

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant son] (Estate of [the deceased])
AICAC File No.: AC-13-154**

And

**IN THE MATTER OF an Appeal by [the Appellant husband] (Estate of [the deceased])
AICAC File No.: AC-13-155**

PANEL: Ms Jacqueline Freedman, Chairperson
Ms Karin Linnebach
Mr. Brian Hunt

APPEARANCES: [the Appellant son] and [the Appellant husband] were represented by [text deleted].
Manitoba Public Insurance Corporation (“MPIC”) was represented by Mr. Trevor Brown.
[text deleted] appeared as Interpreter.

HEARING DATE: March 9, 2016

ISSUE(S): Whether the Appellant, [the Appellant son], is entitled to a lump sum dependant indemnity benefit under the Personal Injury Protection Plan in respect of the death of [the deceased].
Whether the Appellant, [the Appellant husband], is entitled to a greater spousal indemnity benefit under the Personal Injury Protection Plan in respect of the death of [the deceased].

RELEVANT SECTIONS: Subsections 70(1), 83(2), 120(1), 120(2) and 121(2) and Schedules 1 and 3 of The Manitoba Public Insurance Corporation Act (“MPIC Act”).

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

Background:

[The Appellant husband] was the husband of [the deceased]. [The Appellant son] is the son of the Appellant Husband and [the deceased]. On July 6, 2012, [the deceased], the Appellant Husband and their daughter, [text deleted], were tragically involved in a serious motor vehicle accident (“MVA”). While the Appellant Husband and his daughter were not critically injured, [the deceased] did not survive the MVA.

Under Division 3 of the MPIC Act, a death benefit is payable in certain circumstances where a victim dies as a result of an accident:

The Appellant Husband:

Where the deceased victim leaves a surviving spouse, a benefit is payable under the MPIC Act. By decision letter dated April 19, 2013, the case manager advised the Appellant Husband of this benefit:

“As the surviving spouse of [the deceased], you are entitled to a spousal payment. The spousal payment is based on Oksana’s Gross Yearly Employment Income (GYEI) and a factor that is determined by age.

According to the Employer’s Verification of Earning’s form, [the deceased’s] GYEI was \$475.00. This was multiplied by the age factor of [text deleted], which is lower than the indexed minimum amount. Therefore, the following is your spousal entitlement:

Spousal Indemnity *\$56,888 (cheque enclosed)*”

The Appellant Husband disagreed with the amount of the spousal indemnity and filed an application for review. The Internal Review Officer, by decision letter dated October 8, 2013,

confirmed the decision of the case manager and held that the spousal indemnity benefit was correctly calculated according to the legislation. It is from that Internal Review decision that the Appellant Husband now appeals to the Commission.

The Appellant Son:

In reviewing the circumstances of [the deceased's] passing and the indemnity payments available to the [text deleted] family, MPIC considered whether the Appellant Son may be entitled to a lump sum indemnity payment. This is because in certain circumstances, a benefit may be payable to an adult child of a victim. As noted in the case manager's decision letter to the Appellant Son dated September 10, 2013:

“Under the Personal Injury Protection Plan (PIPP), Manitoba Public Insurance has an entitlement for children over 18 years old who are considered “substantially dependant” on the deceased victim.”

However, the case manager found as follows:

“Based on the information provided, you were not considered to be “substantially dependant” on [the deceased] at the time of the motor vehicle accident, and therefore, would not be entitled to a lump sum dependant payment.”

The Appellant Son disagreed with the case manager's determination and filed an application for review. By a decision letter dated December 12, 2013, the Internal Review Officer confirmed the case manager's decision and held that the Appellant Son was not entitled to a dependant lump sum indemnity benefit, by virtue of not having been “substantially dependant” on his mother at the time of her death. It is from that Internal Review decision that the Appellant Son now appeals to the Commission.

Issues for Determination:

The issues that the Commission has to determine in these appeals are:

1. Whether the Appellant Husband is entitled to a greater spousal indemnity benefit; and
2. Whether the Appellant Son is entitled to a lump sum dependant indemnity benefit, by virtue of being substantially dependant on [the deceased] at the time of the MVA.

Preliminary and Procedural Matters:

As noted above, under Division 3 of the MPIC Act, a death benefit is payable in certain circumstances where a victim dies as a result of an accident. Given that the appeals of the Appellant Son and the Appellant Husband both concerned the impact of the death of [the deceased] and that the evidence was likely to be similar in both appeals, the parties agreed that both appeals would be heard together, and that they would be heard on common evidence (i.e. the testimony of each witness would be applicable to the appeal of each Appellant).

At the outset of the hearing, counsel for MPIC made a motion for the exclusion of witnesses, including the Appellants, meaning that the second Appellant to testify should leave the room until the first Appellant had finished his testimony. Counsel for the Appellants responded to this motion and submitted that such an order was not necessary and that the Appellants should be permitted to remain in the hearing room as is a privilege normally accorded to all Appellants. The panel adjourned to consider the motion and returned with its decision to exclude the witnesses, including the second Appellant to testify. The panel reasoned that if the appeals were heard separately, and one of the Appellants appeared merely as a witness at the other Appellant's hearing, he would have had to be excluded at that time. Accordingly, the matter proceeded with the Appellant Husband testifying first and the Appellant Son being excluded during that testimony. After he testified, the Appellant Husband stayed in the hearing room during the testimony of the Appellant Son, who remained in the hearing room after his own testimony.

A second preliminary matter was raised, concerning the issue of funeral expenses. This issue was referenced in the Internal Review decision relating to the spousal indemnity benefit (dated October 8, 2013, referred to above). Although this matter was raised in that Internal Review decision, no actual decision on that point had been made by the Internal Review Officer. Counsel for the Appellants indicated that it remains a matter that the Appellants would like to pursue. Accordingly, counsel for MPIC indicated that pending receipt of the funeral home invoice from counsel for the Appellants, he could direct the Internal Review Officer to issue a decision on this matter. The matter could then proceed through the normal course should the Appellants determine at that time that they did wish to pursue an appeal on that issue. As no decision on the issue has yet been made by the Internal Review Officer, the Commission does not have jurisdiction to address funeral expenses. Accordingly, the appeals proceeded only on the issues of lump sum spousal and dependant indemnity benefits.

Decision:

For the reasons set out below, the panel finds that:

1. The Appellant Husband has not met the onus to establish, on a balance of probabilities, that the amount of the spousal indemnity awarded to him was incorrect; and
2. The Appellant Son has not met the onus to establish, on a balance of probabilities, that he was substantially dependant on [the deceased] at the time of the MVA.

Evidence and Submissions for the Appellants:

Evidence:

Three witnesses provided testimony in support of the Appellants: the Appellant Husband, the Appellant Son, and the late [the deceased's] brother, [text deleted].

The Appellant Husband:

The Appellant Husband provided his evidence with the aid of a [text deleted] interpreter.

The Appellant Husband described the MVA, which happened four years ago. He indicated that the MVA occurred on a sunny day with satisfactory road conditions. He said that he was driving with his daughter in the front seat and his wife in the back seat. They were travelling along [text deleted], heading to [text deleted]. He had begun to reduce his speed in order to turn right and everything happened very quickly. A car that was behind him, which could have passed them in the passing lane as the highway was two lanes at that point, did not do so but instead impacted them from behind. The Appellant Husband was rendered unconscious for a period of time and when he regained consciousness his vehicle had been pushed some distance from the road due to the impact. He indicated that he and his daughter were very lucky that his vehicle was slowed down by the high grass, although the rear of the vehicle was completely deformed. He and his daughter suffered head injuries; his daughter also had some injuries to her feet. His wife did not survive the MVA.

The Appellant Husband testified that he and his late wife were married in [text deleted]. He was eight years older than her. They came to Canada in December 2006, along with their two children. In [text deleted], he had a University degree and was the CFO of a large enterprise, doing accounting work. However, when he came to Canada he did not have a Canadian education and accordingly he began work as a cleaner. Now he works with [text deleted]. His wife obtained similar work cleaning, and then worked in a restaurant. She subsequently took a job as a cook at [text deleted]. [The deceased] also made efforts to improve her English language skills. She attended college in Canada to do so and in addition did volunteer work often in order to improve her skills.

The Appellant Husband testified that in addition to working outside the home, [the deceased] did all of the cooking for the family. He indicated that they never had to go to a restaurant; the food was excellent. [The deceased] also did all of the laundry and small chores so that the only thing he had to attend to was his work. She was also the primary caregiver for the children (and this is only natural in [text deleted]).

The Appellant Husband said that the Appellant Son was married in [text deleted] and when his son's wife came to Canada, she and the Appellant Son lived together with the family. The Appellant Husband said that by the time of the MVA, the Appellant Son and his wife were in their own apartment. The Appellant Husband testified that his wife continued to care for her son and daughter-in-law by cooking meals for them and taking food to them throughout each week. She would also invite them to join him and his wife for dinner several times every week.

The Appellant Husband discussed what his plans for the future had been with his wife. He indicated that given that he was [text deleted] years older than his wife, they had determined that she would work towards getting a higher paying job so that as he was getting closer to retirement he would be able to work less. To that end, [the deceased] was studying to improve her English language skills in order to increase her chances of getting a higher paying job. They had hoped that her higher paying job would be able to help pay the remainder of their mortgage and in addition help fund their children's studies at [University]. Their daughter is currently a student there.

The Appellant Husband testified that the loss of his wife has affected him greatly. He indicated that he feels it is very hard for a person to live without his special someone. In addition, he

won't be able to retire as he had planned. He indicated that after the MVA, his role in the home changed and although his daughter still lives with him, she is a full time student and so he now has to do all the household chores. He indicated that the reason for the appeal is because his loss is incomparably bigger than the indemnity that he received from MPIC, which really couldn't compensate for their actual loss.

Counsel for MPIC cross-examined the Appellant Husband. He questioned the Appellant Husband regarding his wife's work and studies. The Appellant Husband indicated that when they first moved to Canada, both he and his wife worked outside the home. The Appellant Husband indicated that his wife did practically everything inside the home as well. The Appellant Husband indicated that prior to her death, his wife had been studying English for about a year. First she was attending English courses for immigrants and then she was at college part-time. Her income declined when she started to study. When questioned whether he took an extra job when his wife's income went down, the Appellant Husband indicated that he did not take an extra job, but rather he took overtime in order to make ends meet.

When questioned by counsel for MPIC regarding his wife's occupation at the time of the MVA, the Appellant Husband indicated that his wife was a cleaner at [text deleted]. He stated that in addition, she was studying English part-time while she was doing the cleaning job at the [text deleted]. The Appellant Husband confirmed that she was paid \$35 by the [text deleted] for each cleaning session. He didn't recall exactly how often she cleaned but he confirmed that it was not often and that she was not earning a huge amount. When questioned as to whether his late wife earned very much in the year prior to the MVA, the Appellant Husband said that she did earn something, and that it was not negligibly small to the household budget.

Counsel for MPIC reviewed the employment records with the Appellant Husband and confirmed that [the deceased] earned \$475 in the twelve months prior to her death. Counsel also confirmed with the Appellant Husband that [the deceased] was [text deleted] years old at the time of her death.

Counsel for MPIC also questioned the Appellant Husband regarding the Appellant Son. The Appellant Husband confirmed that at the time of the MVA, the Appellant son was [text deleted] years old and that he was married. The Appellant Son, at the time of the MVA, was living with his wife in an apartment a few blocks away from the Appellant Husband and his wife. The Appellant Husband confirmed that he and his wife had his son and daughter-in-law over to dinner often. He indicated that he and his wife would never go to his son and daughter-in-law's expecting to be fed; rather, they would bring food with them to their son's home. The Appellant Husband indicated that he and his wife did a lot of favours for his son and daughter-in-law. When questioned as to whether the Appellant Son did favours for him and his wife, the Appellant Husband indicated that there was no necessity for his son to do anything for him and his wife. The Appellant Husband indicated that infrequently he would invite his son to participate in a repair job in order that they could be involved in an activity together. The Appellant Husband acknowledged that his wife would have wanted to be involved in the Appellant Son's life and that it would have been important for her.

The Appellant Son:

The Appellant Son testified that he was born in [text deleted] and came to Canada with his family at the age of [text deleted] in 2006. When he first came to Canada, he went to school part-time and worked as a technician at [text deleted]. He lived with his parents and his sister, who was a full-time student. While he lived at home, his mother did a great deal for him. She

helped him with many things, including cooking, laundry and homework; she also provided him with financial assistance. His mother had her own funds due to the fact that she was working outside the home for a cleaning company and then as a cook.

The Appellant Son testified that he went to [text deleted] in 2008 and got married there. His wife came to Canada in 2009. Initially, the Appellant Son and his wife lived together at his parents' house. At that time, in 2009, he was no longer working. He was a full-time student at [text deleted], taking an English language course as well as a trades course, in order to improve his employment prospects. His recollection as to the details of his studies was not perfect; however, he estimated that the trade program was one year and prior to that there was the language course, which was also one year. Therefore, together there were probably two years of full-time studies at [text deleted]. The Appellant Son indicated that while he was studying at [text deleted] he was not working and therefore relied on his parents for support.

The Appellant son stated that after graduating from the [text deleted] course in language and trades, he was not able to find a job in his field and therefore he took an additional one year course at [text deleted] which was a pre-employment course for [text deleted] work. He was not sure whether there was a summer break in between the two programs; his recollection on this was not perfect. However, the Appellant Son recalls that he was at [text deleted] for a total of three years. He remembers finishing at [text deleted] a few months before the MVA.

The Appellant Son testified that he began his education in the [text deleted] as [text deleted], although that education was not completed. He wanted to complete it in Canada and his mother was always pushing him to go to University, although that didn't happen. The Appellant Son testified that his mother was a mentor to him. She was always pushing him to be more serious

and she was always trying to make things easier for him, to help him with his studies, and to encourage him to become more financially stable. He testified that after his mother died he got a job in [text deleted]. He worked there in 2012 but [text deleted] changed their [text deleted] system and therefore he moved on in 2013 to [text deleted]. His income from [text deleted] in 2013 was between \$70,000 and \$80,000. The Appellant Son testified that he works approximately 50 to 80 hours per week.

The Appellant Son testified that his mother helped with part of the rent payments on the apartment that he lives in with his wife. In addition, she helped with part of the food and groceries. The Appellant Son testified that his mother helped him in all the possible ways that a mother can help a son. She cooked food at her own home and brought it to him. She stayed with him if he had any issues or difficulties emotionally. She gave him money if he needed it. He acknowledged that his wife was working but stated that if they needed money his mother would help. He stated that his mother didn't clean at their apartment very often but if they needed help she would help. The Appellant Son testified that his life has changed drastically since the death of his mother. It was a huge, tragic loss for him and for a few months after the MVA he couldn't operate normally. He said there couldn't be anything worse than to see someone you love in the morning and then they are gone. He noted that every Sunday and holidays as a child growing up his mother took him to church. The Appellant Son noted that he now has a son who is [text deleted] years old who his mother never saw. The Appellant Son indicated he was very close with his mother and he shared everything with her, all his plans, and it is a very big loss.

Counsel for MPIC questioned the Appellant Son on cross-examination. The Appellant Son confirmed that at the time of the MVA, he was [text deleted] years old and he had been married for about four years. He confirmed that prior to the MVA, he and his wife had been living in

their own apartment for approximately two years. He and his wife both had their names on the lease. When questioned as to whether his wife did much of the cooking, cleaning and laundry, the Appellant Son stated that they would both do it together.

The Appellant Son testified that when he first came to Canada in 2006, he was employed in [text deleted]. He also confirmed that his wife was working when she came to Canada.

When questioned regarding his period of study at [text deleted] which began in 2011, the Appellant Son confirmed that part of the tuition was paid by the government. The Appellant Son indicated that he was a beneficiary of a government program that helps immigrants and that the program helped fund his tuition. The Appellant Son said that in addition to providing funds for his tuition, this program provided him with other funds which went partially towards his rent and also towards spending money. The Appellant Son was uncertain as to the total amount of money he received, but estimated it to be in the neighbourhood of \$10,000.

The Appellant Son indicated that he spoke with his mother very often; she wanted to speak with him and she was interested in how he was doing. He indicated that he went to his parents' house for meals and he had them over occasionally. The Appellant Son indicated that his parents gave him gifts and that he gave them gifts. He indicated that his parents did favours for him and that he did favours for them.

[the deceased's brother]:

[The deceased's brother] testified that he is [text deleted]. He is the brother of the late [the deceased], and thus the brother-in-law of the Appellant Husband and the uncle of the Appellant Son. [The deceased's brother] testified that he was already in Canada when the Appellant

Husband and [the deceased] came to Canada, and that he [text deleted] sponsored them to come to Canada. [The deceased's brother] testified that he knew his sister very well. (MPIC stipulated that a brother would know his sister well.)

...[text deleted]...

He testified that the day of the MVA was the hardest day for the family. He was in [text deleted]. He said that talking about it was hard for him, because it reopened the wounds. He said that he feels particularly guilty because he was the one who invited his sister and the Appellant Husband to come to Canada and thus he feels responsible.

[The deceased's brother] stated that [the deceased] had aspirations for her family. He testified that before he left for [text deleted], he spoke with her and she indicated that she wanted the Appellant Son to become an engineer. He stated that she indicated her intention that she would cook for all of the families, meaning the Appellant Husband, the Appellant Son's family and his, [The deceased's brother's] family and all three families would pay for the Appellant Son's education. [The deceased's brother] testified regarding [the deceased's] goals upon coming to Canada. He said that we are responsible for our children forever. He indicated that it was his sister's dream for her children to go to university.

[The deceased's brother] indicated that his sister was involved in [text deleted] church, in the congregation, in the choir, and in English as a second language classes. In addition, she worked at a restaurant and volunteered. She tried to help her husband, her children and her community.

[The deceased's brother] testified that she helped her family by cooking for them. He stated that this is very common in their cultural background. He gave the example that among his siblings there were three boys and his parents sent them all to University while the girls had to support them in the home, with the understanding that in the future, the boys would support the girls.

[The deceased's brother] acknowledged that [the deceased] did not earn very much for her work at [text deleted]. He stated that regardless, when [text deleted] needed her, she would come and cook and bake. She was also in the choir and she would read the epistle in [text deleted]. She helped to clean and for that she was paid a little bit. He testified that [the deceased] was educated in [text deleted] as a cook and baker. She had special training at a college in [text deleted]. He testified that they did talk about organizing a catering business, but that didn't materialize.

[The deceased's brother] testified that prior to the MVA, [the deceased] was going to school and studying English. She liked to work with kids and took some courses in English as a second language. Her general goal was to send her kids to University. She talked about wanting her children to work smart, not hard.

He testified that [the deceased] and the Appellant Son had a close relationship. He was her first child and he was sick in childhood. [The deceased's brother] said that he visited them often and he observed their relationship. [Text deleted]... He stated that they are very close families. He indicated that the Appellant Son sought out his mother's help and advice all the time and that the Appellant Son is grieving still today.

Appellant's Submission Regarding the Appellant Husband:

In reviewing the evidence in connection with the Appellant Husband's appeal, counsel for the Appellants noted that they are recent immigrants and have only been in Canada for ten years and that [the deceased] has been gone for almost four of those years. Counsel noted further that the family tradition is to do whatever is necessary to improve their lives and those of their children. All members of the family helped, including [the deceased's brother]. Counsel noted that [the deceased] took whatever work she could, including cleaning and working as a cook at [text deleted]. She worked to improve her English language skills by taking classes in English as a second language and all the while she maintained the home and took care of her son and daughter. She wanted the best for her son and daughter and wanted the Appellant Son to be able to take care of his family.

Counsel for the Appellant Husband submitted that no dollar amount can compensate the Appellant Husband for this tragic loss. [The deceased] was an integral part of their family and her death has devastated them; there is now a grandchild she never had the benefit of meeting. To suggest that the \$56,888 spousal indemnity which was received is what her life was worth is ludicrous. Counsel for the Appellant Husband submitted that were it not for the limits of the legislation, a much greater sum could be available. Counsel for the Appellant Husband noted that the value of the vehicles that were totalled in the MVA exceeds the value of the spousal indemnity benefit paid and he submitted that one can't help but wonder where our priorities are. Counsel submitted that the effect of the death of [the deceased] is incalculable and the amount of the spousal indemnity benefit should be based on what her future earnings would have been and not just what they were at the time of the MVA.

Counsel for the Appellant Husband did acknowledge that there is no evidence as to what her future earnings might have been, but he submitted that he has to express these views on behalf of the family. Counsel noted that the death of this individual is a tragedy and it is unfortunate that she fell into the minimum category and no more. It is even worse that the person who took this life was only fined \$1,500. Counsel for the Appellant Husband submitted that the legislation ought to be changed, in order to provide for a more fair result.

Appellant's Submission Regarding the Appellant Son:

Counsel for the Appellant Son noted that in order to be entitled to a lump sum indemnity payment in connection with the death of [the deceased], the Appellant Son must have been "substantially dependant" on her at the time of the MVA. This phrase is not defined in the MPIC Act.

Counsel for the Appellant Son noted that the case manager, in his letter dated September 10, 2013 referred to various factors which would be considered in determining whether the Appellant Son was substantially dependant on his mother. These factors include financial dependence, marital status, employment status, residence and emotional and spiritual connection.

With respect to financial dependence, counsel submitted that the Appellant Son was at least partly financially dependent on his mother at the time of the MVA. Counsel noted that the Appellant Son's testimony was that he spent the better part of the three years prior to the MVA as a student at [text deleted], and at least during the last year he was a full-time student. Although the Appellant Son's testimony wasn't entirely certain on the point, counsel for the Appellant Son acknowledged that it is possible that the Appellant Son may have worked part-time during a break between the studies. However, counsel submitted that even if he might have

worked part-time, he certainly would not have been able to earn enough to support his family. Counsel submitted that [the deceased] also assisted in defraying the Appellant Son's costs, by providing meals on an almost daily basis. Counsel submitted that the evidence of the Appellant Son was also clear that his mother contributed to his rent and gave him some gifts. Counsel for the Appellant submitted that gifts given to the Appellant Son by his mother could have come from her savings. In addition, given her income, a \$20 gift would be considered substantial. Counsel also pointed out that there was no evidence that the Appellant Husband gave any gifts to the Appellant Son.

Counsel for the Appellant Son noted that the evidence was that [the deceased] was studying English in order to be able to get a job and that it was her wish for the Appellant Son to go to university. She wanted the Appellant Son to work smart, not hard. This is because he was sick when he was a child and she didn't want him to have to do manual labour as an adult.

With respect to the Appellant Son's marital status, counsel for the Appellant Son noted that he was married in 2008; however, his wife didn't come to Canada until 2009 and when she came she wasn't working immediately. Counsel submitted that although the Appellant Son was married, this didn't reduce his financial dependence on his mother. In fact, it may have increased it because now they were a family of two. Counsel submitted that the Appellant Son and his wife needed help even when his wife was working. The Appellant Son and his wife lived with his parents for two years and even when they did get their own apartment, they received assistance from [the deceased] and the Appellant Husband.

With respect to emotional and spiritual connection, counsel for the Appellant Son submitted that the evidence is clear that the Appellant Son was emotionally and spiritually tied to his mother.

From early childhood they were close, when she took him to church and he looked to her as a confidante even into adulthood.

On the basis of the foregoing, counsel for the Appellant Son submitted that the Appellant Son was substantially dependant on his mother at the time of the MVA and should therefore be entitled to a lump sum dependant indemnity benefit.

Counsel for the Appellant Son submitted that not every factor needs to be satisfied in order for the Appellant Son to be considered substantially dependant; rather, if the majority of factors are satisfied that should be sufficient.

Evidence and Submissions for MPIC:

Evidence:

MPIC did not call any witnesses but did cross-examine the Appellants, as noted above.

MPIC's Submission Regarding the Appellant Husband:

Counsel for MPIC submitted that with respect to the spousal indemnity paid to the Appellant Husband with respect to the loss of his wife, there is no question that this loss was a tragedy, but the legislation is fixed. He submitted that the goal and purpose of the legislation is to provide some compensation to a surviving spouse for the income that is lost on the death of a spouse. Counsel for MPIC noted that the evidence is that the Appellant Husband was paid \$56,888. Counsel submitted that while that may not be enough to compensate the Appellant Husband for the loss of his wife, that is the amount to which he is entitled according to the MPIC Act. That amount is derived from a calculation taking into account [the deceased's] income, multiplied by her age, multiplied by a factor contained in schedules to the MPIC Act. If the result of that

calculation is less than a certain minimum amount, then the Appellant Husband is entitled to the minimum amount, which is what he received.

Counsel for MPIC submitted that the onus is on the Appellant to show that the Internal Review decision is incorrect and counsel submitted that here, the Internal Review decision is correct and the right amount was paid. Specifically, counsel submitted that in the 52 weeks prior to the MVA, [the deceased] earned \$475. This is reflected in the Employer's Verification of Earnings provided from [text deleted] with respect to her cleaning wages. This \$475 of income multiplied by [the deceased's] age [text deleted] multiplied by the factor in Schedule 1 to the MPIC Act [text deleted] equals [text deleted]. This is significantly less than the minimum, \$56,888. Therefore, it is that amount, \$56,888 which was paid to the Appellant Husband for the spousal indemnity benefit. This is the same calculation set forth in the Internal Review decision, which should therefore be upheld.

MPIC's Submission Regarding the Appellant Son:

Counsel for MPIC submitted that in order for the Appellant Son to be entitled to a lump sum dependant indemnity benefit, he must establish that he was "substantially dependant" on his mother pursuant to subsection 70(1) of the MPIC Act. Counsel noted that this indemnity benefit is not paid to all adult children of a deceased victim of an accident but rather only to an adult child who is "substantially dependant". There are no factors listed in the statute or the regulations which define the meaning of "substantial dependence".

In suggesting factors that the Commission ought to consider, counsel for MPIC referred the panel to a 1999 case from the Manitoba Court of Queen's Bench, *Kawiuk v. Wagenko Estate*, [1999] M.J. No. 13, which was a case involving the dependent's relief legislation. In that case,

the Applicant had to show that she was substantially dependant on the deceased. The Court found as follows at paragraph 9:

“She was not wholly dependant on Mr. Wagenko because she did have her own income; however, she was dependant on him for shelter because she had disposed of her own house on the express understanding with Mr. Wagenko that by moving in with him she would be able to sell her home and distribute the proceeds to her sons in accordance with her late husband’s wishes. She depended on her ability to share accommodation with Mr. Wagenko and the value of that accommodation was substantial. As has now been demonstrated her own income is not sufficient to meet her total needs because she no longer has her own home or the proceeds of the sale of that home for shelter.

I find that she was substantially dependant on Mr. Wagenko at the time of his death.”

Counsel for MPIC submitted that based on this case, one individual could be considered to be substantially dependent on another due to their residence.

Counsel for MPIC also referred the panel to a decision of the Commission from 1998, AC-97-49, in which the Commission had to determine whether the Appellant parents were substantially dependant upon their deceased son. In that case, the Commission held as follows at paragraph 15:

“This Commission has already held (in the appeal of [the Appellants], decided June 19th 1995) that, while financial factors are not irrelevant, they are only one criterion or gauge to be considered in determining substantial dependency. The term ‘substantially dependant’, where it is used with reference to a parent of a deceased victim of a motor vehicle accident, is entitled to be given a broader meaning than mere financial dependency. ...”

The Commission went on to state as follows at paragraph 18:

“As was said by Helper, J.A., when dismissing an application for leave to appeal an order of this Commission in the case of [text deleted] v. MPIC (an unreported decision pronounced in Chambers on October 15th 1996) “there is no magic to the word ‘dependant’ nor to the phrase ‘substantially dependant’.” While the comment was made in the case of *Terry’s Motors Ltd. v. Rinder* (1948) South Australian State Reports, 167, that “‘substantial’ is a word of no fixed meaning and is an unsatisfactory medium for carrying the idea of some ascertainable proportion of the whole”, we give the word ‘substantial’ its normal, everyday meaning, which is to say relatively great in size, value or importance, and we interpret the phrase ‘substantially dependant’ to mean reliant

upon the deceased in large measure, rather than in some inconsequential or sporadic way, for the provision in cash, in kind or by way of personal service of some of the basic necessities of life such as food, clothing, shelter, heat or personal care akin to nursing. Even that should not be regarded as an exhaustive definition of the phrase; other situations will doubtless arise in which substantial dependency can be argued, but they are not relevant here.”

Counsel for MPIC submitted that in order for the Appellant Son to be considered to be substantially dependant on his mother, the relationship had to be more than just close or that the two of them saw each other often or helped each other out, because small gifts fall under the category of parental benevolence and not under the category of the provision of the necessities of life.

Counsel for MPIC submitted that substantial dependency is comprised of many factors including financial dependence, shelter or residence, marital status, employment status and emotional and spiritual dependence.

Counsel for MPIC submitted that culture and family tradition should not be considered as factors in determining substantial dependency. He acknowledged that there was some evidence tendered regarding the [text deleted] culture, including evidence regarding the Appellant Husband’s and his wife’s desire to take care of their children their whole life, but he submitted that the Commission should not take this into account. He referred to the Commission’s decision in AC-97-49 and particularly at paragraph 16 where the Commission stated as follows:

“[text deleted], in giving his evidence, was proceeding from the position that [text deleted] and [text deleted] were disabled and therefore, in the cultural context of their community, dependent upon their son. While that may be true in a broader, sociological context, we do not view it as a persuasive argument when faced with the need to interpret the relevant sections of the MPIC Act.”

Counsel for MPIC did acknowledge, however, that insofar as the evidence was specific to the Appellant Husband, the Appellant Son and [the deceased], the Commission could consider specific evidence rather than cultural generalities.

With respect to financial dependence, counsel for MPIC submitted that it has not been established in this case. Counsel submitted that the evidence was that the Appellant Son was receiving funds from a government program in the year prior to the MVA, which covered tuition, rent and spending money. Although it is unclear exactly how much these government funds were, counsel for MPIC submitted that the onus is on the Appellant Son to submit such evidence and the Appellant Son failed to do so. Counsel for MPIC also submitted that there is evidence that the Appellant Son's wife was working immediately prior to the MVA. Furthermore, in the year prior to the MVA, [the deceased] earned only \$475 and counsel submitted that she thus would not have had any money to support the Appellant Son to a substantial degree and no ability to support him to a significant degree. Rather, the evidence is that when [the deceased] went back to school to study English as a second language, her earnings went down and the Appellant Husband started trying to earn more through taking overtime work.

Counsel for MPIC acknowledged that there is some evidence that [the deceased] helped the Appellant Son with money for rent, but the amount of funds she provided for this is unclear. Counsel submitted that the onus is on the Appellant Son to establish this and he submitted that the Appellant Son has not proven that there was a substantial amount of assistance provided by his mother. Counsel for MPIC also acknowledged that there was evidence that [the deceased] helped the Appellant Son defray some costs by providing meals for him and his wife, but he submitted that supplying food on a weekly basis is not enough to establish financial dependence. Counsel for MPIC submitted that, therefore, without any clear evidence of the Appellant Son's

financial position and without clear evidence of his mother's financial contribution, the Commission cannot make a finding that the Appellant Son was financially dependant on his mother. Counsel for MPIC acknowledged that any amount of money is helpful, but in order to establish substantial dependence, the amount of money has got to be substantial and there is not sufficient evidence for the Commission to make such a finding.

With respect to the category of marital status, counsel for MPIC noted that the Appellant had been married for four years at the time of the MVA. This factor is important, he submitted, because people generally turn to their spouse for support, even though the Appellant Son was close to his mother.

With respect to the factor of shelter or residence, counsel for MPIC noted that the Appellant Son lived in an apartment with his wife for the two years prior to the MVA, and this apartment was a few blocks away from the home of his parents. Counsel for MPIC submitted that there is no evidence as to the extent of any contributions to rent that [the deceased] may have made, for example no bank books or cancelled cheques. Rather, counsel for MPIC submitted that given the age of the Appellant Son, [text deleted], and his education, the Commission ought to make an inference regarding his self-sufficiency.

With respect to the category of employment status, counsel for MPIC acknowledged that the evidence is that the Appellant Son was not working at the time of the MVA. However, counsel submitted that he was receiving benefits from the government in the form of contributions from a government program towards tuition, rent and spending money and thus did have a form of income.

With respect to the category of emotional dependence, counsel for MPIC submitted that this factor should be accorded very little weight, because almost everyone would have an emotional connection or dependence on their parent. Counsel for MPIC acknowledged that the Appellant Son spoke often with his mother but submitted that the evidence was that she wanted to speak often; they wanted to be involved in each other's lives. Counsel for MPIC submitted that this is not emotional dependence.

Similarly, with respect to the category of spiritual dependence, counsel for MPIC submitted that this is very difficult to assess. He submitted that this is an intangible factor and argued that although prior cases have mentioned this factor, little to no weight should be accorded to it. He acknowledged that the evidence was that [text deleted] took the Appellant Son to church and that they were devout members, but counsel submitted that this fact is reflective of their connection to the church rather than of their connection to each other or of the Appellant Son's spiritual dependence on his mother.

Counsel for MPIC submitted that there is not enough evidence under any of these factors to establish that the Appellant Son was substantially dependant on his mother at the time of the MVA. Pursuant to the Commission's decision in AC-97-49, the dependence must be relatively great in size and not sporadic and counsel submitted that the Appellant Son has not established that. Therefore, counsel for MPIC submitted that the Internal Review decision should be upheld.

Discussion:

The onus is on the Appellants to show, on a balance of probabilities, that the decisions of the Internal Review Officers of October 8, 2013 and December 12, 2013 are incorrect. In particular, the Appellant Husband needs to show, on a balance of probabilities, that the amount of the

spousal indemnity benefit paid to him was not calculated in accordance with the applicable statutory provisions. In addition, the Appellant Son needs to show, on a balance of probabilities, that the decision that he did not qualify for a lump sum dependant indemnity benefit was not made in accordance with the applicable statutory provisions. Those provisions are as follows:

Definitions

70(1) In this Part,

...

"dependant" means

(a) the spouse,

...

(d) a child of the victim

(i) who was under the age of 18 years at the time of the accident, or

(ii) who was substantially dependant on the victim at the time of the accident, ...

...

"part-time earner" means a victim who, at the time of the accident, holds a regular employment on a part-time basis, but does not include a minor or a student.

...

Basis for determining I.R.I. for temporary earner or part-time earner

83(2) The corporation shall determine the income replacement indemnity for a temporary earner or part-time earner on the following basis:

(a) under clause (1)(a), if at the time of the accident

(i) the temporary earner or part-time earner holds or would have held employment as a salaried worker, the gross income that he or she earned or would have earned from the employment, ...

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.

Lump sum indemnity to other dependant

121(2) A dependant, other than the spouse or common-law partner, of a deceased victim is entitled to

(a) a lump sum indemnity in the amount opposite the age of the dependant in Schedule 3; and

(b) if the dependant is disabled on the day the deceased victim dies, an additional lump sum indemnity of \$17,500.

After a careful review of all of the documentary evidence filed in connection with this appeal, and after hearing and giving careful consideration to all of the testimony and to the submissions of counsel for the Appellants and counsel for MPIC and taking into account the provisions of the relevant legislation, the Commission finds as follows:

The Appellant Husband:

The Appellant Husband testified to the details of the MVA and impressed upon the panel the significant impact that the tragic loss of his wife has had upon his life and that of his children. The panel extends their sympathies to the Appellant Husband on this loss. It is clear from the Appellant Husband's testimony how important a figure [the deceased] was in the life of his family.

When a person dies as a result of a motor vehicle accident, the MPIC Act provides some level of compensation to their surviving immediate family as a means of compensating for lost employment income. Subsection 120(1) of the MPIC Act calculates a lump sum indemnity benefit to a surviving spouse based on: (i) the age of the deceased spouse; (ii) a multiplication factor contained in Schedule 1 to the MPIC Act; and (iii) in the case of a part-time earner (as [the deceased] was at the time of the MVA), the deceased's gross yearly employment income. [The deceased's] gross yearly employment income is based on her earnings for the 52 weeks prior to the MVA. This figure is determined by the Employer's Verification of Earnings form provided by [text deleted] dated March 12, 2013, which provides that [the deceased] earned \$475 in the 52 weeks prior to the MVA. This figure was confirmed by the Appellant Husband in his testimony.

This \$475 is multiplied by the factor corresponding to [the deceased's] age at the time of the accident [text deleted] as set out in Schedule 1 to the MPIC Act [text deleted]. Pursuant to subsection 120(2) of the MPIC Act, the lump sum spousal indemnity payment cannot be less than the minimum entitlement indexed for the year the MVA took place, which was \$56,888 in 2012. Accordingly, the lump sum spousal indemnity paid to the Appellant Husband was \$56,888. The panel finds that the correct amount was calculated and paid by MPIC to the Appellant Husband in accordance with the applicable legislation.

The panel acknowledges that it is not possible to put a value on the loss of someone's life and this legislation is not intended to do so. Nor is it intended to compensate for the loss of someone's future earning potential. The legislation is intended to capture someone's earning at a certain moment in time and the calculations were made correctly. The Commission does not

have the jurisdiction to amend the legislation. Again, the panel offers condolences to the Appellant Husband's family.

The Appellant Son:

The Appellant Son also testified regarding the significant impact that the loss of his mother had on his life and the panel also extends our condolences to him on this tragic loss.

Under subsection 121(2) of the MPIC Act, a lump sum indemnity benefit is payable to a "dependant" of a victim who dies in a motor vehicle accident. A "dependant" is defined in subsection 70(1) of the MPIC Act to include a child of the victim. Where that child is over the age of 18, to fall within the definition that child must have been "substantially dependant on the victim at the time of the accident". Therefore, in order for the Appellant Son to be entitled to a lump sum dependant indemnity benefit, he must have been "substantially dependant" on his mother at the time of the MVA. The phrase "substantially dependant" is not defined in the MPIC Act.

As referred to earlier, the Commission considered the meaning of the phrase "substantially dependant" earlier in the case AC-97-49. In that case, as noted by counsel for MPIC, the Commission held that the term "substantially dependant" is entitled to be given a broader meaning than mere financial dependency. Further, the Commission held:

"we give the word 'substantial' its normal, everyday meaning, which is to say relatively great in size, value or importance and we interpret the phrase "substantially dependant" to mean reliant upon the deceased in large measure, rather than in some inconsequential or sporadic way ..."

As also noted above, the case manager, by letter dated September 10, 2013, outlined various factors that MPIC takes into account when considering the meaning of the phrase “substantially dependant”, as follows:

“In order to be considered “substantially dependant” numerous factors are taken into consideration including; financial, marital status, employment, where the dependant resides, emotional, spiritual etc.”

The panel considered all of these factors in assessing whether the Appellant Son was substantially dependant on his mother at the time of the MVA.

Financial Dependence and Employment Status

With respect to financial dependence, both Appellants testified that [the deceased] cooked meals on a regular basis for the Appellant Son, thus offsetting some of his food costs. The Appellant Son also testified that his mother provided some assistance with his rent and provided him with some gifts. However, there was also evidence that the Appellant Son received governmental assistance with respect to his tuition, rent and spending money. In addition, there was evidence that the Appellant Son’s wife was working at the time of the MVA.

The category of employment status is essentially a subset of financial dependence, in that it involves an examination of income. The panel reviewed the Appellant Son’s employment status at the time of the MVA. The evidence was not entirely clear on this point; however, it appears that the Appellant Son was not working at the time of the MVA and possibly for one year prior to the MVA, because he was in full-time studies at [text deleted]. It is also possible that for two years prior to that he may not have held a job, or possibly may have held only a part-time job during a break in studies. However, there was also evidence, as noted above, that he was in

receipt of funds from a government program in the approximate sum of \$10,000, which went towards his tuition, rent and spending money.

The onus with respect to proving financial dependency rests on the Appellant Son. Although the Appellant Son may have had little to no employment income at the time of the MVA, he was in receipt of government funds. No evidence was adduced with respect to the specific amount of any gifts provided by [the deceased], nor was there any evidence adduced with respect to the specific amount of any contributions which she may have made towards the Appellant Son's rent. There was no means by which the panel could assess whether any gifts or contributions made by [the deceased] would have been of such a magnitude that the Appellant Son would have been "reliant upon the deceased in large measure". The panel finds that the Appellant Son has not met the onus of establishing, on a balance of probabilities, that he was financially dependent on his mother at the time of the MVA.

Marital Status

The Appellant Son, at the time of the MVA, was age [text deleted] and had been married for four years. He and his wife had been living apart from his parents for two years and, as noted above, his wife was working at the time of the MVA. These facts, which are also important to consider when looking at the other categories, including residence and emotional dependence below, suggest a couple established in their life together. There is evidence that [the deceased] often provided meals to the Appellant son and his wife, but the panel finds that this, on its own, is not sufficient to bring the Appellant son within the phrase "reliant upon the deceased in large measure". Accordingly, the panel finds that no substantial dependence of the Appellant Son on his mother is established by virtue of his marital status.

Residence

With respect to the factor of the Appellant Son's residence or living arrangements, as noted above, the Appellant Son and his wife were living in their own apartment for two years prior to the MVA. As also noted above, the Appellant Son testified that at the time of the MVA, he was in receipt of government funds which contributed towards the rent. In addition, his wife was working. The Appellant Son testified that his mother contributed towards his rent. There was also evidence that in the 52 weeks prior to the MVA, his mother's earnings were \$475. As noted above, with respect to [the deceased's] gifts or rental payments, no specific evidence was adduced (such as cancelled cheques) in order to quantify these rental contributions by [the deceased]. As noted above, the onus with respect to proving dependency rests on the Appellant Son. The panel finds that the Appellant Son has not met the onus of establishing, on a balance of probabilities, that he was substantially dependant on his mother for his living arrangements at the time of the MVA.

Emotional Dependence

With respect to emotional dependence, the Appellant testified that he was very closely connected to his mother. He indicated that he considered her to be very important to his life and that he considered her to be a confidante. It appears that it was a reciprocal relationship, in that the Appellant Son confided in her and the Appellant Husband testified that his wife wanted to be involved in her son's life and this would have been important for her. The panel accepts this testimony. However, a strong attachment is not the same thing as substantial dependency. As noted above, in order for the Appellant Son to have been emotionally dependent on his mother, he must have been "reliant upon the deceased in large measure". At the time of the MVA, the Appellant Son had been married for four years and had been living with his spouse apart from his parents for two years. He had gone to [text deleted] to marry his wife and bring her to

Canada. It is reasonable to assume that the Appellant Son's wife met some of his emotional needs.

The onus with respect to proving dependency rests on the Appellant Son. The panel finds that the Appellant Son has not met the onus of establishing, on a balance of probabilities, that he was substantially dependant on his mother for his emotional needs at the time of the MVA.

Spiritual Dependence

With respect to spiritual dependency, the Appellant Son testified that he had been going to church with his mother since he was a child. The panel has no doubt that the Appellant Son and his mother had a spiritual connection to the church. If a spiritual connection to the church gave the Appellant Son and his mother a spiritual connection to each other, then they may have had that. However, a connection is not the same thing as dependence. The onus with respect to proving dependency rests on the Appellant Son. The panel finds that the Appellant Son has not met the onus of establishing, on a balance of probabilities, that he was substantially dependant on his mother for his spiritual needs at the time of the MVA.

Conclusion

Based on the foregoing, the panel concludes that the Appellant Son has not shown that he was substantially dependant on his mother at the time of the MVA in any of the categories listed above. Accordingly, the Appellant Son has not met the onus to establish, on a balance of probabilities, that he was substantially dependant on his mother at the time of the MVA within the meaning of subsection 70(1) of the MPIC Act. Accordingly, he does not fall within the definition of a "dependant" and is not entitled to a lump sum indemnity benefit under subsection 121(2) of the MPIC Act.

Disposition:

For the reasons outlined herein, the Commission finds that the Internal Review Officer's decision of October 8, 2013 should be upheld and the Appellant Husband's appeal is dismissed.

Also for the reasons outlined herein, the Commission finds that the Internal Review Officer's decision of December 12, 2013 should be upheld and the Appellant Son's appeal is dismissed.

Dated at Winnipeg this 27th day of April, 2016.

JACQUELINE FREEDMAN

KARIN LINNEBACH

BRIAN HUNT