



## Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by I.N.  
AICAC File No.: AC-01-75**

**PANEL:** Mr. Mel Myers, Q.C., Chairman  
Dr. Patrick Doyle  
Mr. Wilson MacLennan

**APPEARANCES:** The Appellant, I.N., was represented by Mr. Anthony Dalmyn;  
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.

**HEARING DATE:** March 16, 2004 and May 21, 2004

**ISSUE(S):** 1. Claim for compensation within two years after date of accident;  
2. Extension of time to file claim for compensation.

**RELEVANT SECTIONS:** Sections 141(1)(a), 141(4) and 150 of The Manitoba Public Insurance Corporation Act ('MPIC Act')

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

### Reasons For Decision

On April 24, 2001 MPIC's Internal Review Officer wrote to Mr. Dalmyn, legal counsel for I.N. (hereinafter referred to as the "Appellant") in respect of her application to have an Internal Review Officer review a decision by the case manager who rejected the Appellant's Application for Compensation in respect of a motor vehicle accident which occurred near [text deleted], Ontario on April 2, 1995. In his decision the Internal Review Officer stated:

[I.N.] was injured in a motor vehicle accident near [text deleted], Ontario on April 2, 1995. Her husband attempted to initiate a Personal Injury Protection Plan (“PIPP”) claim on her behalf in December 2000. Our claims staff declined to accept an Application for Compensation because, as noted in Bruce Buchanan’s decision of December 18, 2000, by then the claim for compensation was outside the two years prescribed by Section 141 of *The Manitoba Public Insurance Corporation Act* (“the Act”). Mr. Buchanan declined to extend the time for making such a claim pursuant to Section 141(4) of the Act. [I.N.’s] Application of January 11, 2001 requests a Review of that decision. The issue is whether she has a “reasonable excuse” for failing to present her claim within the two years as provided.

The Internal Review Officer rejected the Application for Review and confirmed the decision of the case manager. As a result, the Appellant filed a Notice of Appeal to this Commission.

### APPEAL

The relevant provisions of the Act relating to this appeal are:

1. Section 141(1)(a) which states:

**Time limitation for claim**

**141(1)** Subject to subsections (2) to (4), a claim for compensation under this Part shall be made

(a) within two years after the day of the accident;

2. Section 141(4) which states:

**Corporation may extend time**

**141(4)** The corporation may extend a time limitation set out in this section if it is satisfied that the claimant has a reasonable excuse for failing to make the claim within that time.

At the Commission hearing, the Appellant’s legal counsel stated that the grounds for appeal were:

1. The Appellant made a timely claim for compensation within two years after the date of the motor vehicle accident pursuant to Section 141(1)(a) of the MPIC Act and, as a result, MPIC erred in rejecting the Application for Compensation. In the alternative:

2. The Appellant has a reasonable excuse for failing to make a claim for compensation within two years after the date of the accident, pursuant to Section 141(4) of the MPIC Act and, as a result, MPIC erred in failing to extend the time in order for the Appellant to make a timely claim for compensation. In the alternative:
3. MPIC had a duty to inquire from the Appellant if the Appellant intended to make a claim for compensation and a duty to provide the Appellant with an Application for Compensation and MPIC breached these duties.

**Claim for compensation pursuant to Section 141(1)(a) of the Act**

The Appellant was involved in a motor vehicle accident in Manitoba on September 28, 1991, prior to the establishment of the no-fault insurance program in Manitoba. The Appellant retained legal counsel (not the legal counsel representing the Appellant in this appeal) who commenced a tort action in the Court of Queen's Bench in Manitoba on September 28, 1993 and provided medical information to MPIC in respect of that motor vehicle accident.

In 1994 tort liability for accidents was abolished and Manitoba residents injured in accidents outside of Manitoba could claim no-fault benefits from MPIC with MPIC being subrogated to the rights of the injured party – whatever those might be – according to the local law.

In April 1995 the Appellant went on a short trip in Ontario and while a passenger in a motor vehicle she was involved in a motor vehicle accident and was injured. The Appellant, at that time, did not make a claim in respect of her injuries to MPIC and commenced legal proceedings in the Province of Ontario in respect of this motor vehicle accident. The Appellant's counsel, however, on April 23 and April 26, 1996, submitted a medical report to MPIC together with prescription receipts covering a period of time before and after the 1995 motor vehicle accident,

as well as a claim for reimbursement of physiotherapy treatments. In this correspondence the Appellant's counsel requested reimbursement in respect of the prescription drugs and physiotherapy treatments.

The Appellant's legal counsel continued to represent the Appellant in respect of her 1991 motor vehicle accident claim with MPIC. Legal proceedings in respect of the 1995 accident were commenced in the Province of Ontario in 1997. During the course of these proceedings the Appellant and her legal counsel determined the Appellant could not claim a pecuniary loss in the Province of Ontario and that this claim was subject to a threshold.

In the month of December 2000 the Appellant changed legal counsel and Mr. Dalmyn commenced acting for the Appellant and wrote to MPIC requesting the appropriate claim forms in order that the Appellant may request an extension of time to file a claim in respect of the 1995 motor vehicle accident.

MPIC's case manager wrote to the Appellant's legal counsel in a letter dated December 18, 2000 and advised him that, on a review of the Appellant's MPIC file, there was no reason that the Appellant failed to make a claim within the two year limitation period pursuant to Section 141 of the Act and rejected the Appellant's request. As a result, the Appellant made an Application for Review of the case manager's decision. As indicated earlier, the Internal Review Officer rejected the Application for Review and confirmed the case manager's decision.

### **Submissions**

The Appellant's counsel submits, pursuant to Section 141(1)(a) of the Act, that the Appellant made a timely claim for compensation in respect of the Ontario motor vehicle accident which

occurred on April 2, 1995.

The Appellant's legal counsel further submits that Section 140 of the Act does not set out a process for making an Application for Compensation under the Act.

Section 140 states:

**Application for compensation**

**140** An application for compensation under this Part shall be made in accordance with the regulations.

Both legal counsel agree that there is no regulation in force setting out the requirements for an Application for Compensation. MPIC has forms that require various information from the applicants. However, there is no regulation in force providing for a form of application or prescribing any rules for the delivery of the application to MPIC.

MPIC's legal counsel, in response to the Appellant's submission, indicated there was no Application for Compensation filed within the two year period pursuant to Section 141(1)(a) of the MPIC Act. MPIC's legal counsel further submitted that the Appellant's legal counsel did make a request for reimbursement in respect of prescription expenses and physiotherapy expenses but clearly requested payment in respect of the 1991 motor vehicle accident and not the 1995 motor vehicle accident.

**Discussion**

The Commission, in order to determine whether a timely Application for Compensation was made, reviewed the relevant correspondence between the Appellant's former legal counsel and MPIC's case managers.

On April 23, 1996 the Appellant's former legal counsel wrote to MPIC's case manager and provided her with a narrative medical report from Dr. Husarewycz, dated April 9, 1996, together with prescription receipts relating to the Appellant for the period January 1995 to March 29, 1996 in the total amount of \$897.47. The Commission notes that a portion of these receipts related to the April 2, 1995 Ontario motor vehicle accident. The Appellant's legal counsel stated in his letter:

Accordingly, we ask that you provide funds to our office in the amount of \$897.47 to cover [I.N.'s] prescription expense as soon as possible.

Dr. Husarewycz's letter dated April 9, 1996 is rather extensive in nature and referred to the Appellant's motor vehicle accidents which had occurred on September 28, 1991 in Manitoba and April 2, 1995 in Ontario. In this letter Dr. Husarewycz stated:

. . . . Also she informed me that she was involved in a second vehicle accident on April 2, 1995 when she was traveling in a small car as a passenger. She was examined by Doctor in [text deleted], Ontario but I have no information if there were any x-rays taken at that time.

Dr. Husarewycz in his letter further indicated that the Appellant was being treated by Dr. Gorski until October 3, 1995 and thereafter saw Dr. Husarewycz on October 16, 1995. Dr. Husarewycz provided a narrative report in respect of a number of the Appellant's visits to his office for the period after October 3, 1995 to his last examination of the Appellant on March 6, 1996.

On April 26, 1996 the Appellant's solicitor again wrote to the claims manager at MPIC and provided a copy of Dr. Husarewycz's prescription of physiotherapy for the Appellant and asked that MPIC confirm that they will cover the expense for such physiotherapy.

The case manager in a report to file dated May 10, 1996 noted receipt of Dr. Husarewycz's medical report together with prescription receipts and further noted that the Appellant was involved in a more recent accident in April of 1995. In this memorandum the case manager indicated they have requested an updated medical report from the Dr. Gorski, who previously treated the Appellant. The case manager also stated:

. . . . Will question the lawyer with regards to this more recent accident and will not consider the reimbursement of prescriptions until such time as we are in receipt of information pertaining to same. We also require the original receipts.

The case manager in a report to file dated May 17, 1996 indicated she discussed this matter with the Appellant's legal counsel and then wrote to him on May 21, 1996. In her letter the case manager stated:

Further to our telephone conversation of May 17, 1996 we have reviewed the medical report of Dr. Husarcwycz (sic) and we note it makes mention of a motor vehicle accident occurring April 2, 1995 in Ontario. We are requesting at this time all information available pertaining to this loss. It is also noted that the prescriptions recently submitted were prescribed after the second motor vehicle accident and that our file indicates that there were no submission of prescriptions prior to the second motor vehicle accident. Therefore, we cannot consider same. We would also point out for future reference that prescriptions cannot be reimbursed without the original pharmacare receipts.

We are therefore not accepting the new prescription provided for recommendation of physiotherapy as it would appear to relate to the more recent motor vehicle accident of April 2, 1995. (underlining added)

. . . . .

As it would appear that anything ongoing at this time would be related to the more recent motor vehicle accident in question and that perhaps settlement of the motor vehicle accident dating September 28, 1991 is in order. (underlining added)

On October 28, 1996 the case manager wrote to the Appellant's lawyer and stated:

Further to your correspondence of September 17<sup>th</sup>, 1996, please be advised that no consideration will be given to any of the submitted prescriptions as they relate to the more recent accident of April 1995 and prescribed by Dr. Husarewycz. May we also advise that we are unable to give any consideration to reimbursement as we do not accept photocopies and require the original Pharmacare receipts. In order that any consideration will be given to the receipts prior to the second motor vehicle accident we will require an

updated medical report from Dr. Gorski. As there has been little activity on this file for some time we ask for a detailed narrative outlining all the appointment dates Dr. Gorski saw Irene and his prognosis and diagnosis of same. We also ask that he confirm all the prescribed medication and the duration of these prescriptions.

May we advise once again that we have no record of the April 2<sup>nd</sup>, 1995 accident. There is medical substantiation that a significant second loss occurred and therefore submission of any kind after this time will not be considered to be related to the accident of September 28<sup>th</sup>, 1991. We feel it is necessary to obtain Dr. Gorski's report so as to determine your client's status at the time of the second motor vehicle accident in order that we may bring this matter to resolution. (underlining added)

On March 5, 1997 the Appellant's legal counsel responded to the case manager's request for information by indicating that he is currently gathering information and will provide this information to the case manager for the purpose of resolving the matter.

On September 29, 1997 another case manager wrote to the Appellant and stated:

The previous adjuster has attempted numerous time to contact you to begin settlement negotiations or to provide us with information referring to the second incident that occurred in Ontario.

Without the above information from Ontario proper assessment of this claim is not possible. (underlining added)

Having regard to this correspondence the Appellant's legal counsel submitted that:

1. the two year limitation period in respect of the April 2, 1995 accident would have occurred on or about April 1, 1997.
2. on April 23, 1996 the Appellant made a claim for compensation in respect of prescription expenses which in part related to the motor vehicle accident after April 2, 1995.
3. Although the Appellant's legal counsel requested payment of these expenses in respect of the 1991 motor vehicle accident, the MPIC case manager treated this claim

for compensation as a claim in respect of the April 2, 1995 accident and on a number of occasions advised the Appellant's counsel that they would not consider any request for payment unless further documentation was provided to MPIC.

4. Dr. Husarewycz's letter of April 9, 1996 was enclosed in the Appellant's legal counsel's letter to the case manager in his letter of April 23, 1996 and therefore MPIC was aware of the April 2, 1995 accident.

Appellant's legal counsel therefore asserted that a claim for compensation within two years after the April 2, 1995 accident was made by the Appellant to MPIC.

However, MPIC's legal counsel argued that there was no Application for Compensation within the two year period pursuant to Section 141(1)(a) of the MPIC Act. MPIC's legal counsel acknowledged that the Appellant's legal counsel did make a request for reimbursement in respect to prescription expenses and physiotherapy expenses but intended that this claim for reimbursement related to the 1991 motor vehicle accident and not the 1995 motor vehicle accident. As a result, MPIC's legal counsel submitted the Appellant did not make a claim for compensation within the two year period pursuant to Section 141(1)(a) of the Act.

### **Decision**

The Commission, in arriving at a decision in respect of this appeal, is required to interpret the meaning of the provision "an Application for Compensation" under Section 140 of the Act. The Concise Oxford Dictionary, Tenth Edition, defines the word "application" in part to mean "*a formal request to an authority*". This dictionary also defines the word "request" in part as "*an act of asking politely or formally for something*".

The Commission further notes that the form of an application for compensation is not set out in the regulations and as a result an application for compensation can be made either verbally or in writing in a manner or form which clearly indicates that an application for payment from MPIC is being made in respect of a motor vehicle accident. MPIC clearly considered that the Appellant made an application for reimbursement of expenses in respect of the 1995 motor vehicle accident. The Commission notes that the documentary evidence filed before the Commission establishes that this application for reimbursement was made by the Appellant's solicitor on April 23 and April 26, 1996 which was a period within the two year time limit set out in Section 141(1)(a) of the MPIC Act.

MPIC was clearly frustrated by the Appellant's legal counsel's failure to provide MPIC with information it had requested in respect of the 1995 motor vehicle accident and in respect of medical information relating to the 1991 motor vehicle accident. However, the failure of the Appellant's legal counsel to provide this information does not detract from the fact that MPIC determined that the application for compensation was made by the Appellant within the two year period as set out in Section 141(1)(a) of the Act. The Commission therefore finds that the Appellant's request for reimbursement of prescription and physiotherapy expenses by the Appellant's solicitor in his letters to MPIC dated April 23 and April 26, 1996 constitutes an application for compensation within the meaning of Section 141(1)(a) of the MPIC Act.

The Commission rejects the argument made by MPIC's legal counsel that the Appellant was merely a potential claimant in respect of the April 2, 1995 motor vehicle accident. An examination of the correspondence clearly indicates that the Appellant was involved in a motor vehicle accident on April 2, 1995, she sustained injuries in respect of that accident, and one year later requested reimbursement in respect of prescription and physiotherapy expenses relating to

this accident. Although the Appellant's legal counsel requested that these expenses be applied to the 1991 accident, MPIC rejected this request and clearly indicated to the Appellant's legal counsel that MPIC was treating these claims for compensation as related to the 1995 accident and not the 1991 accident.

The Commission further determines that the Appellant was a claimant within the meaning of Section 150 of the Act.

### **Application of Section 150 of the Act**

Section 150 of the Act states:

#### **Corporation to advise and assist claimants**

**150** The corporation shall advise and assist claimants and shall endeavour to ensure that claimants are informed of and receive the compensation to which they are entitled under this Part.

The Dictionary of Canadian Law, Second Edition, defines the word claimant in part as:

1. One who makes a claim. . . . .
4. A person who applies or has applied for benefit or compensation.

Since the Appellant became a claimant in April 1996 MPIC had a statutory duty to assist the Appellant by providing her with the appropriate Application for Compensation form in order to ensure that the Appellant, pursuant to Section 150, was informed of and received the compensation to which she was entitled to under the Act.

As well, once a claimant has made a claim for compensation MPIC is required to determine whether a claimant is entitled to any benefits under the MPIC Act. MPIC is required to conduct an investigation into this claim which would normally include interviewing the claimant in

respect to the circumstances surrounding the motor vehicle accident and the injuries the claimant obtained as a result of the accident, obtaining various medical reports from the claimant's doctors and, if necessary, obtaining medical reports from its own medical consultants. At the conclusion of its investigation, MPIC is required to determine whether or not the claimant is entitled to any benefits claimed under the MPIC Act and to advise the claimant in this respect.

In carrying out its investigation, MPIC is required to comply with the principals set out in Section 150 of the MPIC Act. During the investigative process the relationship between MPIC and the Appellant is not adversarial in nature but is subject to Section 150 of the MPIC Act. As a result when MPIC is carrying out its investigation it is required to act fairly, reasonably and in good faith in order to determine the Appellant's entitlement to benefits under the MPIC Act and it failed to do so in this case.

The Commission finds that when MPIC received the Appellant's claim for reimbursement in respect to prescription drugs and physiotherapy receipts relating to the April 2, 1995 accident, it should not have taken an adversarial position in respect of the Appellant's claim for compensation and rejected this claim as untimely. Instead, MPIC should have recognized that a timely application for compensation was made and, as a result, it should have conducted the appropriate investigation in order to determine whether or not the Appellant is entitled to the benefits she was claiming under the MPIC Act and MPIC failed to do so.

**Extension of time to file Application for Compensation in respect  
of the injuries she sustained in a motor vehicle accident on April 26, 1995**

The Appellant's legal counsel submitted to the Commission that if the Commission rejected the Appellant's submission in respect to the first ground of appeal that *in the alternative* the

Commission should accept the Appellant's second ground of appeal which was:

2. The Appellant has a reasonable excuse for failing to make a claim for compensation within two years after the date of the accident, pursuant to Section 141(4) of the MPIC Act and, as a result, MPIC erred in failing to extend the time in order for the Appellant to make a timely claim for compensation.

The Internal Review Officer in his decision dated April 24, 2001 determined that the Appellant did not have a reasonable excuse for failing to present her claim for compensation within the two year period following the motor vehicle accident and, as a result, confirmed the decision of the case manager dated December 18, 2000 and rejected the Application for Review. As a result, the Appellant filed a Notice of Appeal.

### **Appeal**

The relevant provision in respect of this appeal is Section 141(4) of the MPIC Act which provides as follows:

#### **Corporation may extend time**

**141(4)** The corporation may extend a time limitation set out in this section if it is satisfied that the claimant has a reasonable excuse for failing to make the claim within that time.

The Appellant testified at the appeal hearing and asserted that she had a reasonable excuse for failing to make a claim within two years after the motor vehicle accident. She further testified that:

1. as a result of the 1995 motor vehicle accident, which occurred in the Province of Ontario, she retained the same legal counsel that she had in respect of the 1991 motor vehicle accident, which had occurred in Manitoba.
2. this legal counsel acted negligently in failing to file an Application for Compensation

- within the two year period.
3. she had no knowledge of the requirement that an Application for Compensation must be filed within two years following a motor vehicle accident in the Province of Manitoba and relied on her legal counsel to protect her interests in that respect.
  4. at no time did she act in any fashion to cause the delay in filing an Application for Compensation in the Province of Manitoba.

MPIC's legal counsel submitted that the Appellant had not demonstrated that she had a reasonable excuse which would permit the Commission to extend the time in order to allow the Appellant to seek benefits under the Act arising from the 1995 motor vehicle accident. MPIC's legal counsel stated that:

1. The Appellant relied on her lawyer to pursue her claim and he chose not to make a claim for benefits under the MPIC Act.
2. The Appellant's legal counsel chose to pursue her claim in Ontario rather than Manitoba and that choice does not constitute a reasonable excuse for failing to seek benefits under the Act given the length of delay and the prejudice to MPIC.

MPIC's legal counsel also submitted that the Appellant caused a lengthy delay in filing the Application for Compensation and that as a result MPIC suffered a significant prejudice in this delay. MPIC's legal counsel refers to the Internal Review Officer's decision, dated April 24, 2001, wherein the Internal Review Officer had commented on the prejudice to MPIC in respect of entitlement issues and case management issues due to the Appellant's significant delay and stated:

1. MPIC was prejudiced by the delay in investigating whether or not the Appellant was regularly employed prior to the accident, and whether the Appellant had the capacity

- to work as a result of pre-accident disability. This delay could prejudice the ability of MPIC to determine whether or not the Appellant was entitled to Income Replacement Indemnity (“IRI”) benefits.
2. As well, due to the delay, MPIC was prejudiced in respect of the issue of causation as to whether or not the injuries claimed by the Appellant were caused by the motor vehicle accident. As a result of this delay MPIC would be prejudiced in determining whether or not the Appellant was entitled to IRI benefits.
  3. MPIC’s coverage for medication and therapy was only available when they were medically required and that MPIC had controls in respect of retraining and rehabilitation initiatives. Under the previous tort system MPIC’s position was passive in respect of these matters but under the no-fault plan MPIC took an active role in case management.

MPIC’s legal counsel further submitted that MPIC was entitled to rely on the fact that the Appellant’s legal counsel was pursuing the Appellant’s claims in respect to the 1995 motor vehicle accident in the Province of Ontario and, as a result, the Appellant’s legal counsel waived the Appellant’s right to claim benefits under the MPIC Act. In support of his position, MPIC’s legal counsel cited a decision of the Supreme Court of Canada in *Marischuk v. Dominion Industrial Supplies Ltd.* (1991) 73 Man R.(2d) 271 (S.C.C.).

In reply the Appellant’s legal counsel submitted that:

1. the Internal Review Officer had improperly applied the provisions of Section 141(4) of the Act in rejecting the Application for an extension of time.
2. the Internal Review Officer focused primarily on the issue of prejudice to MPIC caused by the delay and that the Internal Review Officer had failed to properly

- consider whether the Appellant had a reasonable excuse for failing to make the claim within the two year period.
3. the issue of prejudice does not enter into a determination as to whether the Appellant had a reasonable excuse in making a claim within the appropriate time limits and prejudice was only relevant on the issue of quantum.
  4. the prejudice in this case arose from MPIC's own breach of its duty of good faith and fair dealing with the Appellant and that in such circumstances MPIC cannot complain of prejudice.

The Appellant's legal counsel further submitted that the Appellant should not be prejudiced by the actions of her legal counsel who failed to protect her interests in this matter. The Appellant had hired her legal counsel to represent her interests properly and had no knowledge of the requirements of Section 141(4) of the Act which required that an Application for Compensation be made within two years from the date of the motor vehicle accident. In support of this position the Appellant's legal counsel cited the decision of the California Court of Appeal in *Ramirez v. USAA Casualty Insurance Company*, 234 Cal. App. 3d 391 (1991, Cal. C.A. 3<sup>rd</sup> Dist) and the minority decision of Mr. Justice O'Sullivan in *Binkley v. Bajcura*. [1980] M.J. No. 183 (Man. C.A.).

The Appellant's legal counsel therefore submitted that in the circumstances the Appellant had provided a reasonable explanation as to why she had not made a timely Application for Compensation.

The Appellant's legal counsel also argued that the Appellant, by her actions, did not cause any delay in the proceedings and the delay which resulted in prejudice to MPIC was caused solely by

the actions of her legal counsel.

The Appellant's legal counsel further submitted that the Appellant never withdrew her claim, never indicated that she was abandoning her claim, nor did she ever waive her right to proceed with her claim. The Appellant had retained legal counsel to pursue her claim and her persistent conduct in pursuing the claim was totally inconsistent with the waiving of any of her rights to proceed with the claim.

### **Discussion**

MPIC, in support of its submission that the Appellant's lengthy delay in making application for compensation prejudiced MPIC in conducting an appropriate investigation of relevant issues and, as a result, the Appellant has not established a reasonable excuse for failing to make a timely application for compensation. In support of their position, legal counsel for MPIC referred to the majority decision of *Binkley v. Bajcura*, (supra). In that case the Appellant had appealed two orders from the Court of Queen's Bench in respect of two appeals relating to orders of a referee granting an extension of time for service of two Statements of Claim. The Plaintiffs had filed, but not served, the Statements of Claim in both cases within the prescribed one year period in accordance with Queen's Bench Rule 12. However, the Plaintiffs had waited six and one-half years in one action and almost five years and nine months in the other action before applying to the Court of Queen's Bench for an extension of time to serve the two Statements of Claim.

Rule 12 of the Court of Queen's Bench provides:

“12. A statement of claim shall be served within twelve months from the date thereof, or within such further time as the court may allow.”

The majority of the Manitoba Court of Appeal, in arriving at their decision, adopted the

unanimous decision of the Saskatchewan Court of Appeal in *Simpson v. Saskatchewan Government Insurance Office* ((1968) 65 D.L.R. (2d) 324) and stated:

Culliton, C.J.S., for a unanimous court, reviewed the practice in other jurisdictions, opted for a broad and liberal interpretation of the Saskatchewan rule (which is more restrictive than the Manitoba rule) and at pp. 332-333 (DLR) expressed the principle which should govern a court in the exercise of its discretionary powers. The following passage appears at p. 333:

“In an application to renew a writ of summons the basic question which faces the Court is, what is necessary to see that justice is done? That question must be answered after a careful study and review of all the circumstances. If the refusal to renew the writ would do an obvious and substantial injustice to the plaintiff, while to permit it is not going to work any substantial injustice to the defendant or prejudice the defendant’s defence, then the writ should be renewed. This should be done even if the only reason for non-service is the negligence, inattention or inaction of the plaintiff’s solicitors and notwithstanding that a limitation defence may have accrued if a new writ was to be issued. If the non-service of the writ was due to the personal actions of the plaintiff, that, of course, would be a fact to be considered by the Court. Each case should be considered in the light of its own peculiar circumstances and the Court, in the exercise of its judicial discretion, should be determined to see that justice is done.”

The majority of the Manitoba Court of Appeal adopted the principles set out in *Simpson* (supra) in arriving at its decision.

The majority of the court found that the Plaintiff failed to provide an adequate explanation for the significant delay in having the Statements of Claim served upon the Defendants in each case and the Plaintiff had failed to provide an adequate explanation for the delay on the Plaintiff’s part in changing lawyers.

The majority of the court in arriving at its decision reviewed three cases in which there was a failure by the Plaintiff’s solicitors to serve Statements of Claim upon the Defendants within the prescribed period of time provided by the statute and where the courts had provided an extension of time and stated:

In each of the three cases relied on by the plaintiffs, the delay was minimal and should not be considered as comparable to the unusually long and unsatisfactorily explained delays in the cases before us. And, in addition to prejudice which follows from long delay (Minter, *supra*), the delay in these cases is aggravated by the plaintiffs denying the defendants any opportunity to obtain timely medical information about the female plaintiff's injuries.

And further stated:

. . . . As Culliton, C.J.S., put it in Simpson, ((1968) 65 D.L.R. (2d) 324), the conduct of the plaintiff is a relevant factor to be considered. This is not a case of merely visiting the errors of solicitors on innocent plaintiffs. Here, the plaintiffs have not given the court the necessary basis for granting an extension at this late date. To do justice between the parties in the cases before us, would not require an extension of time to serve the statements of claim, considering the background set out above and the absence of a satisfactory explanation from the plaintiffs for the long delays. (underlining added)

The majority of the court in *Binkley v. Bajcura* (*supra*) stated:

1. the majority of the court stated "this was not a case of merely visiting the errors of the solicitors on innocent plaintiffs".
2. the plaintiff's conduct did contribute to the prejudice which follows from a long delay by denying the defendant an opportunity to obtain timely medical information about the female plaintiff's injuries.
3. the conduct of the plaintiff was a relevant factor in rejecting the application for an extension of time.
4. the plaintiff had not given the court the necessary basis for granting an extension at this late date since the plaintiffs had failed to provide a satisfactory explanation for the long delays.

The Commission in determining whether or not a reasonable excuse has been provided by the Appellant under Section 141(4) of the Act, and having regard to the legal principles set out in *Simpson* (*supra*) and *Binkley v. Bajcura* (*supra*), must take into account such matters as the

length of delay, the prejudice resulting from the delay, the conduct of the Appellant in contributing to the delay, and whether the Appellant has waived the right to apply for compensation under the Act.

**Length of delay causing prejudice to MPIC**

The Commission rejects MPIC's submission that the Appellant's lengthy delay in making an Application for Compensation has significantly prejudiced MPIC in conducting an appropriate investigation of the relevant issues. The Commission recognizes that the delay will be inconvenient to MPIC and may create some difficulties for MPIC in this matter but the Commission is of the view that the delay will not impair MPIC's ability to effectively defend its interests in respect of the Appellant's claims.

The Commission notes that the Appellant was involved in a 1991 motor vehicle accident in Manitoba, and MPIC received a number of medical reports in respect of that motor vehicle accident. The material filed before the Commission includes a series of narrative medical reports from Drs. Gorski, Parker, Hoffman and Husarewycz between the period December 13, 1991 and August 30, 1996. As well, MPIC received a further report from Dr. Arneja, dated February 14, 1996. The reports of Drs. Gorski, Parker and Hoffman relate to the Appellant's medical condition in respect of the 1991 motor vehicle accident. The medical reports of Dr. Hoffman and Dr. Arneja refer to both the 1991 motor vehicle accident and the 1995 motor vehicle accident. In addition, MPIC had received prescription drug expenses from before and after the Appellant's 1995 accident.

The Commission therefore finds that MPIC has received a significant amount of medical information in respect of the 1995 motor vehicle accident and therefore cannot claim a lack of

knowledge as to the medical status of the Appellant prior to and after the 1991 motor vehicle accident. As well, MPIC cannot claim a lack of knowledge as to the medical status of the Appellant prior to and after the 1995 motor vehicle accident because it has received medical reports in respect of this accident.

The Commission finds, having regard to the medical information that MPIC had on file, that MPIC has both sufficient resources and ample statutory power under the Act to obtain any additional necessary medical and other information it needs to defend its interests in respect of the Appellant's claims relating to the 1995 motor vehicle accident.

The Commission notes the following provisions of the MPIC Act:

Section 144 of the Act provides:

**Examination by practitioner chosen by claimant**

**144(1)** A claimant shall, at the request of the corporation and at its expense, undergo a medical examination by a practitioner chosen by the claimant.

**Examination by practitioner chosen by corporation**

**144(2)** The corporation may, at its own expense, require a claimant to be examined by a practitioner chosen by the corporation.

**Medical examination to be in accordance with regulations**

**144(3)** A practitioner shall conduct any medical examination required under this Part in accordance with the regulations.

Section 146 of the Act provides:

**Report of examination**

**146(1)** A practitioner who examines a victim at the request of the corporation under section 144 shall make a report to the corporation on the condition of the victim and on any other related matter requested by the corporation.

**Corporation to provide copy of medical report**

**146(2)** Where the corporation obtains a medical report in respect of a medical examination conducted under section 144 the corporation shall, at the request of the person who underwent the medical examination, provide a copy of the medical report to the person and any practitioner designated by the person.

Section 147 of the Act provides:

**Corporation may request medical report re accident**

**147** A practitioner or hospital that treats a person or is consulted by a person after an accident shall, within six days after the practitioner or hospital receives a request in writing from the corporation, provide the corporation with a report respecting any finding, treatment or recommendation relating to the treatment or consultation.

Section 160 of the Act provides:

**Corporation may refuse or terminate compensation**

**160** The corporation may refuse to pay compensation to a person or may reduce the amount of an indemnity or suspend or terminate the indemnity, where the person

- (a) knowingly provides false or inaccurate information to the corporation;
- (b) refuses or neglects to produce information, or to provide authorization to obtain the information, when requested by the corporation in writing;
- (d) without valid reason, neglects or refuses to undergo a medical examination, or interferes with a medical examination, requested by the corporation;
- (e) without valid reason, refuses, does not follow, or is not available for, medical treatment recommended by a medical practitioner and the corporation;
- (h) prevents or obstructs the corporation from exercising its right of subrogation under this Act.

It should be noted that in granting an extension of time, MPIC is not obligated to provide benefits automatically to the Appellant. The onus remains upon the Appellant, and not upon MPIC, to establish, on a balance of probabilities, her entitlement to IRI benefits and her right to reimbursement of physiotherapy and prescription drug expenses.

The Commission also notes that if the Appellant is unable to establish that she was regularly employed prior to the motor vehicle accident, on the balance of probabilities, under Section 105 of the Act the Appellant would not be entitled to IRI benefits. As well, the Internal Review Officer in his decision indicates that there may be evidence from Dr. Parker in his letter dated March 16, 1993 that the Appellant may have been incapable of regular employment prior to the motor vehicle accident due to a pre-existing accident disability. If the evidence established such a disability, the onus would be upon the Appellant, and not upon MPIC, to establish that any pre-

existing accident disability, on the balance of probabilities would not affect her ability to work.

In respect of the issue of causation, the onus is upon the Appellant, and not upon MPIC, to establish, on a balance of probabilities:

1. a causal connection between the motor vehicle accident and the injuries sustained in the accident; and
2. that the motor vehicle accident injuries prevented the Appellant from returning to her pre-accident employment.

If the Appellant is unable to establish, on a balance of probabilities, the above matters, MPIC would not be required to provide IRI benefits to the Appellant.

The Commission further notes that the onus is also upon the Appellant, and not upon MPIC, to establish, on a balance of probabilities, that her request for reimbursement in respect of medication or physiotherapy expenses is medically required under Sections 5 and 38 of Regulation 40/94 of the Act. If the Appellant is not able to establish, on a balance of probabilities, the medical requirement of either the medication or of the therapy, MPIC is not required to reimburse the Appellant in respect of these expenses.

The Commission therefore determines that MPIC will not suffer such prejudice that it will be effectively unable to defend itself in respect of the Appellant's claims for compensation.

#### **Appellant's conduct in respect of delay**

MPIC's legal counsel also asserted to the Commission that although the delay in this matter was due to the actions of the Appellant's legal counsel that having regard to the extraordinary delay in presenting the claim the Appellant had not established a reasonable excuse for failing to make

a timely application for compensation.

The Commission finds that the conduct of the Appellant in this appeal is different from the conduct of the Plaintiff in *Binkley v. Bajcura* (supra). The Commission finds that:

1. the Appellant was a credible witness who testified in a direct and straightforward manner and was consistent throughout her testimony;
2. although there was a lengthy delay in requesting an extension of time, the Appellant did provide a satisfactory explanation for the long delay;
3. there is no evidence that the Appellant personally caused any delay in the proceedings;
4. the Appellant did not know there was a requirement to make an application for compensation within two years of the 1995 motor vehicle accident;
5. the Appellant relied on her legal counsel to protect her interests and that the delay was the sole responsibility of the actions of her legal counsel.

Having regard to the Commission's view of the conduct of the Appellant, the Commission finds that the following comments made by Mr. Justice O'Sullivan in his dissent in *Binkley v. Bajcura* (supra) are applicable to this appeal.

Mr. Justice O'Sullivan referring to the *Simpson v Saskatchewan Government Insurance* case (supra) stated:

In these circumstances, what does justice require? The Court of Appeal for Saskatchewan, in *Simpson v. Saskatchewan Government Insurance Office*, (1967) 61 W.W.R. 741, (1968) 65 D.L.R. (2d) 324, has dealt with the principles to be applied in that province on applications to renew a writ of summons. In that province, as in most provinces, rules provide that writs expire unless served within a period set out by the rules, but the courts are given a discretion to renew the writ. In Saskatchewan a plaintiff must show "good reason". Culliton, C.J.S., speaking for the court, at p. 749, said he intended to give the rule "a broad and liberal interpretation". He said he could think of no better reason for renewing a writ than to see that justice is done. He set out the basic tests to be applied in Saskatchewan in considering renewals of writs in words cited in extensor in the reasons of Matas, J.A.

It is true that in many cases there was a short period between the expiry of the writ and the application for renewal. But in *Lance v. Young*, (1977) 3 C.P.C. 322, Grange, J. of the Ontario Supreme Court renewed a writ even though the plaintiff's solicitor was extremely lax in not serving the writ for some three years. In that case the defendant's

insurer had knowledge of the action from the very beginning and while the action was not diligently pursued, there was little likelihood of it being abandoned. He referred to what was said by Culliton, C.J.S. in *Simpson* (supra) in (1968) D.L.R. (2d) at 332:

“In an application to renew a writ of summons, I think the basic fact which the Court must keep in mind is that it is primarily concerned with the rights of litigants and not with the conduct of solicitors.”

He accepted as sound law the simple statement found in the headnote of *Willson v. Federated Mutual Etc. Ins. Co.* (1962) O.W.N. 193, as follows:

“The Court has a wide discretion to renew a writ post diem notwithstanding the running of a statutory limitation period. Where the facts show that the failure to renew in time was solely the fault of the plaintiff’s solicitor and the defendant was aware of the issue of the writ and would suffer no possible prejudice if the writ were renewed and had no reason to believe that the plaintiff would voluntarily abandon his claim, the discretion should be exercised in favour of renewal.”

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In a recent decision, as yet unreported, *The Public Trustee v. Guaranty Trust Co. of Canada and Berry*, pronounced October 7, 1980, the Supreme Court of Canada in a 4-1 decision delivered by Estey, J. said:

“If on policy we adopt structured, invariable rules which frequently lead to harsh results for no demonstrated purpose, the effectiveness and the quality of judicial service is inevitably impaired.”

He adopted what Pigeon, J. had said, speaking for a unanimous court in *Vachon v. Attorney-General of the Province of Quebec* (1979) 1 S.C.R. 555 at p. 563:

“Except in the case of a nullity enacted by a specific statutory provision allowing the courts no power to remedy it, the Supreme Court of Canada never hesitates to intervene to reverse a decision which dismisses an action on the merits for a formal defect.”

In the case before us, the failure to serve the Statement of Claim within 12 months is at most a formal defect. I do not believe we should refuse an extension of time, with the consequence that there would be a dismissal of claims of which the insurer had full knowledge in good time.

It is said in some of the cases that the plaintiff’s conduct is a factor to be considered. In the *Simpson* case (supra), Culliton, C.J.S. said at p. 333:

“If the non-service of the writ was due to the personal actions of the plaintiff that, of course, would be a fact to be considered by the Court.”

I can understand there may be cases where a plaintiff's conduct amounts to a willful default or to contumacy, but I find it difficult to penalize a plaintiff for having confidence in solicitors licensed to practice by a public body. It is true that in this case we do not have an affidavit from the plaintiffs to account for their delay. Despite urging that counsel should ask for leave to file such an affidavit in this court, counsel declined to do so. But I think it is clear enough on the record before us that the plaintiffs were guilty of no dilatoriness other than a failure to press their lawyers more strongly for action.

### Waiver

The Commission further rejects MPIC's legal counsel's submission on the issue of waiver. The Commission disagrees with MPIC's legal counsel's submission that the Appellant's previous counsel pursued only the 1995 motor vehicle accident in the Province of Ontario and never pursued this claim in Manitoba and, as a result, the Appellant's legal counsel waived the Appellant's right to claim for benefits under the Manitoba Act.

MPIC's legal counsel referred to the decision of *Marischuk v. Dominion Industrial Supplies Ltd. Et al*, (1991) 73 Man. R.(2d) 271 (S.C.C.). At page 275 Mr. Justice Sopinka, on behalf of the Supreme Court of Canada, in his judgment referred with approval the comments of the trial judge, Mr. Justice Kennedy of the Manitoba Queen's Bench, who stated:

“The second issue of waiver comes into effect when a party knowingly acts in a manner where he waives or foregoes reliance upon some known right or defect. It is important that the right or defect, as the case may be, be known, since one should not be able to waive rights of which he was not fully aware or apprised.”

The Commission finds on the evidence submitted to it that the Appellant's legal counsel appeared to be unaware that he was entitled to make a claim in Manitoba in respect of the Appellant's 1995 motor vehicle accident which took place in the Province of Ontario. As a result, the Appellant's legal counsel did not waive the right to pursue a claim in Manitoba because he was not fully aware or apprised of the right to do so.

The Commission accepts the testimony of the Appellant that she was unaware that she was entitled to pursue a claim in respect to the 1995 Ontario motor vehicle accident in Manitoba, and finds that her original legal counsel at no time advised her that she had a right to so proceed.

The Commission further notes that the actions of the Appellant are inconsistent with the waiver of her right to claim compensation in Manitoba in respect of the 1995 motor vehicle accident. There is no evidence that at any time the Appellant abandoned her claim in respect of the 1995 motor vehicle accident. As a result of the Ontario motor vehicle accident the Appellant retained legal counsel, who commenced legal proceedings in the Province of Ontario, which were unsuccessful. The Appellant then retained her present legal counsel who made a claim on her behalf to MPIC. There was a consistent and determined effort by the Appellant to pursue her claim. The Appellant's conduct was not dilatory and was inconsistent with waiving her right to pursue a claim. The Commission therefore concludes the Appellant did not waive her right to apply for compensation in respect of her 1995 motor vehicle accident under the MPIC Act.

### **Decision**

The Commission, after a careful review of all of the circumstances of this appeal is satisfied that:

1. although the delay in filing an application for compensation was lengthy this delay does not prejudice MPIC's defence;
2. the conduct of the Appellant did not cause the delay;
3. the Appellant did not waive her right to apply for compensation under the Act;
4. the Commission accepts the Appellant's explanation that, in the circumstances, she relied upon her legal counsel to make the appropriate timely applications, had no knowledge of the time limits under Section 141 of the Act;
5. in these circumstances the Appellant's explanation for not making a timely application for compensation is reasonable.

As well, the Commission, in determining that the Appellant has a reasonable excuse for failing to make a timely application has determined that a refusal to extend the time limits would result in an obvious and substantial injustice to the Appellant while to permit an extension of time would not work any substantial injustice to the Appellant or prejudice the Appellant's defense. The Commission therefore concludes, for the reasons outlined herein, the Appellant did provide a reasonable excuse for failing to make a timely claim for compensation pursuant to Section 141(4) of the Act.

The Commission therefore finds:

1. that the Appellant has established, on a balance of probabilities, that she made a timely claim for compensation in respect of the motor vehicle accident which occurred on April 2, 1995 pursuant to Section 141(1)(a) of the Act and as a result MPIC erred in rejecting her Application for Compensation. The Appellant's Application for Compensation shall therefore be referred back to a case manager for determination of her entitlement of Personal Injury Protection Plan benefits.
2. In the alternative, if the Commission is incorrect in finding that a timely Application for Compensation was made, the Commission finds that the Appellant had a reasonable excuse for failing to make an Application for Compensation within two years after the date of the accident pursuant to Section 141(4) of the MPIC Act and, as a result, MPIC erred in failing to extend the time in order for the Appellant to make a timely Application for Compensation. The Appellant's claim shall therefore be referred back to a case manager for determination of her entitlement of Personal Injury Protection Plan benefits.
3. The Commission further finds that having regard to the decisions as set out in the

alternative in paragraphs 1 and 2 above, it is not necessary for the Commission to determine the Appellant's third ground of appeal.

As a result, the Appellant's appeal is allowed and the Internal Review Decision dated April 24, 2001 is, therefore, rescinded and the foregoing substituted for it.

Dated at Winnipeg this 23<sup>rd</sup> day of July, 2004.

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**MEL MYERS, Q.C.**

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**DR. PATRICK DOYLE**

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**WILSON MACLENNAN**