Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by R.D.
AICAC File No.: AC-06-26

PANEL:	**Mr. Mel Myers, Q.C., Chairperson** **Mr. Paul Johnston** **Mr. Les Marks**
APPEARANCES:	**The Appellant, R.D., was represented by Mr. Scott Gray;** **The Public Trustee of Manitoba was represented by Ms Jana Taylor;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Dean Scaletta.**
HEARING DATE:	**April 28 and 29, 2008**
ISSUE(S):	**Entitlement to Spousal Indemnity benefits as a Common-Law Spouse**
RELEVANT SECTIONS:	**Section 70(1)(b) Definition of 'Spouse', and Section 120(1)&(2) 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

This is an appeal by R.D. (hereinafter referred to as the 'Appellant') from a decision of the Internal Review Officer of MPIC who determined that the Appellant was not the spouse of the late L.P. ('L.') within the meaning of Section 70(1)(b) of the MPIC Act.

The Appellant, R.D., commenced living with L. in the month of October 2001. Initially they

resided at the residence of K. and D.P. for approximately four (4) months and, subsequently, at the [Text deleted] for approximately one (1) month, and for a further four (4) months at the residence of a cousin of L. In the month of July 2002 the Appellant and L. leased a mobile home at [Text deleted], in the [Text deleted], and commenced to live at this residence.

At that time the Appellant was thirty-seven (37) years of age and L. was eighteen (18) years of age. The Appellant has been employed at the local saw mill as a Utility Relief Operator for eleven (11) years but at the time of the hearing was on lay-off. L., at the time she commenced living with the Appellant, was eighteen (18) years of age and was attending school in order to complete Grade 12.

The Appellant and L. were the parents of D.H.D. ('D.'), born on March 11, 20XX. The Registration of Birth form, signed by L., and the Joint Request to Register Father, signed by L. and the Appellant, are both dated March 14, 20XX - three (3) days after the birth of D.

On January 5, 2004 L. was the driver of a 2003 Pontiac Sunfire, involved in a head-on collision with a bus. She sustained serious injuries which ultimately led to her death on February 8, 2004.

On January 13, 2004 the Appellant made Application for Compensation on behalf of himself and D., born on March 11, 2003.

Case Manager's Decision

On July 5, 2004 MPIC's case manager issued a decision:

1. rejecting the Appellant's position that he was entitled to a spousal death benefit payment under the Personal Injury Protection Plan (PIPP) because he had not lived

continuously with L. for more than one (1) year immediately preceding L.'s death.

2. determining that D. was a dependant of L. and, as such, was entitled to a lump sum payment for the loss of her mother in the amount of $42,030.

3. that since the Appellant was not considered as L.'s spouse at the time of the accident, L.'s dependant, D., was entitled to the spousal death benefit in the amount of $48,034.

4. forwarding to the Office of the Public Trustee the total sum of $90,064 payable to D. (in trust).

The Appellant made an Application for Review of the case manager's decision on the grounds that he had been living with L. continuously, without interruption, for two and one-half (2 ½) years at the time of her death.

Internal Review Officer's Decision

The Internal Review Officer issued a decision on January 26, 2006 confirming the case manager's decision and dismissing the Appellant's Application for Review. Like the case manager, the Internal Review Officer found that the Appellant was not entitled to a spousal death benefit under PIPP because he had not lived continuously with L. for more than one (1) year immediately preceding her death. The Internal Review Officer, in arriving at his decision, adopted the decision of the case manager:

> We have obtained a copy of a Social Assistance Application to the [Text deleted] for benefits, which was signed by [L.] on July 3, 2003. In this application, [L.] declared that she was a single mother and was residing with her parents at their residence on [Text deleted]. We have obtained confirmation from the [Text deleted] band that they accepted this application and paid [L.] social assistance benefits as a single mother for July and August 2003. You contend this application was falsely completed in order obtain social assistance payment when [L.] was unemployed.
>
> In reviewing this information, we must accept [L.'s] signed [Text deleted] Social Assistance application of July 3, 2003 as proof that your cohabitation with [L.]

> was not continuous in the one year prior to her fatal motor vehicle accident. You therefore do not meet the definition of spouse as stated in Section 70(1) of The Manitoba Public Insurance Corporation Act and are not entitled to receive the spousal death payment.

As indicated above, a letter was received from the deceased's mother, V.P., dated November 16, 2005. The information contained in V.P.'s letter corroborates the documentary evidence obtained from the [Text deleted]. In her letter, V.P.'s letter states:

> In the months of June and July, 2004, [L.P.], daughter of [V.] and [L.P.], had resided with us on [Text deleted] because [L.'s] common-law, [R.D.], had requested that she move out of the trailer they were living in.
>
> [L.] then asked for our permission to let her move back home, which we as her parents allowed.
>
> [L.] was receiving Social Assistance from [Text deleted] at the time until she could get back on her feet.

On January 26, 2005 I spoke to V.P. by telephone and she confirmed that the first line of her letter should indicate June and July, 2003 (and not 2004). This was an obvious error as the accident took place in January, 2004.

Aside from references from your client indicating that he is prepared to cooperate with an investigation, there has been no evidence provided (on his behalf) to overcome the evidence that I have cited above which indicates that the deceased was living separate and apart from her common-law husband in the year prior to the accident in question. Accordingly, it is my view that [R.D.] has not established, on a balance of probabilities, that he is entitled to receipt of a spousal death benefit as he has failed to meet the definition of spouse as stated in Section 70(1) . . . (underlining added)

The Appellant filed a Notice of Appeal dated February 23, 2006.

Appeal

The relevant provisions of the MPIC Act are:

Definitions
70(1) In this Part,

"spouse" means the person who, at the time of the accident, is married to and cohabits with the victim, or a person of the opposite sex who is cohabiting with the victim in a conjugal relationship;

(b) for a period of not less than one year immediately preceding the accident, and there is a child of the union.

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

Minimum indemnity
120(2) The lump sum indemnity payable under subsection (1) shall not be less than $40,000. whether or not the deceased victim would have been entitled to an income replacement indemnity had he or she survived.

The Appellant, in his testimony, submitted that from the time he commenced living with L. in the month of October 2001 until her death on February 8, 2004, they had lived continuously together and had not separated. He acknowledged that in order to preserve L.'s status so that she could obtain all of the benefits as a resident of [Text deleted], L. had falsely represented on the following documents that she and her daughter were residing at the residence of her parents on the [Text deleted] Reserve and she was not living at their residence at the [Text deleted]:

a) the Registration Birth Form relating to their daughter, D.

b) a Joint Request to Register Father form.

c) the [Text deleted] Application for Deposit Services.

d) the Application for Social Assistance.

The Appellant also acknowledged that for the purpose of obtaining benefits under the *Income Tax Act* both he and L. falsely filed Income Tax Returns as singles and did not file as common-law spouses. The Appellant also acknowledge that in order to avoid the payment of GST and PST in respect of the purchase of an automobile, they falsely gave their residence as "[Text deleted], Manitoba, [Text deleted]". The Commission notes that because the vehicle was "sold

and delivered on treaty land – Treaty No. [Text deleted]" the acquisition was exempt from GST and PST.

The Appellant also testified that:

1. on January 1, 2004 L. had an affair with another man, which resulted in a quarrel between them, and that L. had temporarily left the residence, together with her daughter, and went to stay at her parent's home.
2. a couple of days later, and prior to January 4, 2004, she had returned to their residence.
3. upon her return to their residence she had acknowledged that she had made a mistake at that time and they had sexual relations.
4. on January 5, 2004 L. left their premises in the Pontiac Sunfire for the purpose of purchasing groceries.
5. sometime after she left the residence she was involved in a motor vehicle accident which ultimately led to her death on February 8, 2004.
6. he loved L. and his daughter and that they had intended that the relationship would be of a permanent nature.
7. they were seeking to find a better home and better environment to raise their child.

At the appeal hearing R.L. testified that:

1. he had known the Appellant for twenty-five (25) years and was a resident at the [Text deleted] when the Appellant and L. moved to the [Text deleted].
2. the distance between their trailers was 200 yards and that he had contact with the Appellant and L. several times a week, when their children played together and

when they socialized.

3. the Appellant and L. fixed up their trailer and he helped them out.

4. there was no break in the relationship between the Appellant and L. between the time they moved in to the [Text deleted] and the time of the motor vehicle accident on January 5, 2004.

5. in the months of July and August 2003 L. did not leave the residence she occupied with the Appellant.

6. if they had separated during the months of July and August he would have known about it.

At the appeal hearing L.W. testified that in the months of July and August 2003 she was living with R.L. at the [Text deleted]. She confirmed R.L.'s testimony that L had not left the residence she occupied with the Appellant during the months of July and August 2003. She further testified that:

1. she and L. were friends.

2. they each had children and they had visited each other in their respective residences.

3. she was advised by L. that the Appellant had cheated on her, but notwithstanding that L. and the Appellant were a good couple.

4. she believed they would stay together forever.

5. as Bank Manager for the [Text deleted] branch in [Text deleted], she had received monthly rental payments from L. and the Appellant in respect of the trailer that they jointly occupied.

At the appeal hearing J.E.P. testified that:

1. he knew the Appellant for sixteen (16) years, including the period between 2001 and 2004.
2. during this period he would visit the Appellant, L. and D., on weekends for a bar-b-que.
3. he would bring over his five (5) year old daughter to play with D..
4. the Appellant and L. were a loving couple.
5. they wanted to buy a house together in order to live in a better environment.
6. the Appellant and L. had arguments but to the best of his knowledge L. had never left the Appellant.

J.E.P., in his Affidavit dated June 7, 2005, which had been filed in these proceedings, had stated that:

1. the last time he saw them together was approximately one (1) or two (2) weeks before she passed away.
2. to the best of his knowledge the Appellant and [L.] resided together continuously for at least three (3) years, if not more.

At the appeal hearing V.P. testified that she was the mother of L. and stated:

1. she and her husband resided at [Text deleted], for eight (8) years.
2. they lived in a three (3) bedroom home, together with their two (2) sons.
3. she was employed as a support worker with the [Text deleted] and was a Teacher's Aide at the [Text deleted].
4. her daughter, L., had been living with the Appellant at the [Text deleted], with her child D., and that from time to time they would visit with her and her husband.

V.P. further testified that:

1. the relationship between herself, her husband and the Appellant was satisfactory until the Appellant initiated a claim with MPIC for a spousal death benefit.
2. she informed MPIC's case manager that she opposed the Appellant's claim for a spousal death benefit because the Appellant was not interested in her granddaughter's welfare and was only seeking the spousal death benefit for his own purposes.
3. she had contradicted the Appellant's claim to MPIC that he had resided with the Appellant continuously for a period of not less than one (1) year immediately preceding the fatal motor vehicle accident.
4. the Appellant had threatened to deny her and her husband access to their granddaughter, D., because V.P. did not support his position to MPIC that L. had not separated from him but they had been living continuously together for not less than one (1) year immediately preceding the fatal motor vehicle accident.
5. the Appellant had in fact denied both herself and her husband access to their granddaughter, D.

In a series of memorandums to file, between February 24, 2004 and March 18, 2004, the case manager reported several discussions she had with V.P. wherein V.P. had stated that:

1. [L.] and the Appellant had not continuously lived together during the one (1) year period immediately preceding the fatal motor vehicle accident causing [L.'s] death.
2. in the latter part of December 2003 [L.] had permanently ended her common-law relationship with the Appellant and at that time was living, together with [D.], at her residence.

A. In a Memorandum to File dated February 24, 2004 the case manager reported that V.P., together with L.'s grandmother, attended at her office and were provided by the case manager with an explanation in respect of the death benefits provided by MPIC. In response V.P. stated:

> . . . that she does not want any benefits going to [R.]. Advised [V.] that [R.] is [L.'s] legal representative as they had been living in a common-law relationship for over twelve months on a consecutive basis and share a child together.
>
> [V.] stated that [R.] and [L.] used to argue and on a few occasions, [L.] would come and stay with her parents for two to three days. <u>[V.] reported that the weekend prior to the accident (Jan 3 and 4th) [L.] was staying at her parents home with her baby and had advised the parents that she was leaving [R.]. [V.] reported that [L.] was going to stay with them until she could find her own residence. [V.] stated that [L.] had been dating another man, [T.C.] (coworker from the [Text deleted]) since November of 2003. [V.] reported that [R.] found out and they had a fight which is why [L.] came to stay with her parents the two days prior to her motor vehicle accident</u>. [V.] agreed to attend office on a later date with her husband and complete a legal statement regarding this information. (underlining added)

B. In a Memorandum to File dated March 18, 2004, the case manager reported a telephone call from V.P. on March 8, 2004 in which V.P. indicated that L. had ended her relationship with the Appellant in the weekend prior to the accident. This memorandum states:

> Phone call from [V.] to report that she would like to attend office to complete a statutory declaration detailed (sic) [L.] and [R.'s] relationship as [V.] is adamant that [L.] had ended the relationship the weekend prior to the accident and that [R.] was aware of this. [V.] would like to complete the declaration in an attempt to have any spousal indemnity payment go to her granddaughter and not to [R.].
>
> [V.] reported that she will attend office on March 10, 2003 at 11:00 am to complete the statement.

In a Memorandum to File dated March 22, 2004 the case manager reported of a telephone discussion with V.P. on March 9, 2004 wherein V.P. disputes the Appellant's allegation that he had been residing continuously with L. for the past twelve (12) months as follows:

> . . . [R.] reported that they have lived together consecutively for the last 12 months, with no plan to separate or end the relationship. [V.] reported that this is inaccurate. She reported that her daughter [L.] had planned on ending the relationship the weekend prior

> to the accident and was in fact dating another man who she worked with at the [Text deleted]. [V.] requested that I contact the man that [L.] was dating to request a legal statement from him. Advised [V.] that I would require that she attend the office first to complete a legal statement. [V.] agreed that she and her husband would attend the office tomorrow, March 10, 2004, at 11am.

C. In a Memo to File dated March 18, 2004 the case manager reported of a telephone discussion with V.P. on March 15, 2004, wherein she contradicts her earlier statement in respect of the cohabitation between the Appellant and L. as follows:

> . . . [V.] advised that they didn't really have a break in cohabitation as she had previously indicated but that [L.] was dating another man, [C.F.], and that she had planned to leave [R.] at the time of the accident.

In a Memorandum to File dated March 29, 2004 the case manager reported a telephone discussion she had with Elaine Campbell, In-take Worker, [Text deleted] Social Services. The In-take Worker referred to a conversation she had with V.P. wherein V.P. again asserted that there was a break in the cohabitation between the Appellant and L. in the twelve (12) months immediately preceding L.'s death.

In this Memorandum the case manager indicated that the information received from the In-take Worker corroborated V.P.'s position that during the months of July and August L. was living, with her daughter, at her parents' home on the [Text deleted] Reserve and stated:

> This confirms that there was a break in the cohabitation within the 12 months immediately preceding the motor vehicle accident. This information confirms that [L. P.] lived outside of the home for a 2-month period immediately prior to the motor vehicle accident which occurred six months later.
>
> This would confirm that [R.D.] is not considered [L.P.'s] common-law spouse, as there was a break in their cohabitation throughout the 12 months immediately preceding the accident. Accordingly, a spousal indemnity payment will be awarded to [L.] and [R.'s] only offspring, [D.H.D.]. Will discuss with supervisor, S. Lupky to confirm. (underlining added)

On March 18, 2004 OCN provided the case manager with a copy of a residency letter which confirmed that during the months of July and August 2003 L. and her daughter were residing at [Text deleted], which is the residence of L.'s parents on the [Text deleted] Reserve.

In a Memorandum to File prepared by the case manager, dated June 23, 2004, she reported a conversation with V.P. who asserted that the Appellant was denying both her and her husband access to their granddaughter, D. In this Memorandum V.P. stated that:

1. she had telephoned the Appellant the previous night to appeal to him to request access to D. and that he had rejected her request.
2. the Appellant advised her that he had sent D. to stay with someone in [Text deleted] as he cannot look after her since he returned to work at [Text deleted] because he works shift work.
3. the Appellant would not tell her who is looking after D. and he refused to provide contact information.

In a Memorandum to File dated October 22, 2004 the case manager reported the allegation by V.P. of the Appellant's threats to her and her inability to have access to her granddaughter D.

> Phone call from [V.P.] to report that [R.D.] attended her home last night and advised [V.] and her husband that if they do not contact me and request that the Spousal LSI that was awarded to [D.] be awarded to him, he will never allow them access to [D.] again. [R.] informed the [P.'s] that he feels the Spousal LSI is his and demanded that they contact me to request I give the money to [R.]. [R.] informed the [P.'s] that they will never see their granddaughter, [D.] again if they do not cooperate. [V.] reported that they tried to reason with [R.] but her (sic) refused to listen.
>
> [V.] advised that they have not seen [D.] in months. [V.] advised that [R.] has a friend in [Text deleted] raising [D.], that she is not even living with [R.]. [V.] stated that they informed [R.] that they will keep [D.] for him while he works shift work so that she can remain in [Text deleted] and be with family instead of strangers. [R.] again refused saying that until they contact me and request that I award him the Spousal LSI he will not

> allow them any contact with [D.]. (underlining added)

In this Memorandum the case manager also reported that V.P. advised her that L. had permanently broken up with the Appellant in the latter part of December 2003, that she had a relationship with T. and that she and her daughter were now residing at her home. V.P. also agreed with the request of the case manager to provide a Statutory Declaration which would set out all of this information.

The case manager, in a Memorandum to File dated March 9, 2005, reported of a further telephone discussion with V.P. wherein she alleged that, as a result of threats received from the Appellant, she was unable to attend at the case manager's office to complete a Statutory Declaration:

> [V.] reported that she and her husband have never attended office to complete stat dec's as [R.] threatened them that he will never allow them access to their granddaughter, [D.], should they provide statements interfering in his appeal regarding the Spousal LSI. [V.] stated that her husband insisted that they not provide the stat dec's in the event that [R.] would allow them access and visitation rights with their granddaughter. [V.] reported that even though they have not provided the stat decs [R.] continues to not allow them any access to their granddaughter who they have not seen now for several months. [V.] stated that [R.] advised he will only allow the [P.'s] contact with [D.] if he is awarded the Spousal LSI. (underlining added)

On November 16, 2005 V.P. wrote to MPIC confirming L. had terminated her cohabitation prior to her death and stated:

> In the months of June and July 2004 (sic), [L.P.], daughter of [V.] and [L.P.], had resided with us on [Text deleted] because [L.'s] common-law, [R.D.], had requested that she move out of the trailer they were living in.
>
> [L.] then asked for our permission to let her move back home, which we as her parents allowed.
> [L.] was receiving Social Assistance from [Text deleted] at the time until she could get back on her feet.

The Commission notes that in this letter there is a typographical error in that the months in question were June and July 2003 and not 2004.

At the appeal hearing V.P. further testified that:

1. commencing in the month of July 2003 until Christmas 2003 L. and her daughter would leave her residence at the [Text deleted] to live at her home several times during these months for durations of four (4) days.
2. at the conclusion of the four (4) day period L. and her daughter would return to the [Text deleted].
3. this process continued until after the Christmas period 2003 when L. advised her parents that she was leaving the Appellant permanently and commenced to live at her parents' home.
4. her daughter and her granddaughter slept in one of her son's bedroom.
5. at that time her daughter ended her relationship with the Appellant she had been dating T.C., who had worked at the [Text deleted] together with the Appellant.
6. she did not recall advising the case manager that there had been no break in the cohabitation between the Appellant and her daughter, L.
7. she did not recall that her daughter informed her that she had been dating another man by the name of C.F.

At the appeal hearing C.P. testified that:

1. she was twenty-one (21) years of age and that she had known L. for one and one-half (1 ½) years prior to L.'s death and that they were friends.
2. she was aware that L. was living with the Appellant and she stated that she would

visit L. and her daughter, D., at the [Text deleted] approximately once a week.

3. L. advised her of her relationship with T.C., that she really liked him and that they were going to live together.
4. around Halloween (October 31, 2003) she observed L. and T.C. together as a couple.
5. she was informed by L. that she intended to start a new life with T.C.
6. at the time of the motor vehicle accident L. had been living at her parent's residence.
7. she had observed L.'s car parked almost every day, for the entire day, at her parent's residence.
8. the car was often parked at the residence for the entire night.
9. around the Christmas period (approximately December 19-20, 2003) she went out with L. and T.C. who presented themselves as a couple going around together and she considered them to be boyfriend and girlfriend.

At the appeal hearing P.Y. testified that:

1. she had known L. since they were little girls in kindergarten when they had become friends.
2. she was aware that L. had been living with the Appellant and that they had a child together.
3. she would visit L. at the [Text deleted] at least twice a week and on weekends.
4. she was informed by L. that she had met T.C. and wanted to have a relationship with him and that this discussion occurred during the month of October 2003.
5. they had gone out together and L. and T.C. acted as if they were a couple.
6. she had observed that T.C. and L. were holding hands after attending at a bar and

at a friend's place.

7. at a Christmas party in 2003 she was advised by L. that she wanted to be with T.C.

8. around this time L. was living at her parent's residence and she would visit her there.

Submission

The central issue in this appeal is whether the Appellant was the spouse of L. at the time of her motor vehicle accident on January 5, 2004 within the meaning of Section 70(1)(b) of the MPIC Act.

The relevant portions of the definition of "spouse" which were in place at the time of the accident [Section 70(1)(b) of the MPIC Act] read:

> **"spouse"** means the person who, at the time of the accident, is married to and cohabits with the victim, or a person of the opposite sex who is cohabiting with the victim in a conjugal relationship;
>
> (b) for a period of not less than one year immediately preceding the accident, and there is a child of the union.

The Commission notes that this particular provision has since been replaced with a definition of "common-law partner" which has essentially the same effect.

If the Commission finds that the Appellant was the spouse of L. at the relevant time then he is entitled to the death benefit pursuant to Section 120(1) of the MPIC Act. However, if the Appellant cannot bring himself in the definition of 'spouse' pursuant to Section 70(1)(b) of the MPIC Act, he would not be entitled to this benefit.

MPIC's legal counsel, and legal counsel for The Public Trustee of Manitoba, set out two (2) grounds why the Appellant had not established, on a balance of probabilities, that he was a "spouse" within the meaning of Section 70(1)(b) of the MPIC Act:

1. The Appellant was unable to bring himself within the definition of 'spouse' by demonstrating his continuous cohabitation with L. between January 5, 2003 and January 5, 2004.
2. The Appellant was unable to bring himself within the definition of 'spouse' pursuant to Section 70(1)(b) of the MPIC Act because L. had, during the Christmas period 2003, permanently ceased to cohabit with the Appellant and had permanently terminated their common-law relationship.

The Appellant's legal counsel in response asserted:

1. there does not have to be a continuous cohabitation between the Appellant and L. in the year immediately preceding L.'s death in order for the Appellant to be a 'spouse' within the meaning of Section 70(1)(b) of the MPIC Act.
2. that any physical separation between the Appellant and L. in the year prior to L.'s death was of a temporary nature and that L. had never, on a permanent basis, terminated her common-law relationship with the Appellant.

Discussion

Continuous Relationship

The Commission rejects MPIC's submission that in order for the Appellant to be a "spouse" within the meaning of Section 70(1)(b) of the MPIC Act there must be continuous cohabitation between the Appellant and L. in the one (1) year period immediately preceding the fatal motor vehicle accident. In arriving at this decision, the Commission applied the following decisions in

respect of the meaning of “cohabitation”.

In the Commission’s decision *M.C. (AC-95-14, October 28, 1995)* the Commission was dealing with the meaning of “cohabitation” for the purpose of a death benefit. At that time Section 70(1) of the MPIC Act stated:

> The relevant sections of the M.P.I.C. Act are these:
>
> Section 70(1) “dependent” means
>
> (a) the spouse.
> (b) The person who is married to the victim but separated from him or her de facto or legally,

The death benefit for a ‘spouse’ were set out in Section 120(1)&(2) of the MPIC Act. In respect of the facts of this case the Commission stated:

> M.C., the Appellant, had lived in a common-law relationship with P.C. from about March of 1943 until February 8th, 1983 when he, having become free to marry her, did so. Their marriage prevailed from February of 1983 until June 23rd, 1994, when P.C. was killed in an automobile accident.

M.C.’s relationship with *P.C.* over a fifty (50) year period was a stormy one and from time to time, as a result of confrontations, *M.C.* would leave the family home “to clear the air and put some space between us” but and would subsequently return to the family home when matters settled down. The Commission found “their partings in other words had always been of a temporary nature” and “at no time did she (*M.C.*) announce, nor even feel, an intention to leave him permanently.” The Commission stated:

> The position of M.P.I.C. is that, because P.C. and M.C. were not apparently living together at the time of his death, the Appellant does not qualify as a ‘spouse’ within the meaning of the definition noted above, and is therefore only entitled to be paid as a ‘dependent’.
>
> The question that we have to decide, then, is whether that temporary absence on M.C.’s

> part should cause us to say that she and her husband were no longer 'cohabiting', that she was no longer his 'spouse' within the meaning of Section 70(1), and that her benefits under the Act must therefore be limited to the $19,000.00 minimum that flows to a dependent.

The Commission further stated:

> The word 'cohabiting', in the present context, is capable of both the narrow, strict interpretation – that is to say, 'living together on a full-time basis under the same roof' – or the more liberal interpretation that allows for temporary absences for good reason falling short of desertion or a decision by one or both of the parties to abandon the state of marriage.

The Commission concluded that by placing a narrow interpretation on the word 'cohabiting' in the present context would result in some grave injustices and adopted the more liberal interpretation of the word 'cohabiting'. In support of their position the Commission quoted:

> As was said by Jeune, P., in the case of Huxtable vs. Huxtable [1899] 68 L.J.P. 83, D.C., at page 85,
>
> > 'Cohabitation may be of two sorts, one continuous and the other intermittent. The parties may reside together constantly, or there may be only occasional intercourse between them which, nevertheless, amounts to cohabitation in the legal sense of the term. Such cohabitation may indeed exist together with an agreement to live apart . . . The circumstances of life, such as business duties, domestic service, and other things, may separate husband and wife and yet, notwithstanding, there may be cohabitation'.

The Commission referred to Maxwell on The Interpretation of Statutes, 12th Edition, at page 203 and stated:

> To quote Maxwell again, at page 203, '. . . It appears to be an assumption (often unspoken) of the Courts that, where two possible constructions present themselves, the more reasonable one is to be chosen.' In our view, and in light of all of the circumstances outlined above – some of which may well have not been within the knowledge of the Internal Review Officer of M.P.I.C. – <u>it is more reasonable to interpret the word 'cohabiting' as being inclusive of a surviving widow or widower who, while living apart from the insured at the time of the latter's death, was only doing so on a temporary basis until one or more reasonable conditions, once fulfilled, would permit her to move back into the family home</u>. (underlining added)

> We therefore find that M.C. does, in fact, qualify for the spousal benefit under Section 120(2), and we so order.

In the Commission's decision of *M.S.B. (AC-95-8, December 1, 1995)* the facts are set out as follows:

> This is an appeal by M.S.B., the legal wife of the late S.J.B., from a decision of the Internal Review Officer of Manitoba Public Insurance Corporation ('M.P.I.C.') whereby that officer held that Ms M. was the spouse of the late S.J.B. within the meaning of Section 70(1) of the M.P.I.C. Act, which will be referred to in greater detail below.
>
> It is not disputed that M.S.B. had not lived with her husband for a number of years, and no claim is advanced on her behalf. Rather, the claim is advanced on behalf of her children.
>
> . . .
>
> S.J.B. was killed in an automobile accident on the 9th of July 1994.

The Commission in this case was required to interpret Section 70(1)(b) of the MPIC Act, which is the same provision this Commission is required to interpret in this appeal.

The Commission stated:

> The sole question that we need to decide is whether R.M. was, in fact, cohabiting with S.J.B. for a period of at least twelve months prior to his death, having born his child.

The Commission referred to its earlier decision in *M.C.* citing *Huxtable v Huxtable* (supra) and stated in respect of this decision:

> The Huxtable decision was rendered in 1899; society to-day, expressing its views through the medium of the courts, would include, amongst the "circumstances of life" to which the learned President referred, most forms of domestic abuse including, but by no means limited to, those having their source in alcohol. Many spouses remain loyal to their mates despite such abuse and, other things being equal, their need to take occasional, or even frequent and regular, shelter from the storms of spousal mistreatment should not be relied upon in order to prove that their cohabitation has ceased.

The Commission concluded that for four and one-half (4 ½) years prior to *S.J.B.'s* death, the Appellant, *M.S.B*., and *S.J.B*. were living together under the same roof and that they were kept apart only due either to their jobs or *S.J.B.'s* alcohol intake. The Commission therefore determined that although there were temporary separations between *M.S.B*. and *S.J.B*. there was no permanent termination of their relationship for a period of not less than one (1) year immediately preceding the fatal motor vehicle accident. As a result, the Commission dismissed the appeal and confirmed the decision of MPIC's Internal Review Officer.

In the case of *Arsenault v. Collier,* [2001] P.E.I.J. No. 124, a decision of the Prince Edward Island Supreme Court – Trial Division, the headnote states:

> Motion by Arsenault for an interim order for spousal support. Arsenault stated that the parties lived together for four years, but Collier testified that they lived together for less than three years. The parties generally lived under the same roof during the four-year period. They had sexual relations. However, they did not share bank accounts or financial expenses, although Collier did pay for certain of Arsenault's expenses while they lived together. Collier claimed Arsenault on his income tax return as his common-law spouse for the two years prior to their separation.
>
> **HELD:** Motion dismissed. Arsenault was Collier's spouse for the purposes of the Family Law Act. However, she had not established that she suffered any economic disadvantage from the relationship or its breakdown.

In determining whether or not Arsenault was Collier's spouse the Court decided that for the purposes of the *Family Law Act* it was not necessary that there be a continuous relationship under the provisions of the *Family Law Act*.

The Court stated:

> The first question to be determined is whether the plaintiff falls within the definition of "spouse" in the Family Law Act, R.S.P.E.I. 1988, Cap. F-2.1. Under Part III of the Act,

Support Obligations, "spouse" is defined:

> 29(1) In this Part
>
> (b) "spouse" means a spouse a defined in clause 1(1)(g), and in addition includes either of a man and woman who are not married to each other and have cohabited,
>
> (i) continuously for a period of not less than three years

The word "cohabit" is defined in ss. 1(1)(b) of the Act as follows:

> (b) "cohabit" means to live together in a conjugal relationship whether within or outside marriage.

It is the plaintiff's position that she and the defendant did cohabit continuously for a period of not less than three years, that is from April, 1997 to July, 2001. The defendant's position is that they cohabited only from November 1998 until July 2001, a period of less than three years.

Counsel have invited my attention to a number of decision concerning this issue. I will refer only to those I find persuasive.

Plaintiff's counsel made reference to Thauvette v. Malyon, [1996] O.J. No. 1356 (Ont. Ct. Jus. (Gen. Div.)) which was an application by the plaintiff for an order declaring the parties to be spouses. The parties never married. They began an affair in 1986 and saw each other a few times a week while still living with their respective partners. Over the years the parties maintained separate residences to keep their respective children separate and apart. The defendant would spend four or five nights per week at the plaintiff's house. The defendant purchased wedding bands at one point late in the relationship.

Mr. Justice Roy granted the application and declared the plaintiff was a spouse within the meaning of Part III of the Family Law Act, R.S.O. 1999, s. 29 of which is in the same language as s. 29 of our Act:

> In this Part "spouse" means a spouse as defined in subsection 1(1), and in addition included [six] either of a man and woman who are not married to each other and have cohabited,
>
> (a) continuously for a period of not less than three years or . . .

The word "cohabit" has the same meaning in the Ontario Act as it does in our Act.

In reaching his conclusion Roy, J. made the following comments at paragraph 32:

> In my opinion, the fact the defendant maintained a separate residence does not in itself mean he did no (sic) cohabit with the plaintiff. In today's society, couples who carry on independent careers often in different cities could hardly be said to live under the same roof. These are instances where couples share more than one residence, like a cottage where one of the parties spends much more time than the other. Would the Courts conclude thereby these people did not cohabit if they

> had not married? I think not. (underlining added)

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

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

> *Canada Pension Plan,* R.S.C. 1985, c. C-8
>
> **2.** (1) . . .
> "spouse", in relation to a contributor, means,
>
> . . .
>
> (ii) a person of the opposite sex who is cohabiting with the contributor in a conjugal relationship at the relevant time, having so cohabited with the contributor for a continuous period of at least one year, and
>
> and, in the case of a contributor's death, the "relevant time", for greater certainty, means the time of the contributor's death.

The Court defined cohabitation as follows:

> The respondent terminated cohabitation and cohabitation is a constituent element of a common law relationship. "Cohabitation" in this context is not synonymous with co-residence. Two people can cohabit even though they do not live under the same roof and, conversely, they may not be cohabiting in the relevant sense even if they are living under the same roof. Such periods of physical separation as the respondent and the deceased experienced in 1993 did not end the common law relationship if there was a mutual intention to continue. I agree with the observation of Morden J.A. in *Re: Sanderson and Russell* (1979), 24 O.R. (2d) 429 (C.A.), at p. 432, that, subject to whatever provision may be made in a statute, a common law relationship ends "when either party regards it as being at an end and, by his or her conduct, has demonstrated in a convincing manner

that this particular state of mind is a settled one". . . . (underlining added)

In the present appeal the Internal Review Officer determined that in order for the Appellant to be a 'spouse' within the meaning of Section 70(1)(b) of the MPIC Act, there must be a continuous period of cohabitation for a period of one (1) year immediately preceding the Appellant's death. The basis for the Internal Review Officer's decision was finding that the Appellant and L. had been physically separated during the months of July and August 2003 and, as a result, the Appellant has not established that he had continuously cohabited with L. for a period of at least one (1) year immediately prior to her death.

In response, the Appellant's legal counsel submitted a great deal of evidence to attempt to establish that there had not been a physical separation between the Appellant and L. during the months of July and August 2003.

However, having regard to the testimony of all the witnesses and, having regard to the documentary evidence, the Commission finds that:

1. L., from time to time during the months of July and August 2003, did physically separate from the Appellant on a temporary basis only for short periods of time to her parent's residence and then would return to the residence that she shared with the Appellant at the [Text deleted].
2. at no time during the months of July and August 2003 did L. ever intend to permanently end her relationship with the Appellant.
3. during these months the Appellant and L. did cohabit in a common-law relationship within the meaning of Section 70(1)(b) of the MPIC Act even though they were not living under the same roof for short periods of time.

4. the period of their physical separation during the months of July and August 2003 did not end their common-law relationship since there was no mutual intention by L. to end that relationship.

Decision

For these reasons the Commission therefore concludes that MPIC has failed to establish, on a balance of probabilities, that the Appellant was not a 'spouse' within the meaning of Section 70(1)(b) of the MPIC Act because there has not been a continuous common-law relationship between the Appellant and L. in the one (1) year period immediately prior to the fatal motor vehicle accident.

Termination of the Common-Law Relationship

The Supreme Court of Canada in *Hodge v. Canada* (supra) determined that a common-law relationship ceases when one or both of the parties terminate the relationship on a permanent basis. The Court stated:

> The respondent terminated cohabitation and cohabitation is a constituent element of a common law relationship. "Cohabitation" in this context is not synonymous with co-residence. Two people can cohabit even though they do not live under the same roof and, conversely, they may not be cohabiting in the relevant sense even if they are living under the same roof. Such periods of physical separation as the respondent and the deceased experienced in 1993 did not end the common law relationship if there was a mutual intention to continue. I agree with the observation of Morden J.A. in *Re Sanderson and Russell* (1979), 24 O.R. (2d) 429 (C.A.), at p. 432, that, subject to whatever provision may be made in a statute, a common law relationship ends "when either party regards it as being at an end and, by his or her conduct, has demonstrated in a convincing manner that this particular state of mind is a settled one". (underlining added)

MPIC's legal counsel and The Public Trustee of Manitoba's legal counsel submitted that L. had

terminated the common-law relationship during the Christmas period in 2003, several weeks before the fatal motor vehicle accident and, as a result, the Appellant was not a "spouse" within the meaning of Section 70(1)(b) of the MPIC Act.

The Appellant's legal counsel, not surprisingly, rejected that submission and asserted that the evidence established, on a balance of probabilities, that there was no termination of the common-law relationship prior to the fatal motor vehicle accident.

The Commission, after review of the testimony of all the witnesses, and the documentary evidence, finds that shortly before the end of December 2003 L. did permanently terminate her common-law relationship with the Appellant, was residing at her parents residence with her daughter at that time, and had established a serious relationship with T.C.. As a result, the Commission determines that at the time of the fatal motor vehicle accident the Appellant was not a spouse within the meaning of Section 70(1)(b) of the MPIC Act.

The Commission notes there is a conflict in the evidence between the Appellant and his witnesses, and V.P. and her witnesses, as to whether or not there was a permanent separation between L. and the Appellant at the end of December 2003. In determining this issue the Commission considered the credibility of all of the witnesses who testified at the hearing.

In *Faryna v Chorny* [1952] 2 D.L.R. 354, the British Columbia Court of Appeal addressed the issue of the credibility of witnesses in civil proceedings. Mr. Justice O'Halloran, on behalf of the British Columbia Court of Appeal, stated:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an

> examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

V.P. was an impressive witness and in her testimony she essentially confirmed the discussions she held with the case manager, and the [Text deleted] Social Services In-take Worker, as reported in their Memorandums in respect of her relationship with the Appellant subsequent to the death of L..

In her testimony V.P. asserted that:

1. the Appellant's motives in claiming the spousal death benefit were for his own self interest and not in the interest of her grandchild, D..
2. the Appellant threatened her that if she did not support the claim for the spousal death benefit he would deny her and her husband access to their grandchild.
3. she did not support his claim of continuous cohabitation with L. and, as a result, the Appellant denied D.'s grandparents access to her.
4. the Appellant advised her that he had sent D. to stay with someone in [Text deleted] because he could not look after her after he returned to work because of his work shifts and would not tell her who was looking after D. and refused to provide her with contact information.

The Commission notes that the Appellant did not, in his testimony, deny V.P.'s allegations that she made to the case manager or to the [Text deleted] In-take Officer in respect of the Appellant's motives, his threats to her and her husband, and his denial of access by them to D. The Commission further notes that the Appellant had an opportunity, after hearing the testimony

of V.P., to rebut her testimony in respect of these issues and he failed to do so. The Commission therefore accepts V.P.'s testimony in respect of the issues.

In respect of the Appellant's motives for claiming the spousal death benefit, the Appellant testified that his primary motive was solely for the purpose of providing funds to properly bring up his daughter, to provide her with a loving and safe environment and, as well, to provide for an appropriate memorial stone for his late wife. The Commission, however, finds that the Appellant was acting contrary to the interests of his daughter, D., by attempting to use D. as a pawn in obtaining V.P.'s support in his claim for a spousal death benefit from MPIC.

The Commission notes that L. and D. visited L.'s parents and often stayed at their residence. The Commission finds that V.P. had a deep and loving affection for D. and would have provided her with a great deal of comfort and support after the loss of her mother but she and her husband were denied access to D. by the Appellant. Acting contrary to the interests of D., the Appellant ignored V.P.'s pleas to permit D. to have access to her grandparents and he sent her away to [Text deleted] to live with someone else when he was unable to look after her after his return to work. The Appellant's conduct in respect of issuing threats to V.P., and denying her and her husband access to D., are inconsistent with his testimony in respect of his motives in seeking a spousal death benefit from MPIC.

The Commission notes that V.P. did, on one occasion, contradict herself as to whether or not there was a break in the cohabitation between the Appellant and L.. V.P. initially informed the case manager there was a separation between the Appellant and L. during the months of July and August 2003, and subsequently advised the case manager that in fact there was no break in that relationship. However, the Commission finds that this contradiction was caused primarily by the

threats of the Appellant to V.P. in respect of access to her granddaughter.

The Commission further notes that subsequently V.P. testified that there was a permanent separation between the Appellant and L. in the end of December 2003 prior to the motor vehicle accident, and her evidence was corroborated by the testimony of C.P. and P.Y.. The Appellant, on the other hand, testified that L. had temporarily separated from him for several days in the latter part of December but that she had returned prior to the end of December 2003 and had resumed her common-law relationship with him. The Commission finds, however, that the Appellant's testimony in this respect is not corroborated by his witnesses R.L., L.W. and J.E.P.

The Commission notes that the Appellant testified that in the one (1) year period immediately preceding the death of L. they had continuously cohabitated. The Appellant called three (3) witnesses to support his position that the Internal Review Officer erred in concluding that, due to the physical separation between the Appellant and L. in the months of July and August 2003, the Appellant was not a "spouse" within the meaning of the MPIC Act. R.L. testified that the Appellant and L. did not physically separate during the months of July and August 2003 but his testimony did not deal specifically with whether or not L. and the Appellant had separated in the last two weeks of December 2003. L.W. also testified that during the months of July and August 2003 there had been no separation between the Appellant and L.. However, like R.L., she did not specify in her testimony that there was no separation between L. and the Appellant in the last two weeks of December 2003.

J.E.P., who was a friend of the Appellant, also testified that to the best of his knowledge the Appellant and L. resided together continuously for at least three (3) years, if not more, prior to her death, and to the best of his knowledge she had never left the Appellant. The Commission

notes that the basis of J.E.P.'s knowledge as to the duration of the relationship between the Appellant and L. was as a result of his weekend visits to their [Text deleted] residence from time to time during that three (3) year period.

In his Affidavit dated June 7, 2005 J.E.P. deposed that the last time he saw the Appellant and L. together was approximately one (1) or two (2) weeks before L. passed away. The Commission notes that on the day of the fatal motor vehicle accident V.P. testified that L. had traveled to the Appellant's residence for a visit. In his testimony J.E.P. did not state for how long, and in what circumstances, he observed the Appellant together with L. on the weekends, one (1) or two (2) weeks prior to her passing away. The Commission is therefore uncertain, having regard to J.E.P.'s testimony and the statements in his Affidavit, whether L. was a visitor or a permanent resident at the [Text deleted].

The Commission therefore finds that the testimony of R.L., L.W. and J.E.P. does not corroborate the testimony of the Appellant that after a temporary period of separation in the latter part of December 2003 L. had returned to the Appellant's [Text deleted] to resume cohabitation with him on a permanent basis.

The Commission, however, finds that V.P.'s testimony in respect to the issue of a permanent separation between the Appellant and L. is corroborated by the testimony of C.P. and P.Y. V.P. testified that several weeks before the fatal motor vehicle accident L. had permanently left the [Text deleted] where she was living with the Appellant and moved into her parent's home with her baby. She further testified that her daughter told her that she had been dating another man, T.C., who was a co-worker at the [Text deleted] and that she intended to stay with her parents until she found a new residence.

C.P. and P.Y. both testified that L., in the latter part of December 2003, separated from the Appellant and was living together with her daughter at her parents home. C.P. specifically testified that around Halloween (October 31, 2003) she observed L. and T.C. together as a couple and that L. had informed her that they intended to start a new life together.

P.Y. testified that:

1. L. had informed her that she had met T.C. and wanted to have a relationship with him and that this discussion occurred in the month of October 2003.
2. L. and T.C. had publicly gone together and acted as a couple.
3. she had observed them holding hands while attending at a bar and at a friend's place.
4. at a Christmas party in 2003 L. had advised her that she wanted to be with T.C.

The Commission finds that, in respect of the issue as to whether or not there was a permanent separation between the Appellant and L. in the latter part of December 2003, the Appellant's testimony in this respect is uncorroborated while the testimony of V.P. is corroborated by C.P. and P.Y. The Commission therefore gives greater weight to the testimony of V.P. than it does to the testimony of the Appellant in respect of the issue of a permanent separation between the Appellant and L.

The Appellant's credibility was adversely affected in a significant manner by his acknowledgment that he made false statements when purchasing an automobile and in filing his Income Tax statement.

On September 13, 2003 the Appellant and L. had signed documents relating to the acquisition of

the 2003 Pontiac Sunfire, which was later involved in the fatal motor vehicle accident on January 5, 2004. At that time they were both residing at the [Text deleted] in the [Text deleted]. The Appellant and L. each gave their address as "[Text deleted], Manitoba, [Text deleted]". Because this vehicle was "sold and delivered on Treaty Land – Treaty [Text deleted]", the acquisition was exempt from both GST and PST.

The Commission notes that the Appellant, in his Statutory Declaration, dated February 24, 2004, stated:

> I certify that the information given on this return and in any documents attached is correct, complete, and fully discloses all my income.
>
> It is a serious offence to make a false return.

In his Statutory Declaration dated February 24, 2004, the Appellant states:

> "We filed income tax seperately (sic) as singles for financial purposes. We did not file as common-law spouses."
>
> . . .
>
> "I certify that the information given on this return and in any documents attached is correct, complete, and fully discloses all my income.
>
> It is a serious offence to make a false return."

The Commission agrees with MPIC's legal counsel, in his written submission, wherein he states:

> After enjoying the benefits of what he now maintains was a fiction in terms of their <u>actual</u> respective residences, [R.] comes before this Commission asking it to find that he and [L.] used her [Text deleted] address as an "address of convenience" (to secure income tax and other financial benefits to which they were not entitled) and that, contrary to various solemn declarations made in writing to various government agencies, they were actually common-law spouses living in a common, off-reserve residence for the entire time period in question.
>
> [R.] was content to have documentation in place showing that [L.] was living separate and apart from him, on [Text deleted], when it meant:

> 1. They could each claim various income tax credits as single individuals.
> 2. [L.] could apply for, and receive, social assistance benefits from [Text deleted].
> 3. They could acquire a new automobile without paying GST or PST.
>
> He is far less content when that same documentation was relied upon by MPI to conclude that there were gaps in his cohabitation with [L.] during the relevant time period.
>
> In other words, when establishing and maintaining separate residences results in financial benefits for [R.], he finds those arrangements perfectly acceptable. But when those same arrangements lead to a denial of his claim for the spousal death benefit created by Section 120(1) of the *Act,* he finds them objectionable.

The Commission finds that on several occasions, in order to obtain financial benefits, both for himself and L., the Appellant was prepared to make false declarations to avoid the payment of GST and PST in respect of the purchase of an automobile and to obtain various income tax credits as single individuals.

Summary

Having regard to the totality of the testimony and the documentary evidence, the Commission finds that V.P. was a credible witness whose testimony on essential issues relating to the permanent separation between the Appellant and L., and her relationship with T.C. was corroborated by C.P. and P.Y., while the Appellant's testimony in this respect was not corroborated. The Commission also finds that V.P.'s testimony is consistent with a series of discussions she held with the case manager, which are reflected in the case manager's Memorandums to File.

On the other hand, the Commission finds that the Appellant's credibility was adversely affected by:

1. his failure to deny V.P.'s allegations of threats he made.

2. his conduct in denying D. access to her grandparents, which raised serious questions as to his motives in seeking the spousal death benefit from MPIC.
3. his false declarations in respect of the purchase of an automobile and in his income tax returns.

For all of these reasons the Commission finds that the common-law relationship between the Appellant and L. ceased for a one (1) or two (2) week period prior to the end of December, 2003. As a result, the Commission finds that the Appellant was not a "spouse" within the meaning of Section 70(1)(b) of the MPIC Act and dismisses the Appellant's appeal.

Dated at Winnipeg this 16th day of July, 2008.

MEL MYERS, Q.C.

PAUL JOHNSTON

LES MARKS