

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-07-62**

PANEL: Mr. Mel Myers, Q.C., Chairperson
Mr. Errol Black
Dr. Patrick Doyle

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted];
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Terry Kumka
The Public Trustee of Manitoba was represented by [text deleted].

HEARING DATE: May 7 & 8, 2008

ISSUE(S): Entitlement to Spousal Indemnity benefits as a common-law spouse

RELEVANT SECTIONS: Sections 70(1)(b) (prior to 2001), 120, 121 and 122 of The Manitoba Public Insurance Corporation Act ('MPIC Act')

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

Reasons For Decision

[The Appellant] gave birth to [Appellant's Child] on [text deleted] at the age of [text deleted].
On June 23, 1995 [the Deceased] was fatally injured in a motor vehicle accident. At the time of the accident the Deceased was [text deleted] years of age.

An Order was made by the Honourable Madam Justice Bowman of the Court of Queen's Bench (Family Division) [text deleted] on the 17th day of March, 1997 declaring that the Deceased be

declared the biological father of the Child. The Court Order was based upon the Appellant's application and both the Appellant's parents and the Deceased's parents provided letters in support of that application.

The Appellant did not initially make application to MPIC for spousal indemnity benefits or dependent benefits pursuant to the provisions of Sections 120, 121 and 122 of the MPIC Act. On July 22, 2005 [text deleted], the Appellant's lawyer, made an application on behalf of the Appellant and the Child to MPIC for benefits under the MPIC Act.

In response to requests for information from MPIC the Appellant provided MPIC with an Affidavit dated February 24, 2006 wherein she asserted that:

1. she was married to [Appellant's Husband] on November 20, 1999 and her surname changed to [text deleted].
2. she is the mother of the Child who was born on [text deleted] and provided certified copies of both the Appellant's original and amended Birth Registration and Court of Queen's Bench Order made on March 17, 1999 declaring the Deceased to be the father of the Child.
3. she began a dating relationship with the Deceased in 1993 and commenced living together with him in the Spring of 1994 and they planned to marry in 1996 after the Deceased completed high school.
4. they did not have their own residence but were living together at the residence of her parents on the [Text deleted] and with his Aunt, [text deleted] on the [Text deleted] for short periods of time.
5. they were living together from the Spring of 1994 until the Deceased's death.

6. she was not aware that either she or the Child had any rights to compensation under the MPIC Act until June 2005.
7. at that time she wanted to send the Child to camp but did not have any money to do so.
8. as a result, she spoke to her Aunt, [text deleted], who was a Child and Family Services Worker, to inquire as to the possibility of obtaining funding to send the Child to camp. [Appellant's Aunt] suggested that she contact a lawyer to inquire as to the rights of both herself and the Child as a result of the Deceased's death.
9. she spoke to a lawyer, [text deleted], in early July 2005 when he first advised her as to her rights under the MPIC Act.

On May 1, 2006 the Appellant's parents provided a letter to MPIC indicating that their daughter, the Appellant, was dating the Deceased for two and one-half (2 ½) years and they were expecting a baby in the year that he had passed away. They further stated in their letter that the Appellant and the Deceased stayed at their home and at the home of his Aunt, [text deleted], and they were going to get married the following year after his graduation from high school.

MPIC also received a letter from [text deleted], the Deceased's Aunt, who stated that the Appellant and the Deceased had been dating for two and one-half (2 ½) years and that she used to drive them back and forth from the settlements of [Text deleted] and [Text deleted]. She further stated in this letter that the Appellant and the Deceased would stay at her house when she needed them to baby sit and, as well, that they stayed at the Appellant's parent's home. She concluded her letter by stating that they were expecting a baby.

[Text deleted] the Deceased's mother, provided a sworn Affidavit to MPIC dated May 5, 2006.

In this Affidavit [Deceased's Mother] asserted that:

1. the Deceased came to live with her and her husband when he was [text deleted] years old, after his mother had passed away.
2. both herself and her husband obtained guardianship of the Deceased in the 1980's and that he had lived with them until he died in a motor vehicle accident on June 23, 1995 when he was [text deleted] years of age.
3. the Deceased did not have a common-law relationship.
4. the Deceased lived at home with them at the time of his death.
5. the Deceased was a student at the [Text deleted] School in [Text deleted], Manitoba, and traveled by school bus from their home in the [Text deleted] to the [Text deleted] and returned by school bus.
6. she was not aware of any relationship the Appellant had at the time of his death or that at that time the Appellant was pregnant.
7. after the baby was born the Appellant approached and advised her that the Child was her son's and that she accepted the Child as her grandchild.

Case Manager's Decision

On June 5, 2006 MPIC's case manager wrote to [Appellant's legal counsel] advising that in view of the conflict in the information that she had received from the Appellant and from the Deceased's mother in respect of the relationship between the Appellant and the Deceased, she had concluded that the Appellant had not established, on a balance of probabilities, that a common-law relationship existed between the Appellant and the Deceased. She further stated:

- (a) . . . Should you wish to pursue this matter, you must provide adequate proof that a common-law relationship existed *continuously for a period of not less than three years immediately preceding the accident, or for a period of not less than one*

year immediately preceding the accident, and there is a child of the union.
(underlining added)

- (b) there would be no payment made to the Appellant.
- (c) there was no substantive evidence proving that the Child was that of the Deceased and, as a result, MPIC was unable to consider paying any benefits on behalf of the Child.

On December 15, 2006 the Appellant made an Application for Review of the case manager's decision.

Internal Review Officer's Decision

On March 16, 2007 the Internal Review Officer issued a decision wherein she acknowledged that the Deceased was the biological father of the Child and that the Child would be paid dependent death benefits. The Internal Review Officer further found that no spousal indemnity benefits would be paid to the Appellant as the Appellant had not proven a common-law relationship existed between herself and the Deceased. As a result, the Internal Review Officer concluded that the Child would be entitled to both the spousal payment and the dependent payment, which would be paid to the Public Trustee.

On March 30, 2007 the case manager wrote to the Public Trustee and stated:

[text deleted] was fatally injured in a motor vehicle accident on June 23, 1995. Most recently, Manitoba Public Insurance was notified that [text deleted] had one child, [text deleted]).

As [text deleted] is a dependent of [text deleted] is entitled to a Lump-sum Indemnity Dependent Death Benefit payment totaling \$35,490. In addition to this, as no common-law or spousal situation exists, [text deleted] is also entitled to a spousal benefit payment of \$40,560.

Under separate cover, we have processed a total payment of \$76,050 to [text deleted] in trust, c/o your office. [text deleted] resides with his mother, [the Appellant]. You may contact [the Appellant] through her legal representative:

[text deleted]

The case manager also provided this information to the Appellant's lawyer.

On June 13, 2007 the Appellant filed a Notice of Appeal.

Appeal

The relevant provisions of the MPIC Act are:

Definitions

70(1) In this Part,

“**spouse**” means a person who, at the time of the accident, is married to and cohabits with the victim, or a person of the opposite sex who has cohabited with the victim in a conjugal relationship

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

Computing indemnity under schedules

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

Minimum indemnity

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

Posthumous child of deceased victim

121(1) For the purpose of this section, a posthumous child of a deceased victim is deemed to be a dependant under one year of age.

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.

Dependant child of deceased victim with no spouse or common-law partner

122 If on the day he or she dies the deceased victim has no spouse or common-law partner but has a child who is a dependant, the child is entitled, in addition to a lump sum indemnity under section 121, to a lump sum indemnity under section 120 and, where there is more than one child, the lump sum indemnity shall be divided equally among them.

The Appellant testified, at the appeal hearing, and confirmed in substance the information that she had set out in her Affidavit dated February 24, 2006. She further testified that:

1. she began dating the Deceased in 1993 and that in Christmas of that year the Appellant had provided her with a promise ring, which indicated that they had a relationship.
2. at that time she resided with her parents at the [Text deleted] and was a [text deleted] student at the [Text deleted] School.
3. at that time, the Deceased resided with his parents at the [Text deleted] and was a [text deleted] student at the [Text deleted] High School, in [Text deleted], Manitoba.
4. in order to attend school the Deceased would take a bus, which was a forty-five (45) minute ride each way.
5. during the course of the school week, Monday to Friday, she and the Deceased did not live together.
6. commencing in the month of February 1994 until the Deceased died on June 23, 1995, they spent each weekend together living primarily at his sister's residence on the [Text deleted].

7. occasionally they would spend the weekend at the Deceased's Aunt's residence on the [Text deleted], where they would babysit for her.
8. on several occasions they stayed at her parent's residence on the [Text deleted].
9. on a couple of occasions they stayed over at the Deceased's parent's residence when his parents were away, and on one (1) occasion when his parents were present on the weekend.
10. after she commenced seeing the Deceased they were regarded by the community as a couple.

She further testified that:

1. she became pregnant in the month of [text deleted] and that the Deceased was the father.
2. the Deceased was delighted with the prospect of having a child and he told her two (2) days before he died that he wished that the Child would be named after him.
3. he advised her that he intended to place a down payment on the purchase of an engagement ring for her.
4. the Deceased's parents did not know of her pregnancy until after the death of the Deceased.

She further testified that:

1. she had a good relationship with the Deceased's parents until she met her future husband, [text deleted], who she married in 1999.
2. at that time the Deceased's mother, [text deleted], and his father, stopped talking to her.

3. in the Summer of 2005 she approached the Deceased's mother and requested the sum of fifty (\$50) dollars in order that she could send her Child to a Summer camp but the Deceased's mother refused her request.

In cross-examination the Appellant testified that:

1. she acknowledged that in her Affidavit dated February 20, 1997 she had stated that she was in a dating relationship with the Deceased over a period of two (2) years.
2. her former lawyer had prepared the Affidavit and did not accurately reflect the relationship between herself and the Deceased.
3. she also acknowledged that in this Affidavit she had never described her relationship with the Deceased as a common-law relationship.
4. she was never asked by her former solicitor at the time of the preparation of the Affidavit whether or not there was a common-law relationship between herself and the Deceased.
5. she also acknowledged that at the time of his death the Deceased had no income, no bank account, nor did he have his own residence.

[Text deleted], the Appellant's lawyer, indicated to the Commission that the Appellant's lawyer at the time of the preparation of the Affidavit was [text deleted] who, unfortunately, had passed away and therefore [Appellant's legal counsel] was unable to obtain any information as to the manner in which the Appellant's Affidavit was prepared by [text deleted].

[Text deleted], the Appellant's mother, testified at the hearing and stated that:

1. the Appellant met the Deceased two (2) years before his death and on some weekends he had stayed over at her residence.
2. she was unable to remember the number of times this had occurred but on those occasions the Appellant had her own bedroom and slept together with the Deceased.
3. on those occasions the Deceased had his meals at her residence.
4. she became aware of the pregnancy the day the Deceased died.
5. she was of the view that there was a serious relationship between her daughter and the Deceased and that she expected when he graduated from high school they would be married.

[The Deceased's Aunt] testified that:

1. she resides on the [Text deleted] and is the Aunt of the Deceased.
2. she first met the Appellant one and one-half (1 ½) to two (2) years before the Deceased's death when the Appellant started seeing the Deceased.
3. in her automobile she would often pick-up the Appellant on the [Text deleted] and bring her to her residence on the [Text deleted] where the Appellant would meet the Deceased.
4. on those occasions both the Appellant and the Deceased were her babysitters and they would stay over at her premises on the weekend.
5. on those occasions the Appellant and the Deceased slept together in the same room and they had their meals at her residence.
6. she described the relationship of the Appellant and the Deceased as two great teenagers who were always together.
7. she never discussed that relationship with the Appellant's mother.

In cross-examination she acknowledged that:

1. she did not have a close relationship with the Deceased's mother but did have a close relationship with the Appellant's mother.
2. in her letter dated May 1, 2006 she described the relationship between the Appellant and the Deceased as having dated for two and one-half (2 ½) years.

[Text deleted], the biological brother of the Deceased, and who was two (2) years older than him, testified at the hearing and stated that:

1. he had trained with [text deleted], was a former [text deleted], but was no longer working in that capacity and had applied to the [Text deleted] for employment.
2. he had grown up at the [Text deleted], and had lived for a period of three (3) years at [Deceased's Aunt's] residence at the [Text deleted].
3. In the month of August 1994 he moved to [text deleted] and every couple of weeks he would return home to the [Text deleted].
4. on one occasion, while staying at the residence of [Deceased's Aunt], he observed that the Appellant and Deceased had spent a night together at this residence.
5. he recognized them as a couple who were going together.

He further testified that:

1. a week before the Deceased's death he met with him for dinner.
2. the Deceased advised him that the Appellant was pregnant with his child and he sought his approval.
3. the Deceased advised him that he was going to ask the Appellant to marry him when she turned [text deleted] years of age.

4. the Deceased advised that he intended to make a down payment in respect of the purchase of an engagement ring and that he intended to give this ring to the Appellant on June 23, 1995, the day the Deceased died in a motor vehicle accident.
5. one (1) year before the Deceased's death the Deceased had a girlfriend other than the Appellant and that he had broken up with his girlfriend six (6) months later.

[Text deleted], the adoptive mother of the Deceased, testified that:

1. she had adopted the Deceased [text deleted] when he was [text deleted] years old.
2. one (1) year prior to the motor vehicle accident he was attending the [Text deleted] in [text deleted] and was residing in [text deleted].
3. during the last year, prior to the fatal motor vehicle accident, he was residing at the [Text deleted] but was attending [text deleted] at the [Text deleted] School, in [Text deleted], Manitoba, which is approximately fifty (50) miles away from her residence on the [Text deleted].
4. in order to attend this High School, he took a bus to and from the school each day.
5. during this period of time the Deceased had several girlfriends, including the Appellant.
6. she was aware that a few months prior to his death the Deceased was dating the Appellant, whom she had never met.
7. she was unable to recall how many weekends the Deceased was away from her residence prior to the fatal motor vehicle accident, but he was not away every weekend.

She further testified that:

1. she became aware of the Appellant's pregnancy sometime after the Deceased died.
2. she met the Appellant for the first time at the Deceased's funeral and, at that time was made aware that the Deceased was the father of the Appellant's baby.
3. she denied that while she was at her residence the Appellant stayed over and slept with the Deceased.
4. she did not allow for this to occur in her home.
5. she was aware that on occasion the Deceased slept at his sister, [text deleted], residence, but she was not aware that the Appellant stayed over at that residence.
6. [Text deleted] and the Deceased did not have a good relationship and that [text deleted] was jealous of the Deceased.

Submissions

MPIC's legal counsel submitted that the appeal should be dismissed on the following grounds:

1. the Child of the union between the Appellant and the Deceased was born subsequent to the time of the motor vehicle accident and, as a result, the Appellant was not entitled to a death benefit under the provisions of Sections 70(1)(b), 120, 121 and 122 of the MPIC Act.
2. the Appellant has not established, on a balance of probabilities, that she and the Deceased had cohabitated in a conjugal relationship for a period of not less than one (1) year immediately preceding the accident pursuant to Section 70(1)(b) of the MPIC Act.

Posthumous Child of the Union between the Appellant and the Deceased

MPIC's legal counsel submitted that since the Child of the union between the Appellant and the Deceased was born subsequent to the motor vehicle accident, the Appellant did not qualify for a

death benefit pursuant to Section 70(1)(b) of the MPIC Act. MPIC's legal counsel submitted that the Appellant, in order to be entitled to this death benefit, must be a person who, at the time of the fatal motor vehicle accident:

- (a) was cohabiting with the victim in a conjugal relationship for a period of not less than one (1) year immediately preceding the fatal motor vehicle accident; and
- (b) there must be a child of the union between the Appellant and the Deceased born prior to the fatal motor vehicle accident.

MPIC's legal counsel submitted that:

1. Section 70(1)(b) referred only to a child of the union and made no reference to a posthumous child of the union.
2. under Section 121(1) of the MPIC Act there is a specific reference to a posthumous child of the Deceased.
3. the intention of legislature was to distinguish between a non-posthumous child of the union, under Section 70(1)(b) of the MPIC Act, and a posthumous child of the union, Section 121(1) of the MPIC Act.

In response to this submission, [text deleted], the Appellant's legal counsel, submitted that the purpose of the language "at the time of the accident" in Section 70(1)(b) of the MPIC Act, was for the purpose of establishing the criteria of entitlement in order for a claimant to obtain a death benefit pursuant to Sections 120, 121 and 122 of the MPIC Act. [Appellant's legal counsel] submitted that in order for the Appellant to obtain this death benefit, she is required to establish that:

1. at the time of the accident she had cohabited with the Deceased in a conjugal relationship; and

2. there was a child born as a result of the union, either before or after the fatal motor vehicle accident.

The Commission agrees with [Appellant's legal counsel's] submission and rejects the submission of MPIC's legal counsel. The Commission finds that the purpose of the provision "at the time of the accident" in Section 70(1) of the MPIC Act is to require that there existed a common-law relationship at the time of the fatal motor vehicle accident. This provision has no application to the existence of a child born as a result of the common-law relationship either prior to or after the fatal motor vehicle accident. The legislation provides for a death benefit in order to financially assist the surviving common-law partner in raising a child of the union. The need for such financial assistance exists whether the child was born before or after the fatal motor vehicle accident. The Commission concludes that it would be unjust and unreasonable to accept MPIC's interpretation to restrict the meaning of a child of a union under Section 70(1)(b) of the MPIC Act to a child born prior to the fatal motor vehicle accident and to exclude a child born after the fatal motor vehicle accident.

Common-law Relationship

[Text deleted], the Appellant's legal counsel, submitted that the Appellant has established, on a balance of probabilities, that she and the Deceased cohabited in a conjugal relationship for a period of not less than one (1) year immediately preceding the motor vehicle accident and that there was a child of the union. [Appellant's legal counsel] reviewed the testimony that was submitted at the hearing and stated that:

1. the Appellant was [text deleted] years of age when she met the Deceased during the Christmas period in 1993 and commenced a dating relationship.

2. the Appellant commenced staying together with the Deceased on weekends in the month of February 1994 and continued this relationship until the fatal motor vehicle accident which occurred on June 23, 1995.
3. at the time of the motor vehicle accident she was [text deleted] years of age and the Deceased was [text deleted] years of age.
4. their child was born on [text deleted].

[Appellant's legal counsel] submitted that:

1. although the Appellant and the Deceased lived in their respective parent's residences during the period commencing in the month of February 1994, between Monday and Friday, they did live together most of the weekends, occasionally at her parent's residence, on several occasions at his Aunt [text deleted] residence, and on the majority of the occasions at his sister, [text deleted], residence.
2. the Appellant testified that on one occasion the Appellant and the Deceased spent the weekend at his parent's residence in the presence of his parents.
3. the relationship was beyond a dating relationship.
4. the Deceased had provided the Appellant with a promise ring which indicated that they had a relationship.
5. they held themselves out in the community as a couple, and this was confirmed by the testimony of [text deleted].
6. [Text deleted], the Appellant's mother, and [text deleted], the Deceased's Aunt, both confirmed the Appellant's testimony that they lived together on weekends at their respective residences and that the two of them slept together and had their meals together at these residences.

7. when the Appellant informed the Deceased she was pregnant he was delighted and requested that the Child be named after him.
8. the Deceased had informed her that he had intended to place a down payment on an engagement ring for her and that he intended to marry her when he turned [text deleted] years of age.
9. [Text deleted], the Appellant's biological brother, confirmed that he was so advised by the Deceased.
10. she named the Child after the Deceased.

[Appellant's legal counsel] concluded in his submission that:

1. although the Appellant and the Deceased were quite young, their conduct was consistent with the establishment of a common-law relationship, which involved not only sexual activity but commitment to have a permanent relationship.
2. the relationship between the Appellant and the Deceased was a common-law relationship and not a dating relationship.
3. the Commission should rescind the Internal Review Officer's decision in respect of the spousal death benefit and allow the Appellant's appeal.

Mr. Kumka, legal counsel for MPIC, and [text deleted], The Public Trustee's legal counsel, submitted that the Appellant has not established, on a balance of probabilities, that the Appellant and the Deceased had cohabited in a conjugal relationship for a period of not less than one (1) year immediately preceding the fatal motor vehicle accident.

They both asserted that:

1. the relationship between the Appellant and the Deceased was a dating relationship and not a common-law relationship.
2. having regard to the principles set out in *Steffen v. Bryer*, 184 Man.R. (2d) 310, a decision of the Manitoba Court of Appeal, Mr. Kumka indicated that the Appellant and the Deceased never shared a home together, each living at their respective parents' residence, from Monday to Friday, and on the weekends from time to time at residences of the Deceased's sister and the Appellant's parents.
3. there was no evidence of an inter-dependent relationship in terms of assisting and supporting each other.
4. they did not hold themselves out as having a common-law relationship to friends and family.
5. the Deceased's parents were not aware that the Appellant and the Deceased were sleeping together, or that the Appellant was pregnant with the Deceased's child until after the fatal motor vehicle accident.
6. the Appellant had been afraid to inform her parents that she was pregnant.
7. the Appellant and the Deceased were teenagers, with no income, no bank accounts, no employment, and no residence.
8. the Appellant, in her Affidavit of February 20, 1997, stated that she was in a dating relationship with the Deceased for over two (2) years.
9. the Appellant's mother, in her letter dated May 1, 2006, stated that the Appellant and the Deceased had dated for two and one-half (2 ½) years.

Discussion
Cohabitation – Continuous Relationship

The Commission notes that the case manager, in arriving at her decision to deny the Appellant a spousal benefit, found that the Appellant had not cohabited for a continuous period of not less than one (1) year immediately preceding the accident. The Internal Review Officer confirmed the case manager's decision and dismissed the Application for Review. The Internal Review Officer found that no spousal indemnity benefits would be paid to the Appellant as the Appellant had not proved a common-law relationship existed between herself and the Deceased.

The Commission notes that the Internal Review Officer in arriving at her decision to dismiss the Application for Review, failed to consider the previous decisions of the Commission, as well as the Courts, when determining that in order to establish cohabitation for the one (1) year period immediately preceding the motor vehicle accident pursuant, to Section 70(1)(b) of the MPIC Act, the common-law relationship had to be continuous. In *[text deleted]* (AC-06-26, July 16, 2008) the Commission reviewed its decisions in *[text deleted]* (AC-95-14, October 28, 1995), *[text deleted]* (AC-95-8, December 1, 1995), see *Arsenault v. Collier* [2001] P.E.I.J. No. 124. Pursuant to these decisions the Commission determined that in order to establish a common-law relationship under Section 70(1)(b) of the MPIC Act it was essential that the common-law relationship had not been terminated permanently, either jointly or by either partner unilaterally. However, the Commission determined that it was not essential in order for a common-law relationship to exist that it be continuous.

The Commission notes that MPIC's legal counsel did not, in his verbal submission to the Commission, seek to support the decision of the Internal Review Officer who determined that it is essential for a common-law relationship to be continuous. The Commission finds that, having

regard to the documentary evidence filed in the hearing and the testimony of the witnesses, prior to the fatal motor vehicle accident, neither the Appellant nor the Deceased terminated their relationship.

Cohabitation – Boyfriend-Girlfriend Relationship or Common-Law Relationship

The central issue for determination by this Commission is whether or not at the time of the fatal motor vehicle accident the relationship between the Deceased and the Appellant was a common-law relationship within the meaning of Section 70(1)(b) of the MPIC Act and not merely a dating relationship between a girl and a boy.

The Manitoba Court of Appeal in *Steffen v Bryer*, (supra) addressed the meaning of ‘cohabitation’ in a common-law relationship pursuant to the provisions of the *Fatal Accident Act*, RSM [1987], C. F50 (the ‘Act’). The Plaintiff’s main claim pursuant to the *Fatal Accident Act* (supra), alleged that the death of her “common-law spouse” was caused by the negligence of the Defendant. The Defendant sought sumM. judgment dismissing the claim on the ground that the Plaintiff did not come within the definition of “common-law spouse” in the Act.

In March of 2000 the deceased died as a result of injuries sustained while working for the defendants, his employers. At the time of the death of the deceased, when the cause of action arose, the Act created the same cause of action for a “common-law spouse” as for a married spouse. “Common-law spouse” was defined as:

Common-law spouse

3(5) Where the deceased

- (a) cohabited with a person continuously for a period of not less than five years immediately preceding death in a relationship in which that person was substantially dependent upon the deceased; ...

The Court stated:

That person has the same rights as a husband or wife under this Act and shall, subject to subsection (6), be included in the action under subsection (1).

The Plaintiff maintained that she and the Deceased were “common-law spouses” and cohabited in a common-law relationship. In discussing the meaning of ‘cohabitation’ the Court stated:

. . . the term “cohabit” does not have a precise meaning, but it has received consideration judicial interpretation to assist courts in determining, on the facts, whether two people cohabited. In the case of *Tanouye v. Tanouye*, [1994] 2 W.W.R. 735 (Sask. Q.B.), the court considered many of the authorities and concluded (at para. 36):

The authorities seem to indicate that a common-law relationship or marriage requires perhaps not all but at least a majority of the following characteristics: economic interdependence including an intention to support; a commitment to the relationship, express or implied, for at least an extended period of time; sharing of a common principal residence; a common desire to make a home together and to share responsibilities in and towards that home; where applicable, shared responsibilities of child rearing; and a sexual relationship. As well, it appears that, superimposed on the relationship, there should be the general recognition of family, friends, and perhaps to some extent the larger community, that the particular man and woman appear as a “couple”, i.e., a family unit.

Again, in the case of *Molodowich v. Penttinen*, (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), Kurisko D.C.J. adopted the same approach. He canvassed a number of decisions concerning the interpretation of the word “cohabit” and consolidated the factors into seven descriptive components, no single component being determinative (at pp. 381-82):

- (2) shelter;
- (3) sexual and personal behaviour;
- (4) services;
- (5) social;
- (6) societal;
- (7) support (economic); and
- (8) children.

Taking those factors and applying them to the plaintiff’s affidavit, and accepting those facts as true, the evidence establishes that the plaintiff and the deceased were certainly in a relationship of some kind, but not a relationship where the parties cohabited together.

The Court, in determining that there was no common-law relationship stated:

First, the parties never shared a home together. They each continued to rent the residences they had before the relationship. That in itself, as with any one factor, is not

conclusive. Many couples in today's world carry on long-distance relationships. They did have a sexual relationship from 1996 until the deceased's death and that relationship was exclusive and committed. They kept clothes and personal belongings at each other's residences, spent their free time with each other, including week-ends, and frequently spent the night together. They were engaged to be married, and the deceased had bought her a ring, although no date had been set for the wedding. Of considerable significance is the fact that the plaintiff was named as the sole beneficiary of the deceased's life insurance policy.

The affidavit is sparse with respect to any other details of their life together. They had no children, again not a conclusive factor. However, there is no description of an interdependent relationship. She describes buying some work clothes for him on one occasion. On another occasion, the deceased drove the plaintiff to the hospital in Regina, picked her up and "stayed with me, and ensured that I was alright." In turn, she took care of him when he was ill for a few days. She states that she was financially dependent on him, but gives no details of income or expenses or facts underlying the assertion of dependency. There is no discussion of their domestic life together and division of chores, no evidence regarding vacations, hobbies or social occasions shares privately or with their friends.

...

Significantly, the plaintiff acknowledges that they did not hold themselves out as "common-law spouses" to their friends and family. . . .

Cohabitation is more than dating, more than a close sexual relationship and more than becoming engaged. Accepting the plaintiff's evidence in total and placing it in the best light possible, the motions judge found it was more consistent with a couple that did not in fact cohabit with each other. He had evidence to support his finding, and there is no error upon which to justify intervention. (underlining added)

The Court of Appeal unanimously dismissed the Appellant's appeal.

In *Arsenault v. Collier*, [2001] P.E.I.J. No. 124, a decision of the Prince Edward Island Supreme Court – Trial Division, the Court dealt with the meaning of cohabitation within the context of a common-law relationship under the *Family Law Act*.

The headnote states:

Motion by Arsenault for an interim order for spousal support. Arsenault stated that the parties lived together for four years, but Collier testified that they lived together for less

than three years. The parties generally lived under the same roof during the four-year period. They had sexual relations. However, they did not share bank accounts or financial expenses, although Collier did pay for certain of Arsenault's expenses while they lived together. Collier claimed Arsenault on his income tax return as his common-law spouse for the two years prior to their separation.

HELD: Motion dismissed. Arsenault was Collier's spouse for the purposes of the Family Law Act. However, she had not established that she suffered any economic disadvantage from the relationship or its breakdown.

The Court adopted the same approach as the Manitoba Court of Appeal *Steffen v Bryer* (supra) and applied the seven (7) factors determined by Kurisko, D.C.J. in *Molodowich* (supra) as follows:

1. Shelter - The parties generally lived under the same roof during the four (4) year period prior to their separation.
2. During this period of time they had sexual relations.
3. Support (Economic) – the parties did not share a bank account or financial expenses, although *Collier* paid for certain of *Arsenault's* expenses while they lived together. These expenses were four thousand (\$4,000) for a student loan, and a few hundred dollars on the Plaintiff's Visa Account. In addition, the Defendant gave the Plaintiff \$2,000 to enable her to accompany her father to Halifax where he went for medical treatment. While the parties were together the Plaintiff took a registered care worker course, for which the Defendant paid. According to the Plaintiff, while she and the Defendant lived together at his residence, the Defendant paid all the household expenses, as well as her personal expenses. At the request of the Defendant the Plaintiff stopped working in early 1998 as he was quite capable of looking after her needs. The Plaintiff discontinued working in early 1998 and only began working again in September, 2001, following their separation.

4. The Court further stated:

It is significant, in my view, that for the tax years 1999 and 2000 the defendant claimed the plaintiff as his common-law spouse for income tax purposes. As already noted, in order for him to be able to claim her as such for the 1999 tax year he and the plaintiff had to have cohabited together for a continuous period of at least one year.

5. Children – there were no children in this relationship.

The Court concluded his judgment by saying

Applying the jurisprudence to the evidence presented I conclude that the plaintiff is the spouse of the defendant for the purposes of Part III of the Family Law Act.

Decision

The Commission finds, having regard to the factors set out by the Manitoba Court of Appeal in *Steffen v. Bryer* (supra), a common-law relationship did not exist between the Appellant and the Deceased. The Commission concludes that the relationship between these two (2) parties was a dating relationship and not a relationship where the parties cohabited together.

The Commission notes that the relationship between the Appellant and the Deceased in this appeal is very different from the common-law relationship that the Court found in *Arsenault v. Collier* (supra). In that case the Court determined there was a common-law relationship because the parties generally lived under the same roof during the four (4) year period prior to the separation. The Court noted that *Collier* paid certain of *Arsenault's* expenses such as a student loan, payment of a Visa account, assistance to accompany her father to Halifax, and payment of a registered care course. As well, *Collier* paid all of the household expenses and all of *Arsenault's* personal expenses while they lived together at his residence. In addition, *Arsenault* stopped working and was financially supported by *Collier*. The Court further noted that for two

(2) tax years *Collier* claimed *Arsenault* as his common-law spouse for income tax purposes. Having regard to these characteristics the Court determined that there was a common-law relationship between *Collier* and *Arsenault*.

The Commission notes that the only common characteristics in the relationship between the Deceased and the Appellant in this appeal, and *Arsenault* and *Collier*, is that the parties in each relationship had sexual relations.

In considering the characteristics cited by the Manitoba Court of Appeal in *Steffen v. Bryer* (supra) in determining whether or not a common-law relationship existed between the Appellant and the Deceased, the Commission noted that the following characteristics of a common-law relationship were common in both cases:

1. the Appellant and the Deceased did have sexual relations;
2. there was a child of the union, who was named after the Deceased.

The Commission also notes that the following characteristics set out by the Manitoba Court of Appeal in *Steffen v. Bryer* (supra) are not consistent with a common-law relationship between the Appellant and the Deceased:

Residence – Sharing A Common Principal Residence

1. The Appellant, when she met the Deceased around Christmas 2003, was [text deleted] years of age and a [text deleted] student and resided with her parents on the [Text deleted].
2. At that time the Deceased was [text deleted] years of age, a [text deleted] student, who resided with his parents at the [Text deleted].

3. Between February 1994 and June 23, 1995 the parties stayed together on weekends at the Appellant's parent's residence on one occasion, several times on weekends at the Deceased's Aunt's residence, and the majority of time on weekends at the Deceased's sister's residence.
4. Between February 1994 and June 23, 1995 there is no evidence that during the school week (Monday to Friday) the parties saw each other.

**A common desire to make a home together
and to share responsibilities in and towards that home**

The parties were teenagers, attending high school, had no jobs, no income, and, therefore, at the time of the fatal motor vehicle accident their common desire to have a home together and share responsibilities could only at best have been a desire that this would take place in the future but did not exist at the time of the fatal motor vehicle accident on June 23, 1995.

Economic interdependence, including an intention to support

As teenagers living with their parents, neither of the parties had any income or jobs, and were in no position to economically provide any financial support to each other and neither was financially dependent upon the other.

**Commitment to relationship, express or implied,
for at least an extended period of time**

The Deceased had provided the Appellant with a promise ring, which demonstrated a commitment to have an exclusive relationship while they were dating. However, as a student with no job and no independent financial means, he was in no financial position to carry out this intention. The Appellant indicated that the Deceased intended that they marry after he

completed [text deleted], which would have been at least one (1) year after the fatal motor vehicle accident.

The Commission finds that the conduct of the parties is consistent with a dating relationship, but does not demonstrate that at the time of the fatal motor vehicle accident there existed a relationship which, on the whole, was synonymous with a common-law relationship. The Commission notes that both parties were very young, had not reached their maturity as adults, had no significant life experiences, and that their commitment to become engaged and be married was a future commitment which may or may not have been fulfilled. The Commission also notes that notwithstanding the intentions of the Deceased there was evidence that the relationship between the parties was not exclusive since during this relationship the Deceased was dating other females.

Recognition as a couple, i.e. family unit

There is no evidence that there was a general recognition by family, friends and perhaps to some extent the larger community, that the parties appeared as a “couple”, i.e. family unit. The Appellant’s parents and the Deceased’s Aunt and Sister were aware that the parties were dating and staying together on weekends, but that relationship was not disclosed to the Deceased’s parents.

The Appellant, in her Affidavit of February 20, 1997, described her relationship with the Deceased as a dating relationship over a two (2) year period. The Appellant’s mother, in her letter dated May 1, 2006, stated that the parties had dated for two and one-half (2 ½) years. The Commission agrees with the Appellant’s statements in her Affidavit, and her mother’s statement in her letter, that the relationship between the parties was recognized as a dating relationship and

not as a relationship where the parties appeared as a “couple”, i.e. family unit. The Commission also finds that there is no evidence that the larger community recognized the parties as a “couple, i.e. a family unit.

Having regard to the characteristics set out in *Steffen v. Bryer* (supra), the Commission finds that the majority of the characteristics clearly demonstrate that the parties did not have a common-law relationship. The only evidence consistent with a common-law relationship is that the parties stayed together on weekends, had sexual relations, and had a child. However, these characteristics are as consistent with a dating relationship as they are with a common-law relationship.

The Commission determines that, having regard to the totality of the evidence, there are no details of a life together consistent with a common-law relationship. There is no permanent residence, no interdependent relationship, no evidence of any domestic life together and division of chores, and no evidence regarding vacations, hobbies or social occasions shared privately or with their friends.

The Commission finds that the Appellant and the Deceased were young teenagers who had commenced dating, and that their relationship had not yet developed into a common-law relationship. As the Court stated in *Steffen v. Bryer* (supra):

Cohabitation is more than dating, more than a close sexual relationship and more than becoming engaged. (underlining added)

For these reasons the Commission therefore finds that the Appellant failed to establish, on a balance of probabilities, that pursuant to Section 70(1)(a) of the MPIC Act she and the Deceased

had cohabited in a conjugal relationship for a period of not less than one (1) year immediately preceding the motor vehicle accident of June 23, 1995. The Commission therefore dismisses the Appellant's appeal and affirms the decision of the Internal Review Officer dated March 16, 2007.

Dated at Winnipeg this 5th day of August, 2008.

MEL MYERS, Q.C.

ERROL BLACK

DR. PATRICK DOYLE