

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [The Appellant]
AICAC File No.: AC-01-76**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Ms. Yvonne Tavares
Mr. F. Les Cox

APPEARANCES: The Appellant, [text deleted], appeared in person together with his representative, [text deleted]; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Mark O'Neill.

HEARING DATE: March 25, 2003

RELEVANT SECTIONS: Sections 171(1) and 136(1) of The Manitoba Public Insurance Corporation Act ("MPIC Act") and Manitoba Regulation 40/94

AICAC NOTE: THIS DECISION HAS BEEN EDITED TO PROTECT THE APPELLANT'S PRIVACY AND TO KEEP PERSONAL INFORMATION CONFIDENTIAL. REFERENCES TO THE APPELLANT'S PERSONAL HEALTH INFORMATION AND OTHER PERSONAL IDENTIFYING INFORMATION HAVE BEEN REMOVED.

Reasons for Decision

The Appellant has appealed the following Internal Review decisions:

Internal Review Decision dated June 15, 2001 – Physiotherapy Treatments

1. On June 15, 2001 the Internal Review Officer dismissed the Appellant's Application for Review and confirmed the decision of the Case Manager to deny the Appellant reimbursement for the cost of physiotherapy treatments in respect of a motor vehicle accident which the Appellant was involved in on September 28, 1998. In arriving at his decision, the Internal Review Officer reviewed the medical reports of the Appellant's physician, the reports of the rehabilitation specialist that the Appellant's physician referred the Appellant to, and determined that the Case Manager was correct in determining that neither the attending physician or the specialist to whom the Appellant

was referred, prescribed physiotherapy and, accordingly, physiotherapy treatment was not required. The Appellant has appealed the Internal Review Officer's decision to the Commission.

The relevant provisions of the MPIC Act and Regulations are:

Reimbursement of victim for various expenses

136(1) Subject to the regulations, the victim is entitled, to the extent that he or she is not entitled to reimbursement under *The Health Services Insurance Act* or any other Act, to the reimbursement of expenses incurred by the victim because of the accident for any of the following:

- (a) medical and paramedical care, including transportation and lodging for the purpose of receiving the care.

M.R. 40/94

Medical or paramedical care

5 Subject to sections 6 to 9, the corporation shall pay an expense incurred by a victim, to the extent that the victim is not entitled to be reimbursed for the expense under *The Health Services Insurance Act* or any other Act, for the purpose of receiving medical or paramedical care in the following circumstances:

- (a) when care is medically required and is dispensed in the province by a physician, paramedic, dentist, optometrist, chiropractor, physiotherapist, registered psychologist or athletic therapist, or is prescribed by a physician.

Internal Review Decision dated May 3, 2002 – New Information

2. On May 3, 2002 the Internal Review Officer determined that:

- (a) three documents provided to the Case Manager by the Appellant on November 20, 2001
- (b) a memo from [MPIC's Doctor], dated December 11, 2001

do not constitute new information within the meaning of Section 171(1) of the MPIC Act and, as a result thereof, MPIC was not required to exercise its discretion to make a fresh decision in respect of the Appellant's claim for compensation under the Act. The Appellant appealed this decision to the Commission.

Internal Review Decision dated August 28, 2002 – New Information

3. On August 28, 2002 the Internal Review Officer determined that three documents which were enclosed in a letter from the Appellant to the Internal Review Officer, dated July 18, 2002, did not constitute new information within the meaning of Section 17(1) of the MPIC Act and, as a result thereof, MPIC was not required to exercise its discretion to make a fresh decision in respect of the Appellant's claim for compensation under the Act. The Appellant appealed this decision to the Commission.

The relevant provision of the MPIC Act is:

Corporation may reconsider new information

171(1) The corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.

APPEAL

The appeal hearing in respect of these matters was set to proceed on March 27, 2003. Prior to that date the Appellant advised the Commission that:

- (a) he was unable to proceed with the appeal hearing without legal representation;
- (b) he was unemployed and unable to afford the cost of a lawyer;
- (c) his Application to Legal Aid to provide him with a lawyer without fee was rejected;
- (d) pursuant to the provisions of the MPIC Act and Section 7 of the Charter, the Commission was required to fund legal counsel in order to represent him at the appeal hearing.

Upon receipt of the Appellant's request to fund legal counsel, the Commission set a pre-hearing meeting on Tuesday, March 25, 2003 to hear submissions from both the Appellant and MPIC in respect of this request.

Prior to the pre-hearing meeting on March 25, 2003, the Appellant provided the Commission with the decisions of the Supreme Court of Canada in *New Brunswick (Minister of Health and Community Services) v. G. (J.) [J.G.]* (1999) 3 S.C.R. 46 (hereinafter referred to as “*G.*”) and *R. v. Prosper* [1994] 3 S.C.R. 236 (hereinafter referred to as “*Prosper*”).

At the pre-hearing meeting on March 25, 2003, the Appellant was represented by [Appellant’s representative], who is not a lawyer. [Appellant’s representative] submitted that:

- (a) the Appellant was incapable of representing himself in respect of the complex legal issues that were involved in the Appellant’s appeal.
- (b) the Appellant had been unable to obtain legal counsel, he was without funds and unemployed, and that Legal Aid has refused to provide legal counsel for him in respect of his appeal.
- (c) MPIC has a lawyer representing them at the appeal hearing and therefore it was unfair to the Appellant to have to appear before the Commission without legal representation.
- (d) under the provisions of the MPIC Act, the Commission had the authority to fund the Appellant’s legal counsel in these appeal proceedings.
- (e) Having regard to the decisions in *Prosper* (supra) and *G.* (supra), the Appellant’s rights to life, liberty and security have been violated pursuant to Section 7 of the Charter and, as a result, the Commission is required to fund the Appellant’s legal counsel in these proceedings.
- (f) Section 15 of the Charter would be violated if the Commission did not fund the Appellant’s legal counsel in these proceedings.

MPIC ACT

In reply to the Appellant's submission in respect of the MPIC Act, MPIC's legal counsel asserted to the Commission at the hearing that there was no provision under the MPIC Act that would permit the Commission to fund legal counsel for the Appellant.

The Commission has previously dealt with this issue in [text deleted], decided May 29, 1995, wherein the Commission stated at page 7:

“The Appellant has been aware, throughout, that he has a perfect right to retain counsel, but insists that this Commission must require M.P.I.C. to pay his legal costs. We revert to the comment made at the beginning of these Reasons, and we point out that, since there is no provision in the statute or regulations for the payment of a claimant's legal expenses, we would be powerless to make such an Order even under circumstances where we might feel it appropriate. This is not, in any event, one of those circumstances.”

The Commission confirms that the MPIC Act does not provide for funding of legal counsel and, as a result thereof, the Commission dismisses the Appellant's request in this respect.

CHARTER

In respect of the Charter issues raised by the Appellant, MPIC's legal counsel did not provide any legal submission to the Commission that the Commission did not have the jurisdiction, under the provisions of the MPIC Act, to consider and apply the provisions of the Charter with respect to the Appellant's request that the Commission fund legal counsel for the Appellant in these proceedings. Therefore the Commission, without deciding whether or not it has jurisdiction to consider and apply the provisions of the Charter, is for the purposes of the Appellant's Charter application to the Commission, assuming it has jurisdiction to deal with the merits of the Appellant's position in respect of this application.

In respect of the Charter issues raised by the Appellant, MPIC's legal counsel, on March 23, 2003, forwarded an e-mail to the Commission setting out MPIC's reply in respect of the two Supreme Court Decisions *Prosper* (supra) and *G.* (supra) which the Appellant had filed with the Commission.

CHARTER – SECTION 10(B) – “ARREST OR DETENTION”

In respect of *Prosper* (supra), MPIC's legal counsel, in his e-mail to the Commission, stated:

“We take the position that the Prosper case has no application in these circumstances. That case dealt with a right to retain and instruct counsel without delay. That right, under 10(b) of the Charter, exists for everyone upon “arrest or detention”. [The Appellant] has neither been arrested nor detained. This in our view, is simply not a matter that involves issues which require an examination of [the Appellant's] rights under the Canadian Charter of Rights and Freedoms.”

At the appeal hearing MPIC's legal counsel repeated this submission to the Commission. However, [Appellant's representative], on behalf of the Appellant, argued that the Appellant's circumstances in this appeal were similar to the circumstances of the Appellant in *Prosper* (supra) and that the failure by the Commission to fund the Appellant's legal counsel in these proceedings would constitute a violation of Section 10(B) of the Charter.

The Commission agrees with MPIC's legal submission that the *Prosper* case (supra) has no application to the circumstance of this case. *Prosper* (supra) dealt with the duty of the police to inform the person who is being detained of his right to retain and instruct counsel without delay and the duty of the police not to ask any questions of the person detained relating to the alleged offence in question until the detainee has had an opportunity of exercising his rights to retain legal counsel. In this appeal, the Appellant was neither arrested nor detained as a result of the provisions of the MPIC Act and, as a result, the Commission determines that there was no violation of the Appellant's rights under Section 10(B) of the Charter in refusing to fund the

Appellant's legal counsel in these appeal proceedings.

CHARTER – SECTION 7 – LIFE, LIBERTY AND SECURITY OF THE PERSON

Legal counsel, in his e-mail to the Commission, in respect of the *G.* case (supra) stated:

“In our view, [the Appellant] has not incurred a violation of any Charter right. His matter does not involve a breach of “security of the person” under s. 7 of the Charter, which occurred in the New Brunswick Minister of Health case. The state has not threatened the security of his person. This is an insurance claim.”

At the appeal hearing legal counsel repeated this submission to the Commission. [Appellant's representative], on behalf of the Appellant, argued that the failure of the Commission to fund the Appellant's legal counsel would constitute a violation of the provisions of Section 7 of the Charter and that the Commission was bound by the decision of the Supreme Court in *G.* (supra).

Section 7 of the Charter states:

“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

The Commission notes that the Manitoba Court of Appeal has consistently held that Section 7 of the Charter does not apply to economic or commercial rights. (*Home Orderly Services Ltd. v. Government of Manitoba* (1987), 43 D.L.R. (4th) 300 (Man. C.A.) at 306 and 308 and *Pearlman v. Manitoba Law Society* (1989), 62 D.L.R. (4th) 681 (Man. C.A.) at 692-693; aff'd on other grounds [1991] 2 S.C.R. 869)

In *G.* (supra), the Supreme Court of Canada was required to consider whether a parent involved in child protection proceedings had Section 7 rights, and specifically the right to state-funded counsel. The majority held that the court proceedings engaged the parent's security of person interest. A three-member minority of the Supreme Court agreed with that ruling, and also held

that the parent's liberty interest was at stake.

(*G.*, paras. 67 and 118)

The headnote in respect to the majority of the Supreme Court decision relating to Section 7 states in part:

“The Minister's application to extend the original custody order threatened to restrict the appellant's right to security of the person guaranteed by s. 7 of the Charter. This right protects both the physical and psychological integrity of the individual and this protection extends beyond the criminal law and can be engaged in child protection proceedings.”

The Commission notes that in addition to extending the security provisions under Section 7 of the Charter, the court also imposed specific limitations on the application of this provision.

Thus, with respect to a threat to psychological integrity, Lamer C.J. emphasized that the state interference must be serious and profound in character and stated:

“. . . It is clear that the right to security of the person does not protect the individual from the ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action. If the right were interpreted with such broad sweep, countless government initiatives could be challenged on the ground that they infringe the right to security of the person, massively expanding the scope of judicial review, and, in the process, trivializing what it means for a right to be constitutionally protected. (para. 59)

For the restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity. The effects of the state interference must be assessed objectively, with a view to their impact on the psychological integrity of a person of reasonable sensibility. This need not rise to the level of nervous shock or psychiatric illness, but must be greater than ordinary stress or anxiety.” (para. 60)

The Commission determines that the Appellant's appeal issues are fundamentally different from the issues in *G.* (*supra*). The Appellant's claims in respect of reimbursement of the costs for physiotherapy treatments and payment of IRI benefits are essentially economic in nature and do not come within the scope of life, liberty and security of a person as set out in Section 7 of the Charter.

(Home Orderly Services Ltd. v. Government of Manitoba (supra) and Pearlman v. Manitoba Law Society (supra))

The Commission agrees that the denial by MPIC in respect to the Appellant's claims for compensation would certainly add stress and anxiety to an Appellant but determines that in the circumstances of this appeal the Appellant's stress and anxiety are within the classification of ordinary stresses and anxiety that a person of reasonable sensibility would suffer as a result of denial of the Appellant's compensation claims by MPIC. The Commission, therefore, concludes that the denial by MPIC in respect to the Appellant's compensation claims do not constitute a violation of the Appellant's Section 7 rights to security. As a result, the Commission is not required by Section 7 to fund the Appellant's legal counsel before this appeal Commission and dismisses the Appellant's application in this respect. (*Blencoe v. British Columbia (Human Rights Commission)* (2000), 2 SCR, 307.

CHARTER – SECTION 7 – PRINCIPLES OF FUNDAMENTAL JUSTICE

If the Commission is in error in concluding that there is no violation of the Appellant's Section 7 rights to security, then the Commission would be required to determine whether or not the denial by the Commission to fund the Appellant's legal counsel in the appeal proceedings would not be in accordance with the principles of fundamental justice as set out in Section 7 of the Charter.

In *G.* (supra), Chief Justice Lamer in addressing the issue of the principles of fundamental justice, identified three factors:

1. the seriousness of the interests at stake;
2. the complexity of the proceedings; and
3. the capacity of the person whose liberty or security interest is at stake.

(*G.*, (supra), para 75)

The Commission recognizes that the Appellant's interest in these proceedings is extremely serious and important to him. As well, the Commission recognizes that the Appellant is financially unable to retain legal counsel and has been rejected by Legal Aid in respect to the appointment of counsel.

However, the proceedings before the Commission are far less complex than the proceedings in *G*. The hearings occur before an Administrative Tribunal and not a Court of Law, the members of the Tribunal are not required to be lawyers, and the proceedings before the Tribunal are not subject to legal or technical rules of evidence. The procedures and issues confronting the Appellant and his representative must be reasonably characterized as both comprehensible and manageable. In addition both the Appellant and his representative have had experience in appearing before the Commission on previous occasions as Appellants and are therefore familiar with the Commission's appeal proceedings.

In respect of the capacities of the Appellant and his representative, there is no evidence that the Appellant or his representative do not have the intelligence or the education, communication skills, composure and familiarity with the administrative system to present the Appellant's case effectively. These comments apply solely to the issues before the Commission in respect to the Appellant's appeal on the merits but do not have application to the Charter issues raised by the Appellant in this appeal. However, the fact that the Appellant is raising Charter issues does not tip the scales in favour of counsel funded by the Commission. *Re Baig and the Queen* (1990), 58 C.C.C. (3d) 156 (B.C.C.A.) at pp. 158-159.

As a result, the Commission finds having regard to the above mentioned reasons, that the denial

by the Commission to fund legal counsel for the Appellant in these proceedings does not violate the principles of fundamental justice under Section 7 of the Charter.

CHARTER – SECTION 15(1)

At the conclusion of the hearing the Appellant also raised the issue of a Section 15 violation of the Charter. Section 15(1) of the Charter provides:

“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

The Appellant’s claim in respect of Section 15(1) violation of the Charter must be analyzed in accordance with the three-pronged test in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, at para 88:

- (A) whether a law imposes differential treatment between the claimant and others, in purpose or effect;
- (B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and
- (C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee in the sense that it denies the claimant’s human dignity.

The onus is upon the Appellant to establish, on the balance of probabilities, a violation of Section 15(1) of the Charter having regard to the three prong test as set out in this case, and the Commission finds that the Appellant failed to do so.

The Commission recognizes that an Appellant who is able to afford to hire legal counsel or an experienced advocate may be in a better position to effectively present their position before the Commission than an Appellant who is financially unable to afford the costs of legal counsel or an experienced advocate. However, this differential treatment arises out of the economic

circumstances of an Appellant and is not the result of the provisions of the MPIC Act.

For the above mentioned reasons the Commission determines that its refusal to fund legal representation for the Appellant in respect of his appeal does not constitute a violation of the Appellant's Section 15(1) Charter rights.

CONCLUSION

The Commission therefore determines:

- (a) that there is no provision under the MPIC Act which would permit the Commission to fund legal counsel in these proceedings; and
- (b) the failure of the Commission to fund the Appellant's legal counsel in these proceedings does not constitute a violation of Section 7, 10(B) or 15(1) of the Charter.

The Commission therefore dismisses the Appellant's request that the Commission fund the Appellant's legal counsel in these proceedings and will therefore set a date for the hearing of the merits of this appeal.

Dated at Winnipeg this 5th day of May, 2003.

MEL MYERS, Q.C.

YVONNE TAVARES

F. LES COX