

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-07-26**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Ms Linda Newton
Mr. Les Marks

APPEARANCES: The Appellant, [text deleted], was represented by Mr. Dan Joannis of the Claimant Adviser Office; Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman.

HEARING DATES: August 7, 2008 and November 14, 2008

ISSUE(S): Extension of time to file an Application for Compensation

RELEVANT SECTIONS: Sections 141(1)(a) and 141(4) 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

The Appellant is a resident of the [text deleted], in the Province of Ontario, and resides with his parents in that City.

In the month of August 2003 the Appellant was visiting his girlfriend on [text deleted] in the Province of Manitoba. On August 27, 2003 he was a passenger in a motor vehicle operated by [driver], a [text deleted] Ford Explorer, and this vehicle was plated with an Alberta license plate. The Appellant reports that while he was a passenger in this motor vehicle the driver attempted to

turn at high speed and, as a result, the automobile rolled over several times. The Appellant was thrown through the front windshield of the automobile onto the road. As a result of this accident the Appellant claims to have suffered injuries to his back, knees and ankles, as well as a closed head injury.

In the month of October 2003 the Appellant's father, [text deleted], obtained the services of [Appellant's initial representative], a lawyer in the Province of Manitoba, to pursue a claim against the operator of the motor vehicle, [driver]. In a letter to the Claimant Adviser Office, dated July 22, 2006, [Appellant's initial representative] states:

. . . A Statement of Claim was filed in May 2004 in the province of Alberta, where [driver] was a resident, however, our efforts to locate him and his insurance details were unsuccessful. A private investigator was hired by the [Appellant's] family in February 2006 to secure the insurance information and, if possible, to locate [driver]. Unfortunately, it was subsequently discovered that [driver]'s insurance policy had been cancelled by the carrier for non-payment of premiums.

In a letter dated January 17, 2005 [Appellant's initial representative] wrote to the Appellant advising him that the Statement of Claim which had been issued in the Province of Alberta had been served upon the Appellant in the Province of Manitoba on July 5, 2004. [Appellant's initial representative] further indicated that he was therefore in a position to file a default judgment against [driver], required an Order from the Alberta Court of Queen's Bench for service outside of the Province of Ontario, and that an Alberta law firm had been retained for that purpose. As well, [Appellant's initial representative] intended to take steps to determine whether [driver] had any assets which could be seized, or whether his insurance would cover his loss.

On March 2, 2005 [Appellant's initial representative] wrote to the Appellant advising that he was unable to contact [driver] and therefore was unable to determine whether or not [driver] was

insured at the time of the accident and if so by whom. [Appellant's initial representative] further advised the Appellant that he did not intend to enter judgment against [driver] because if [driver] did have insurance at the time of the accident entering a default judgment against him would simply invalidate his insurance since [driver] had not notified his insurer of the motor vehicle accident. [Appellant's initial representative] further stated:

. . . If, however, [driver] did not have insurance, he likely has no assets and it would be fruitless for us to "chase" him. We would of course attempt to ascertain that with more certainty if he can be located at all.

[Appellant's initial representative] also requested [Appellant's father] to attempt to ascertain [driver]'s whereabouts in order to determine if [driver] was insured and, if he was so insured, with which company.

The Appellant's father retained a firm of private investigators to locate [driver] to determine whether or not he had advised his insurer of the motor vehicle accident. The private investigation firm advised the Appellant that he was unable to locate [driver] but discovered that his insurance policy had been cancelled by the insurance carrier for non-payment of premiums. The investigator also recommended that the Appellant initiate an injury claim with MPIC.

In a note to the Appellant's MPIC file dated July 7, 2006 a member of the private investigation firm contacted MPIC and requested that MPIC open an insurance claim on behalf of the Appellant.

On or about July 31, 2006 the Appellant filed an Application for Compensation, two (2) years and eleven (11) months after the motor vehicle accident. As a result, the firm of [text deleted] was retained by MPIC, to assist them in their investigation in respect of the Appellant's claim,

and provided a report to MPIC dated September 26, 2006 wherein they provided MPIC with a list of all of the Appellant's health care providers who treated him in respect of his injuries.

[Text deleted] also provided MPIC with a supplemental statement, dated September 22, 2006, from the Appellant which noted that to the best of his recollection he had retained legal counsel approximately thirty (30) to sixty (60) days after the motor vehicle accident. The Appellant, in his statement, acknowledged that his father had been acting as his representative following the accident and he further stated:

. . . I am not sure why there was a delay in reporting the claim to Manitoba Public Insurance Company. It was likely because my lawyer thought that [driver], the owner of the SUV, was insured.

Case Manager's Decision

On October 18, 2006 MPIC's case manager wrote to the Appellant:

1. denying his claim for Personal Injury Protection Plan benefits ('PIPP') due to his failure to submit an Application for Compensation within the two (2) year period prescribed by Section 141(1) of the MPIC Act.
2. that the Application for Compensation was filed with MPIC eleven (11) months after the two (2) year limitation period under the MPIC Act.
3. indicated that this delay prevented MPIC from seeking recovery from the uninsured motorist and that MPIC's subrogation rights have been prejudiced.

Internal Review Officer's Decision

The Internal Review Officer issued her decision on January 12, 2007 dismissing the Application for Review and confirming the case manager's decision. The Internal Review Officer stated that:

1. contrary to the provisions of Section 141(1) of the MPIC Act required the Appellant's Application for Compensation was submitted eleven (11) months beyond the two (2) year limitation as set out in this Section.
2. Section 141(4) of the MPIC Act allowed MPIC to extend the time limitation period if it is satisfied the claimant had a reasonable excuse for failing to make the claim within that time.
3. the Appellant had not provided a reasonable excuse to permit MPIC to extend the time limitation.
4. MPIC had been prejudiced not only as a result of the delay in respect of pursuing its subrogation rights against the driver of the motor vehicle, but also in respect of case management of the Appellant's injuries.

The Appellant filed a Notice of Appeal on February 24, 2007.

Appeal

The relevant provisions of the MPIC Act in relation to this appeal are:

Section 141(1)(a) which states:

Time limitation for claim

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

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

Section 141(4) which states:

Corporation may extend time

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

The Appellant was represented by Mr. Dan Joanisse of the Claimant Adviser Office and MPIC was represented by Mr. Morley Hoffman. The Appellant and his father, [text deleted], at the time of the appeal, resided in Windsor, Ontario, and participated in this hearing by way of teleconference.

The Appellant's father testified at the hearing and stated that:

1. at the time of the accident he was familiar with the tort system in respect of motor vehicle accidents in the Province of Ontario, but that he had no knowledge of the no-fault system in respect of motor vehicle accidents in the Province of Manitoba.
2. he had retained [text deleted], a lawyer in Manitoba, for the purpose of representing the Appellant in respect of the injuries he sustained in the motor vehicle accident.
3. he assumed that [Appellant's initial representative] would carry out the normal duties as a lawyer in issuing a Statement of Claim and, if a claim was not settled with the driver's insurance carrier, the matter would be referred to the Court.
4. at the time he instructed [Appellant's initial representative] to represent the Appellant, [Appellant's initial representative] did not advise him or the Appellant that the Appellant was entitled to make a claim with MPIC in respect of the motor vehicle accident injuries.

[Appellant's father], during the course of his testimony, was asked to comment on [Appellant's initial representative's] statement in his letter of July 22, 2008 wherein he stated:

I was contacted by [the Appellant's] father, [Appellant's father], in October 2003, and given instructions to commence a civil claim against [driver].

[Appellant's father] further testified that:

1. he did not give such instructions to [Appellant's initial representative] but asked [Appellant's initial representative] to represent the Appellant in respect of his claim against [driver] and that he expected legal counsel to take the appropriate action on behalf of the Appellant.
2. he first discovered that the Appellant was entitled to make a claim to MPIC after reading the private investigator's report dated June 5, 2006 wherein he was advised that the Appellant could advance a claim with MPIC.
3. as a result of receiving that information the Appellant, shortly thereafter, filed an Application for Compensation with MPIC.

The Appellant also testified at the hearing by teleconference, and described his injuries, and indicated that he had requested his father to assist him in pursuing his claim against [driver].

Submissions

MPIC's legal counsel submitted that:

1. there was a two (2) year period after the motor vehicle accident in which the Appellant could have filed a claim for compensation and he failed to do so.
2. the Appellant's claim was filed two (2) years and eleven (11) months after the motor vehicle accident which prejudiced MPIC's right to effectively case manage the Appellant's injuries.
3. MPIC was also prejudiced by the delay since it could no longer pursue the subrogation rights against the driver of the motor vehicle that was involved in the accident.

MPIC's legal counsel also submitted that:

1. the Appellant, in his Application for Compensation, stated that it seemed inappropriate to file a claim against MPIC and he chose not to do so and instead pursued other sources of potential compensation.
2. when the Appellant found that he could not make a successful claim against [driver's] former insurance carrier he decided to pursue the claim against MPIC.
3. the Internal Review Officer was correct in determining that the Appellant did not have a reasonable excuse as contemplated in Section 141(4) of the MPIC Act.

As a result, MPIC's legal counsel requested that the Commission confirm the Internal Review Officer's decision and dismiss the Appellant's appeal.

The Appellant's representative submitted that the Commission:

1. in its previous decision [text deleted] (*AC-01-75*) had determined that whether or not a reasonable excuse had been provided by the Appellant under Section 141(4) of the MPIC Act must have regard for the legal principles as set out in *Simpson v. Saskatchewan Government Insurance Office* ((1968) 65 D.L.R. (2d) 324) and *Binkley v. Bajcura*, [1980] M.J. No. 183 (Man. C.A.).
2. must take into account such matters as length of delay, the prejudice resulting from the delay, the conduct of the Appellant in contributing to the delay, and whether the Appellant has waived the right to apply for compensation under the Act.

The Appellant's representative also submitted that, having regard to the principles set out in [text deleted] (*supra*), the Appellant had established, on a balance of probabilities, that he had provided a reasonable excuse for the delay in filing the Application for Compensation. As a

result, he asserted that the Commission should allow the appeal and grant an extension of time to permit the Appellant to file the Application for Compensation in a timely fashion.

At the conclusion of submissions by both parties, the Commission advised that it wished to receive written submissions in respect of the issue of potential prejudice to MPIC's subrogation rights if an extension was granted.

On August 19, 2008 Mr. Hoffman wrote to the Commission enclosing his submission in respect of prejudice to MPIC's subrogation rights if an extension was granted. Mr. Hoffman advised that, having regard to the testimony of [Appellant's father], which was different from that indicated in [Appellant's initial representative's] letter of July 22, 2008, he wished the Commission to reconvene the hearing and issue a Subpoena to [Appellant's initial representative] to attend the new hearing to give evidence. A copy of this letter was provided to Mr. Joannis of the Claimant Adviser Office.

On September 24, 2008 Mr. Joannis provided a written submission in respect of the subrogation issue and, as well, objected to Mr. Hoffman's request to reconvene the hearing to hear testimony from [Appellant's initial representative].

On October 20, 2008 the Commission received a response from Mr. Hoffman disagreeing with Mr. Joannis's submission in respect of calling [Appellant's initial representative] to testify. On October 23, 2008 the Commission wrote to Mr. Hoffman and Mr. Joannis and granted Mr. Hoffman's request and stated:

Upon a careful review of the submissions of both parties, and in the interest of ensuring that the Commission has heard all of the evidence it needs to make a proper decision in this appeal, I am granting Mr. Hoffman's request that the Commission reconvene the

hearing in this appeal in order to permit Mr. Hoffman to subpoena [Appellant's initial representative] to testify as to the discussions he held with [the Appellant] in respect of [the Appellant's] claim against [driver].

The hearing reconvened on November 14, 2008. Both Mr. Hoffman and Mr. Joannis attended the hearing and [Appellant's father] and the Appellant participated by teleconference.

[Appellant's initial representative] commenced his testimony by requesting a waiver from the Appellant in respect of the attorney-client privilege in order to testify before the appeal hearing. The Appellant waived the attorney-client privilege.

[Appellant's initial representative] produced a letter dated March 21, 2005 that he had written to [Appellant's parents] at [text deleted], Ontario, which had not been previously filed in evidence in the appeal hearing. In this letter [the Appellant] advised that he had no success in determining the status of [driver]'s insurance and made the following recommendation to [Appellant's parent's]:

My idea at this juncture is to put in a claim through Manitoba Public Insurance to collect whatever benefits we can get from MPI under the Non-resident Victims' provisions. I would ask that you confirm at your earliest convenience that you wish me to put in this claim with MPI on behalf of [the Appellant].

[Appellant's initial representative] further testified that he had never received a reply to his letter from [Appellant's parents] or from the Appellant, and at no time was this letter returned to him by the post office indicating it had not been delivered.

The Commission asked [Appellant's initial representative] why he had not advised Mr. Joannis in his letter of June 22, 2008 as to the existence of his previous letter of March 21, 2005.

[Appellant's initial representative] explained that when he provided the letter dated July 22, 2008 to Mr. Joanisse, the March 21, 2005 letter was not contained in his correspondence file. However, when Mr. Hoffman subpoenaed him to attend the hearing before the Commission, he had the opportunity of examining not only his own correspondence file, but a separate file kept by his secretary in respect of the Appellant's insurance claim. Upon examining this file he was able to locate the letter that he had sent to [Appellant's parents], dated March 21, 2005.

In a further response to a question by the Commission, [Appellant's initial representative] acknowledged that he did not attempt to contact [Appellant's father] or the Appellant prior to August 26, 2005 (the expiry date in respect of the Appellant's claim under the MPIC Act), in order to determine whether they had received his letter of March 21, 2005.

[Appellant's father] was requested by the Commission to respond to [Appellant's initial representative's] testimony and he stated that:

1. he never received [Appellant's initial representative's] letter of March 21, 2005.
2. if he had received this letter he would have immediately contacted [Appellant's initial representative] and instructed him to file a claim with MPIC on behalf of the Appellant.
3. on or around February 11, 2005 he and his family moved from his residence at [text deleted], Ontario, to [text deleted], Ontario.
4. after moving to his new residence he would return on a regular basis to his previous residence at [text deleted] in order to collect the mail.
5. after a period of time he found the occupants of this residence to be unfriendly and he stopped attending at this residence to pick-up his mail.

6. instead, he attended at the local post office and completed an application that would permit the post office to send his mail addressed to himself and his family at [text deleted] to his new residence at [text deleted].
7. he did receive letters from [Appellant's initial representative] dated February 4, 2005 and March 2, 2005, and that they were both addressed to [text deleted].
8. the next letter he received was a bill from [Appellant's initial representative] for his legal services on April 6, 2005.
9. he noted that this letter was addressed to his address at [text deleted] but had a sticker attached to it from the post office indicating the addressee at [text deleted] had moved to [text deleted].

Discussion

Length of delay causing prejudice to MPIC

1. Case Management

The Commission rejects MPIC's submission that in the Appellant's lengthy delay in making an Application for Compensation has significantly prejudiced MPIC in case managing the Appellant's injuries and in effectively pursuing subrogation rights against the driver.

The Commission notes that MPIC has received a copy of a letter from [Appellant's doctor] to the Claimant Adviser Office dated April 9, 2008. In this letter [Appellant's doctor], who was the Appellant's personal physician, provides a narrative report describing at some length the nature of the injuries sustained by the Appellant in the motor vehicle accident. In addition, MPIC received a letter from its agent in Ontario, [text deleted], providing a series of medical authorizations from the Appellant's caregivers which permitted MPIC to obtain medical reports from them. The Commission therefore finds that MPIC could obtain the relevant medical

information in respect of the Appellant's motor vehicle accident and cannot claim a lack of knowledge as to the medical status of the Appellant prior to and after the motor vehicle accident in question.

The Commission finds, having regard to the medical information that MPIC had on file, that MPIC has both sufficient resources and ample statutory power under the Act to obtain any additional necessary medical and other information it needs to defend its interests in respect of the Appellant's claims relating to the 2003 motor vehicle accident.

The Commission notes the following provisions of the MPIC Act:

Section 144 of the Act provides:

Examination by practitioner chosen by claimant

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

Examination by practitioner chosen by corporation

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

Medical examination to be in accordance with regulations

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

Section 146 of the Act provides:

Report of examination

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

Corporation to provide copy of medical report

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

Section 147 of the Act provides:

Corporation may request medical report re accident

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

Section 160 of the Act provides:

Corporation may refuse or terminate compensation

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

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

It should be noted that upon receipt of all of the relevant information in respect of the Appellant, MPIC is not obligated to provide benefits automatically to the Appellant. The onus remains upon the Appellant, and not upon MPIC, to establish, on a balance of probabilities, his entitlement to Income Replacement Indemnity ('IRI') benefits and other Personal Injury Protection Plan ('PIPP') benefits under the MPIC Act.

The Commission does recognize that the delay will be inconvenient to MPIC and may create some difficulties for them, but the Commission is of the view that the delay will not impair MPIC's ability to effectively defend its interest in respect of the Appellant's claim.

Subrogation Rights

MPIC's legal counsel submitted, having regard to the decision of the Manitoba Court of Appeal in *MPIC v University of Waterloo* (2007) MBCA 107, Section 2(1)(e) of *The Limitation of Actions Act* overrides Section 77(2) of the MPIC Act.

Subrogation re accident in Manitoba involving non-resident

77(1) Notwithstanding section 72 (no tort actions), where a person is entitled to compensation under this Part in respect of an accident that occurred in Manitoba, the corporation is subrogated to the person's rights and is entitled to recover the amount of the compensation

(a) from any person who is not resident in Manitoba, to the extent that the person is responsible for the accident; or

...

Limitation of action

77(2) An action by the corporation under this section shall be commenced within two years after the day on which the corporation decides that compensation is payable to the person. (underlining added)

Section 184(1) of the MPIC Act submits that the Commission, after conducting a hearing, may:

Powers of commission on appeal

184(1) After conducting a hearing, the commission may

...

(b) make any decision that the corporation could have made.

Section 2(1)(e) of *The Limitation of Actions Act* reads:

Limitations

2(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:

(e) actions for malicious prosecution, seduction, false imprisonment, trespass to the person, assault, battery, wounding or other injuries to the person, whether caused by misfeasance or non-feasance, and whether the action be founded on a tort or on a breach of contract or on any breach of duty, within two years after the cause of action arose;

Section 4 of *The Limitation of Actions Act* reads:

Provisions of this Act to prevail

4 Notwithstanding any limitation provision to the contrary in force on January 1, 1968 and contained in any other Act of the Legislature, but subject to the provisions of this Act, the periods within which actions shall be commenced set out in section 2 apply in respect of actions to which such limitation provision in

another Act has heretofore applied unless that other Act or the limitation provision thereof is mentioned in the Schedule.

MPIC is opposing the Appellant's request for an extension of time and submits among other things that an extension of time by the Appellant to file his claim for benefits under the MPIC Act would prejudice MPIC's ability to assert its subrogation rights under Section 77 of the MPIC Act.

In fact, MPIC says that its ability to assert its subrogation rights would "arguably" be prejudiced (rather than certainly), in light of pronouncements made by Manitoba's Court of Appeal in *MPIC v University of Waterloo* (supra). MPIC writes as follows about the potential implications of that decision:

[...] the Court of Appeal ruled MPI's subrogation rights under section 77 are subject to common law tort principles. The court stated that MPIC cannot be in a better position than an injured Plaintiff if he could sue. Thus, arguably, MPIC's right to sue for its subrogated claim must be exercised within two years of the accident, the limitation period for personal injury actions. An injured Plaintiff would have to sue for within two years and MPI cannot be in a better position.

The Appellant's representative disagrees with MPIC's position in this respect.

The Commission notes that this is the first occasion that the Commission has been required to interpret the relationship between the provisions of Section 77(1) & (2) of the MPIC Act, and Sections 2(1)(e), and Section 4 of *The Limitation of Actions Act*, having regard to the decision of the Manitoba Court of Appeal in *MPIC v University of Waterloo* (supra). The Commission finds that the decision of the Manitoba Court of Appeal in *MPIC v University of Waterloo* (supra) has no application to the issue of MPIC's subrogation rights in this appeal.

The essence of the Court of Appeal's decision in *University of Waterloo* (supra) related to the question of whether MPIC, in making a subrogated claim under Section 77(2) of the MPIC Act, can recover from a non-resident of Manitoba the full scope of all benefits it has paid out under the MPIC Act, or only those benefits that could ordinarily be recovered under common law tort principles. Ultimately, the Court of Appeal held that MPIC's right of recovery under Section 77(2) is limited to what ordinarily is recoverable under common law tort principles. At paragraph 42 of the decision, the Court of Appeal writes:

{...} The right of MPIC to recover, based on the concept of subrogation, is governed and potentially limited by principles of common law, such as remoteness, foreseeability and causation. {...}

MPIC essentially argues that in this appeal, if it were to attempt to assert its rights of subrogation, it could be faced with the *University of Waterloo* (supra) decision being extended to mean that the ordinary two-year limitation period for torts applies, as established in Section 2(1)(e) of *The Limitation of Actions Act*.

In reality, the *University of Waterloo* (supra) decision says nothing about which limitation period applies when MPIC asserts its subrogated rights under Section 77 of the MPIC Act. Rather, the decision says only that when MPIC asserts a subrogated claim, it can only do so to the extent that common law tort principles would allow.

To the extent that the *University of Waterloo* (supra) decision limits MPIC to claiming on the basis of common law tort principles it is indisputable that, the usual two-year limitation period that applies to torts is not a common law principle. Limitations periods are creatures of statute, and in that respect are unknown to the common law. Graeme Mew, author of *The Law of Limitations* (2d, 2004), writes as follows at page 4 of his text:

The earliest recorded statute of limitation in England is the Statute of Merton, 1235. Before then, the common law knew no limitation periods.” (underlining added)

On the same page, Mew explains that the first time any limitation period was introduced for tort actions in particular, was in the *Statute of Limitations, 1623*, also known as the *Statute of James*. More recently, in Manitoba, Justice Twaddle of the Manitoba Court of Appeal wrote as follows at paragraph 62 of *Rarie v. Maxwell*, [1998] M.J. No. 588, at paragraph. 62:

A limitation on the time within which an action may be brought is a creature of statute. Indeed, we frequently refer to a cause of action which has not been commenced within a limitation period as “statute-barred”. Thus, in the absence of a statutory limitation, proceedings may be commenced at any time, even where the events which gave rise to the proceeding occurred a very long time before.

In short, because the limitation period is not a common law element of a tort, it is difficult to see how the *University of Waterloo* (supra) would stand for the principle that the limitation period at Section 2(1)(e) of *The Limitation of Actions Act* somehow prevails over the period in Section 77(2) of the *MPI Act*. Rather, the issue would seem to be one of choosing between potentially conflicting provisions in two different statutes. This gives rise to doctrines of statutory interpretation.

In fact, it appears to me that the specific wording of Section 77(2) of the *MPI Act* leaves little room for ambiguity as to what happens to the usual general limitation period in *The Limitation of Actions Act* when MPIC decide to make a subrogated claim. Section 77(2) provides:

Limitation of Action

77(2) An action by the corporation under this section shall be commenced within two years after the day on which the corporation decides that compensation is payable to the person.

If Section 2(1)(e) of *The Limitation of Actions Act* were to prevail over Section 77(2) of the *MPI Act*, it would effectively make Section 77(2) meaningless – and the Courts routinely remind

themselves not to interpret legislation in a way that renders provisions meaningless (a doctrine called the "presumption against tautology"). In any event, in addition to any presumption of statutory interpretation that might be triggered in this case, Section 4 of *The Limitation of Actions Act* expressly provides as follows:

Provisions of this Act to prevail

4 Notwithstanding any limitation provision to the contrary in force on January 1, 1968 and contained in any other Act of the Legislature, but subject to the provisions of this Act, the periods within which actions shall be commenced set out in section 2 apply in respect of actions to which such limitation provision in another Act has heretofore applied unless that other Act or the limitation provision thereof is mentioned in the Schedule. (underlining added)

The MPIC Act only came into existence in 1970 (when it was known as *The Automobile Insurance Act*). When that statute was first enacted in 1970, a reference to it was added to the schedule to *The Limitation of Actions Act*. So, when the MPIC Act was amended in 1993 to add Part 2 dealing with Universal Bodily Injury Compensation, the MPIC Act already was mentioned in the schedule. An examination of Section 4 clearly operates to make the limitation of Section 77(2) of the MPIC Act prevail over the limitation period in Section 2(1)(e) of *The Limitation of Actions Act*.

The Commission therefore concludes that Section 77(2) of the MPIC Act means what it says – especially in light of Section 4 of *The Limitation of Actions Act*. As a result, when MPIC seeks to assert a claim of subrogation, then, pursuant to Section 77(2) of the MPIC Act, the limitation period will only start to run from the day when the decision was made that compensation is payable to the claimant. As a result, Section 2(1)(e) of *The Limitation of Actions Act* does not override Section 77(2) of the MPIC Act.

The Commission therefore finds that if the Commission extends the time in which the Claimant could file an Application for Compensation, and if MPIC decides that compensation is payable to the Claimant pursuant to Section 77(2) the limitation period to pursue its subrogation rights commences on the date MPIC decides that compensation is payable to the Claimant.

As well, when MPIC rejects a Claimant's request for compensation and the Claimant files an appeal with the Commission, the Commission's powers on appeal are set out in Section 184(1) of the MPIC Act, which state:

Powers of commission on appeal

- 184(1)** After conducting a hearing, the commission may
- (a) confirm, vary or rescind the review decision of the corporation; or
 - (b) make any decision that the corporation could have made.

Where the Commission allows the Appellant's appeal, in whole or in part, and orders that compensation is payable to the claimant, the Commission is making a decision that MPIC could have made pursuant to Section 184(1)(b) of the MPIC Act. When this occurs the limitation period of MPIC's subrogation rights commences from the day on which the Commission decides that compensation is payable to the Appellant, pursuant to Section 141 of the MPIC Act.

It is for these reasons that the Commission rejects MPIC's submission that granting an extension of time to permit the Appellant to file an Application for Compensation will prejudice MPIC's subrogation rights.

Appellant's conduct in respect of delay

On August 7, 2008, the first day of the hearing, MPIC's legal counsel asserted that the Appellant's conduct caused the untimely Application for Compensation. In support of this

position he referred to the submission made by the Appellant's father in a document attached to the Application for Review of the case manager's decision wherein he stated:

1. it seemed inappropriate to file a claim with MPIC where there is no belief or grounds to believe that [driver] did not have proper insurance coverage.
2. *"we tried to use the court system to get satisfaction for the injuries caused by the negligence of [driver]. It was only when it was discovered that he was not insured that a claim was filed with the corporation"*.

In his testimony before the Commission [Appellant's father] acknowledged that he had erred in making those statements and further acknowledged that these statements were an afterthought in order to attempt to justify the delay in filing an Application for Compensation.

The Commission notes that in his testimony [Appellant's father] stated that at the time he instructed [Appellant's initial representative] to represent the Appellant [Appellant's initial representative] did not advise him or the Appellant that the Appellant was entitled to make a claim with MPIC in respect of his motor vehicle accident injuries. The Commission further notes that [Appellant's initial representative], in his letter to the Claimant Adviser, dated July 26, 2008, corroborates the testimony of [Appellant's father] by stating:

With respect to your inquiry about what discussions, if any, took place regarding MPIC, I can verify this subject was not discussed with [Appellant's father] to my recollection until approximately June 2006 after receiving the private investigator's report advising that [driver] was uninsured at the time of the accident. Had [the Appellant] and his father inquired about MPIC or availability of benefits at the outset, I would have simply advised them to contact the corporation directly since they would not have required legal counsel for this purpose. (underlining added)

[Appellant's initial representative] testified at the hearing on November 14, 2008 and explained in this letter that he had overlooked a letter he had written to [the Appellant] on March 21, 2005,

approximately 5 months prior to the expiry date (August 26, 2005) for making a claim to MPIC, in which he had requested instructions to file a claim with MPIC on behalf of the Appellant.

[Appellant's initial representative] testified in a candid and direct fashion without equivocation and we accept his testimony that he did send a letter to [Appellant's parents] on March 21, 2005 and he never received this letter back from the post office indicating it was not delivered.

[The Appellant], in his testimony, indicated he never received [Appellant's initial representative's] letter of March 21, 2005 and at that time [Appellant's father] and his family had moved, on or about February 11, 2005, to their new home at [text deleted], Ontario. He further testified that initially he was picking up the mail at his previous address on [text deleted] and subsequently, on or about February 11, 2005, he completed the appropriate form at the post office to have the mail delivered to his new address. The Commission has found that [Appellant's father] was a credible witness and we accept his testimony as a result of the change of address that he did not receive [Appellant's initial representative's] letter of March 21, 2005 advising him to provide [Appellant's initial representative] with instructions to commence a claim with MPIC on behalf of the Appellant, [text deleted].

The Commission also notes the determined efforts [Appellant's father] made in retaining counsel in Manitoba, and subsequently a private investigator, in order to obtain compensation in respect of the injuries sustained by the Appellant in the motor vehicle accident. Having regard to these determined efforts by [Appellant's father], the Commission is satisfied that if he had received [Appellant's initial representative's] letter of March 21, 2005 he would have probably contacted [Appellant's initial representative] and instructed him to commence a claim with MPIC on behalf of his son, [the Appellant].

The Commission therefore finds that the delay in filing a claim with MPIC, two (2) years and eleven (11) months after the expiry date, pursuant to Section 141(a) of the MPIC Act, was not due to the conduct of [Appellant's father] or the Appellant. Both [Appellant's father] and the Appellant were credible witnesses who testified in a direct and straightforward manner and their testimony was consistent throughout. Although there was a lengthy delay in requesting an extension of time, [Appellant's father] and the Appellant did provide a satisfactory explanation for the long delay.

Waiver

MPIC's legal counsel has not submitted that the Appellant waived his rights to claim for benefits under the MPIC Act. The Commission finds that there was no evidence that the Appellant did waive these rights.

Decision

The Commission, after a careful review of all of the documentation in this appeal, the testimony of the Appellant and [Appellant's father], is satisfied, on a balance of probabilities, that:

1. although the delay in filing an Application for Compensation was lengthy, it does not prejudice MPIC's ability to conduct an effective defense against the Appellant's claim nor does it prejudice MPIC's subrogation rights;
2. the Appellant and [Appellant's father] were not aware, prior to the expiry date of the claim on August 26, 2005, that the Appellant was entitled to make a claim to MPIC in respect of the injuries he sustained in the accident.
3. the explanation provided by the Appellant and [Appellant's father] for not making a timely Application for Compensation was reasonable.

4. as a result, the conduct of the Appellant or his father, [Appellant's father], did not cause a delay in filing an Application.
5. the Appellant did not waive his right to apply for compensation under the MPIC Act.

The Commission, in its decision in [text deleted] *supra*, (page 28), stated:

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

The Commission finds that these comments apply to the Appellant in this appeal.

As a result, the Appellant's appeal is allowed and the Internal Review Officer's decision dated January 12, 2007 is therefore rescinded and the foregoing substituted for it.

Dated at Winnipeg this 1st day of December, 2008.

MEL MYERS, Q.C.

LINDA NEWTON

LES MARKS