was able to safely return to work even though he was still experiencing symptoms. The Appellant was able to manage his ongoing symptoms and return to work with his previous employer, missing only 2 days of work due to the flu in the year after his return to work. The Commission found that the Appellant did not meet the onus of establishing that MPIC erred in terminating his IRI benefits and dismissed the appeal.

4. No Power to Award Costs (Legal Fees)

The Appellant sought reimbursement for legal fees for counsel to represent her at her hearing before the Commission and in her communications with her case manager. The Appellant submitted that although the MPIC Act does not provide compensation for legal fees, the legislation should be reviewed. It was submitted that as MPIC has the advantage of legal representation retained specifically for the purposes of representing MPIC at the appeal, the Appellant must also have legal representation in order for a fair hearing to take place. A lay person such as the Appellant would lack the legal training and resources necessary to properly prepare for an appeal.

Counsel for MPIC submitted that the MPIC Act does not provide jurisdiction for the Commission to order reimbursement of legal fees. He relied on prior decisions of the Commission and of the Court of Appeal which found that there were no provisions in the Act for funding legal representation at the Commission. He also noted the formation of the Claimant Adviser Office to provide assistance to Appellants free of charge.

The panel reviewed this case law, which recognized the intention of the MPIC Act to make the appeal procedure as streamlined, speedy, relatively simple and inexpensive as possible. The panel concluded that the power to award costs must be specifically conferred by the empowering statute. The Commission was bound to decide the case based on the MPIC Act and case law which recognized the lack of such a provision. Accordingly, the panel found the Commission does not have the jurisdiction to award costs for legal fees to the Appellant.

5. Calculation of Death Benefits

Division 3 of the MPIC Act provides for the payment of a lump sum indemnity on the death of a victim of an MVA. The following case provides an example of the diverse circumstances which may arise in these types of matters.

In 2012, a husband, wife and their adult daughter were tragically involved in a serious MVA. While the husband and his daughter were not critically injured, unfortunately the wife did not survive the MVA. In addition to leaving behind her husband and daughter, the deceased wife also left behind an adult son.

As noted above, under the MPIC Act, a death benefit is payable where a victim dies as a result of an accident. A benefit is payable to a surviving spouse. A benefit is also payable to a child over

18 years old who is "substantially dependent" on the deceased victim. Here, MPIC paid a death benefit to the husband and to the adult daughter, whom MPIC considered to be substantially dependent on her mother. No death benefit was paid to the adult son.

The husband filed an appeal with the Commission, arguing that the amount of the benefit paid to him should have been larger, to take into account the significance of his loss, as well as his late wife's lost future earning potential. The adult son also filed an appeal with the Commission, arguing that he should have received a death benefit, as he was also substantially dependent on his mother.

Counsel for MPIC argued that the calculation of the husband's death benefit had been made correctly, in accordance with the legislation. Counsel further argued that the adult son was not substantially dependent on his mother.

The Commission expressed its condolences to the husband and the son for their tragic loss. In reviewing the death benefit paid to the husband, the Commission noted that it is not possible to put a value on the loss of someone's life and the MPIC Act is not intended to do so; rather, it is intended to capture someone's earnings at a certain moment in time. The Commission found that the calculation of the benefit paid to the husband had been made correctly.

With respect to whether the adult son was entitled to a death benefit, the Commission noted that "substantially dependent" has been interpreted to mean "reliant upon the deceased in large measure, rather than in some inconsequential or sporadic way". Various factors of dependence have been considered, including financial dependence and employment status, marital status, residence or living arrangements, emotional dependence and spiritual dependence. The Commission found that in the circumstances of this case, the adult son was not able to meet the onus of establishing, on a balance of probabilities, that he was substantially dependent on his mother at the time of the MVA in any of these categories. At the time of the MVA, he was married, and he and his wife were living in their own apartment. He was a recipient of funds from a government program. Although his mother did provide him with some meals, there was no evidence to support that she made any financial contributions. Therefore, the Commission found that he was not a "dependent" and was not entitled to a death benefit.

6. Application of the MPIC Act

In this case, the Commission had to consider the scope of the coverage of the MPIC Act, as well as issues of its constitutionality.

The Appellant was a commercial truck driver. His truck was stolen and as a result he missed several weeks of work. He sought IRI benefits from MPIC based on his loss of income caused by business disruption. MPIC denied his claim on the basis that the Appellant did not suffer any bodily injuries in an accident, which is required under the MPIC Act in order to be entitled to IRI benefits.

The Appellant appealed MPIC's denial of benefits to the Commission. In his appeal, he argued that he was entitled to the benefits claimed. Alternatively, he argued that the provisions of the MPIC Act which would deny his claim were contrary to sections 9 and 13 of the Manitoba

Human Rights Code (the Code) and subsection 15(1) of the Canadian Charter of Rights and Freedoms (the Charter). Due to the constitutional question, the Attorney General (AG) of Manitoba was also a party in this case.
It was not in dispute that the Appellant was not involved in an accident and did not suffer any bodily injury. Therefore, the Commission held that the Appellant clearly did not fall within the benefit provisions of the MPIC Act.

The Commission then considered the submissions of the parties relating to the Code. Section 9 of the Code prohibits the differential treatment of individuals on the basis of certain listed characteristics. The Appellant argued that he had suffered differential treatment here; however, the Commission found that he did not establish, on a balance of probabilities, any differential treatment suffered by him on the basis of a characteristic enumerated in the Code. The Commission further found that if the Appellant had, in the circumstances, been subject to differential treatment, section 13 of the Code would have permitted such treatment. Subsection 13(1) of the Code prohibits discrimination in the provision of a service or program unless "bona fide and reasonable cause exists for the discrimination". The Commission found that to exclude from the PIPP scheme persons who do not suffer a bodily injury is reasonable and not discriminatory. The Commission accepted that it would not be feasible or economical for MPIC to insure all losses, such as theft, particularly where loss of use insurance is available for purchase.

The Commission also considered the submissions of the parties relating to the Charter. The Appellant argued that his equality rights were violated under subsection 15(1) of the Charter, which provides as follows:

> **Equality before and under law and equal protection and benefit of law**
> **15.** (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The Appellant argued that although it was not specifically enumerated in subsection 15(1), his status as a commercial driver, or more particularly a non-injured commercial driver, was deserving of protection as a ground analogous to those listed there. Counsel for the AG of Manitoba argued that "occupation" has not been found to be an analogous ground for the purposes of section 15. The Commission reviewed the case law on this point and found that the Appellant's occupation as a commercial driver does not fall within the parameters of subsection 15(1) of the Charter. In any event, the Commission noted that any person who suffers the theft of his or her vehicle but does not suffer a bodily injury is not eligible for PIPP benefits. Therefore, no distinction is made by the legislation between non-injured commercial drivers and non-injured domestic drivers; they are both subject to the same fate. Therefore, the Commission found that the Appellant was unable to establish that commercial drivers, to the exclusion of other drivers, were subject to any disadvantage.

Although the Commission found that there had been no breach of subsection 15(1), it nevertheless considered the application of section 1 of the Charter, which would permit a breach

in circumstances where it can be demonstrably justified as a reasonable limit in a free and democratic society. The Commission held that the purpose of the PIPP legislation is to provide compensation to persons who suffer bodily injuries in an MVA, and that to exclude from those provisions persons who have not been injured in an MVA vehicle accident is rationally connected to that objective and minimally impairing of section 15. Therefore, if there had been a breach of section 15 of the Charter, it would have been justified under section 1.

The Appellant was dissatisfied with the Commission's decision and sought leave to appeal from the Manitoba Court of Appeal. As noted above, a decision of the Commission is binding, subject only to a right of appeal to the Manitoba Court of Appeal on a point of law or a question of jurisdiction, and then only with leave of the court. The Appellant, in his application for leave, argued that there had been two errors of fact as well as an error of law and an error of jurisdiction in the Commission's decision. In denying leave to appeal, the Manitoba Court of Appeal noted that since errors of fact are not appealable, there was no arguable merit to those two grounds. Regarding the issue of whether the Commission erred in its finding that the Appellant was not entitled to PIPP benefits, the court noted that the Appellant's circumstances simply do not meet the definition of "accident" or fall within the PIPP provisions because he was neither involved in an accident nor injured. With respect to the Appellant's argument that the Commission erred in law in connection with its consideration of the Code, the Court held that the Appellant "failed to convince me that there is any arguable merit to his claim that the Commission erred in law". The court also noted that the Appellant "has failed to persuade me that there is any arguable merit regarding his assertion that the Commission erred in law with respect to its conclusion that there was no section 15 Charter breach. As a result, and as already stated, the [Appellant's] argument that the Commission erred with respect to its section 1 Charter analysis is moot since section 1 need only be considered if the Commission held that there had been a section 15 Charter breach, which it did not".

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