Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-10-096

PANEL:	**Ms Laura Diamond, Chairperson** **Dr. Sheldon Claman** **Ms Jacqueline Freedman**
APPEARANCES:	**The Appellant, [text deleted], was represented by Ms Laurie Gordon and Mr. Phil Lancaster of the Claimant Adviser Office;** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Kirk Kirby.**
HEARING DATE:	**May 29, 2012, and September 24, 2012**
ISSUE(S):	**Entitlement to Personal Injury Protection Plan benefits.**
RELEVANT SECTIONS:	**Sections 70(1), 71(1), 71(2), 127, 136(1), 161(1) 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 sought Personal Injury Protection Plan ("PIPP") benefits as a result of an incident that occurred on December 23, 2003. The Appellant completed an undated Application for Compensation with MPIC indicating that while seated as a passenger in a moving vehicle he heard a big bang and immediately felt his head ringing. The Appellant indicated that he had received head injuries in this accident from shotgun pellets and glass.

The Appellant's case manager wrote to him on September 16, 2009 indicating that the material facts surrounding the incident had been reviewed, including medical reports from [Appellant's Doctor], supporting his injuries as a result of a gunshot wound. The case manager indicated that based on this review it was determined that the injuries the Appellant sustained were caused by an assault, and not by an automobile or the use of an automobile and that MPIC was unable to provide coverage to him for the injuries sustained in the incident.

The Appellant sought an Internal Review of this decision. On April 22, 2010, an Internal Review Officer for MPIC reviewed the Appellant's file and summarized the incident that occurred December 23, 2003.

> "...You were a passenger in a motor vehicle being driven by either "[text deleted]" or "[text deleted]" when the driver pulled over near the intersection of [text deleted] in [text deleted]. You advised that you saw some guys dressed in black and you told your friend to drive away which he did. As you were driving away, you heard banging or a big bang and you realized someone was shooting at the vehicle. You then stated that a shotgun blew out the back window of the vehicle you were in which resulted with you having a bunch of shotgun pellets and glass in the back of your head. Your friend then dropped you off at the [Hospital] emergency. You stated that you used a fake name when attending at the hospital and once you admitted your real name, the doctors told you to leave and you were discharged from the hospital..."

The Internal Review Officer also referred to reports from [Appellant's Doctor]:

> "Your case manager was able to obtain information from [Appellant's Doctor] which included an x-ray from April 27, 2009 which indicated that you have metallic fragments in the subcutaneous tissues of the right frontal frontoparietal temporal area. [Appellant's Doctor's] report confirmed that your injuries were as a result of a gunshot wound. The metallic fragments were found at the front and side of your head, not at the back as you claim."

The Internal Review Officer confirmed the case manager's decision that the injuries sustained by the Appellant on December 23, 2003 were caused by an assault and not by the use of an automobile. In support of this position, she reviewed two Manitoba Court of Appeal cases

[*McMillan v. Thompson* (RM) (1997) 115 Man. R. (2d) 2 (C.A.) and *Mitchell v. Rahman* (2001) 163 Man. R.(2d) 87 (C.A.)]. She also reviewed a previous decision of the Commission in *[text deleted]* (AC-96-12).

The Internal Review Officer compared these cases with the Appellant's situation and concluded that she did not agree that the Appellant's injuries resulted from the ordinary and well-known activities to which automobiles are put, and that moreover, there was no causal relationship between the Appellant's injuries and the ownership, use or operation of a vehicle. The firing of the shotgun at the Appellant and the resulting shotgun pellets in his head had no connection with the use of the motor vehicle on the night in question, nor did the use of the motor vehicle cause him a greater injury than had he not been in the motor vehicle.

The Appellant's Application for Review was dismissed and the case manager's decision was upheld.

It is from this decision of the Internal Review officer that the Appellant has now appealed.

Evidence and Submission for the Appellant:

The Appellant testified at the hearing into his appeal. He indicated that on December 23, 2003, his friend [text deleted], who was not the registered owner of the vehicle, was driving the vehicle. The Appellant was sitting in the passenger seat. He explained that he was working a [text deleted]. They were called to a [text deleted] location. The Appellant was hesitant to go there, because the last time he had been to that address there was a party and beer bottles had been thrown at him. He hesitated, but the caller indicated she would make it worth his while. They attended the address, in the back lane, and a female came out to the vehicle [text deleted].

The two then left the residence in the vehicle. However, the same client phoned back about five minutes later, as they were making their way back down [text deleted]. She indicated she wanted them to come back again. The Appellant told her he didn't want to and he was going to turn off his phone and go to sleep. However, she then offered extra money and they decided to go back.

The Appellant testified that they approached the address again, and were waiting outside when they received another call from the woman asking if they were in the same vehicle. The Appellant told her that they were, that they were outside and to hurry up. Approximately three to five minutes later, he saw men dressed in black running up to the car from behind. He yelled at the driver to go, and as he looked back in the rear view mirror he saw guns or bats. He yelled to the driver to duck and go. [Appellant's friend] started driving and shots were fired at the windows. The Appellant stated that at the time he did not know what the shots were. He later discovered that they were being shot at and his head was injured. He held the back of his head to keep pressure on his wounds and was driven straight to the Emergency Department, where both were admitted upon walking in. The police were there and questioned them. He had difficulty hearing as there was ringing in his ears and he was "shell-shocked".

The Appellant testified that he lied to the police about his name because [text deleted]. He had shotgun pellets in his skull. Later, the police came back and he was more coherent, so he told them that he had lied about his name. The Appellant testified that at this point the doctor became angry that he had lied and told him to leave. The Appellant testified that the doctor dressed his head, but took his clothes as evidence. He phoned a friend who allowed him to come over and recover.

The Appellant testified that the only treatment provided to his head was some kind of wrapping, and that although he was not sure, they may have done some kind of scan while he was there.

The Appellant explained that at that time he did not have an address. Shortly thereafter he left the province and went to [text deleted]. He worked as a volunteer at the [text deleted], assisting homeless people and others. He also founded a group for [text deleted] in an anti-violence network, travelling to [text deleted] and places around [text deleted] to give presentations to schools and justice committees. He indicated that he suffered from headaches because of the shooting and took Tylenol and Motrin.

He later returned to [text deleted] with his family. He testified that he still has headaches and as time has gone by they have gotten worse and turned into migraines. He sees [Appellant's Doctor], who sent him for X-rays.

The Appellant testified that he also suffers from paranoia and anxiety as a result of being shot in the automobile.

When asked why he didn't file an Application for Compensation until six years after the event, the Appellant explained that he was [text deleted]. It was not until he [text deleted] that he was asked why he never made a claim and the Automobile Injury Compensation system was explained to him.

The Appellant described the medication that he continues to take to treat his headaches and anxiety related sleep disturbance.

Counsel for the Appellant reviewed the statements which the Appellant had provided to his case manager and indicated that they were consistent with the testimony which he had provided, with more detail, to the Commission. She noted that MPIC had never before questioned whether this incident had actually occurred, until the Appellant was cross-examined before the Commission. The Internal Review Officer listed the facts as she understood them, acknowledging that the Appellant sustained injuries in the incident. The position of MPIC was always that, based upon the law, the injuries were not caused by a motor vehicle accident, but rather by an incident involving an assault. MPIC had not taken the position that the event had never occurred.

Counsel for the Appellant reviewed the case law which the Internal Review Officer had examined. She urged the Commission to take a liberal interpretation of the MPIC Act, consistent with the *McMillan* (supra) decision.

She also reviewed the two-part test set out in *Mitchell v Rahman*. The first part, the purpose test, involved an examination of whether the incident involved an ordinary and well-known activity to which a vehicle was put. She indicated that in this appeal, the Appellant and driver were in the vehicle using it to return to the residence. This was a common use for a vehicle.

The second prong of that test was to show a connection between the shots and the use of the motor vehicle. The motor vehicle, she submitted, contained a load, albeit an illegal load, and that is what the shooters were after. Had the Appellant been in another vehicle [text deleted], he would not have been shot at. Nor can we say that he would have been shot at had he been on foot. Clearly, the Appellant was set up, and the shooters were waiting for that particular vehicle to return. Had the Appellant not been a passenger in that vehicle, he would not have been shot at. That is what prompted the shooting.

Counsel for the Appellant disagreed with the Internal Review Officer's conclusion that had the Appellant been outside of the vehicle he might have been killed and so the vehicle protected him. That is not the test, she submitted. It fails to consider that had the Appellant not been in that particular vehicle that night, he would not have been injured, as he would not have been a target in the shooting of the vehicle.

Counsel for the Appellant indicated the Appellant was asking the Commission to find that his injuries were caused by use of the motor vehicle, entitling him to PIPP benefits regarding his scarring and for psychological counselling.

Following the hearing, on May 30, 2012, the Commission wrote to the parties requesting that they provide a written summary of their positions (with supporting authority from case law/statutory provisions) regarding the effect of the illegal nature of the activity described by the Appellant, upon his entitlement to benefits under the MPIC Act. The panel also requested that the parties address the two-part test encompassing both "purpose" and "causation" set out by the Supreme Court of Canada in a recent decision, when interpreting the phrase "arising out of the ownership, use or operation of a vehicle".

The panel asked the parties to provide written submissions, with supporting authorities where necessary, to address the question of whether the accident described by the Appellant resulted from the ordinary and well known activities to which automobiles are put.

In response to this request, counsel for the Appellant provided a written submission dated June 22, 2012, and then (following counsel for MPIC's written submission dated June 26, 2012), she provided a reply, dated July 6, 2012.

In her written submission, counsel reviewed Section 71 of the MPIC Act and the exclusions set out in Section 71(2). She submitted that although it was acknowledged that the Appellant was involved in an illegal activity [text deleted] at the time of the incident, Section 71(2) does not exclude persons involved in illegal activities from coverage under the MPIC Act.

Further, she submitted that Section 161(1) of the MPIC Act can reduce benefits to a victim, but only those who are convicted of certain criminal acts. The Appellant was not charged, and clearly not convicted of any of the offences set out in Section 161(1) of the MPIC Act. Further, Section 161(1) authorizes reduction of indemnities only where the criminal conviction is one made out in respect of the accident. The Appellant's illegal activity was clearly not within the scope of Section 161(1).

Counsel for the Appellant submitted that if the legislature wished to deny automobile insurance benefits to insured persons involved in illegal activities, other than those set out in Section 161(1) of the MPIC Act, it would have done so.

Counsel went on to address the question of whether the accident described by the Appellant resulted from the ordinary and well-known activities to which automobiles are put. In her view, it was relatively straight-forward that the Appellant was a passenger in a vehicle that was being used as transportation, which was an ordinary and well-known activity to which automobiles are

put. The [text deleted] was not occurring when the shooting took place. Rather, the vehicle was driving.

In her letter dated July 6, 2012, counsel for the Appellant also reviewed the recent Supreme Court of Canada case of *The City of Westmount v. Rossy*, 2012 SCC 30, as well as an older Supreme Court of Canada decision in *Amos v. ICBC,* [1995] 3 S.C.R. 405.

She noted that in *Rossy* (supra) the Supreme Court of Canada had stated that the vehicle's role in an accident need not be an active one for an incident to fall within the definition of "accident" in the Act and to be considered "caused by an automobile". She submitted that like *Rossy*, the Appellant was "using the vehicle as a means of transportation" and this was enough to find that the damage arose as a result of an accident such that the no-fault benefits of this scheme would be triggered. She also quoted from the hypothetical example set out by the Supreme Court of Canada in *Amos* (supra):

> "If the appellant had not been shot, but had lost control of his car while trying to get away from his assailants, the injuries suffered as a result of a subsequent car crash would surely be covered by the respondent. Similarly, if the appellant had suffered injuries as a result of being intentionally hit by the same assailants using a car instead of a gun, the respondent would not deny coverage."

Counsel for the Appellant submitted that the fact that [text deleted] were in the vehicle would be irrelevant in that case, as well as in the appeal at hand.

Further, she noted that the Appellant provided honest, credible testimony at the appeal hearing and that although counsel for MPIC had suggested that there is no evidence that this event occurred, MPIC failed to determine whether there was any report made to the [text deleted] Police Service. The case manager had been advised by [text deleted] Police Services that she

would have to make a formal request in order to obtain that report, but she never did so. This shows that MPIC made little effort to confirm or disprove the Appellant's version of events, leading to the case manager and Internal Review Officer's acceptance of the Appellant's description of the incident.

Accordingly, counsel submitted that counsel for MPIC could not now take the position that the event had never occurred. She submitted that the appeal should be allowed, and the decision of the Internal Review Officer overturned.

Evidence and Submission for MPIC:

On cross-examination of the Appellant, counsel for MPIC inquired regarding the details of the incident, when it actually occurred, who was driving, what car was used, etc. He also asked the Appellant to provide more details regarding his attendance at the hospital and his attendance at [Appellant's Doctor] in August of 2009.

Counsel then submitted that in this case, the appeal falls far short of the standard of proof, on a balance of probabilities, that is required to be met. He noted several inconsistencies in the evidence heard before the Commission, as well as the Appellant's admission that he had lied in the past, to the doctors and police at the hospital. He noted that there was no supporting evidence to corroborate that this incident happened as the Appellant described it. There was no police report or emergency admission report which could support the Appellant's version of events. As there was no corroboration of the Appellant's evidence, the appeal could not meet the balance of probabilities test required to convince the Commission that an incident occurred involving the use of a motor vehicle.

MPIC had tried, given the limited information which it had, to do its best to obtain information to confirm whether the accident happened the way the Appellant said it did. However, it had no way of determining conclusively that there was any attendance at the hospital for treatment. A request to [text deleted] for a police report, led only to the case manager being advised that the incident did not involve a motor vehicle accident, but rather involved only a violent illegal act. This did not support the Appellant's evidence regarding the use of a motor vehicle in the incident.

Counsel also reviewed the case law provided by counsel for the Appellant. He submitted that, in the alternative, even if the Commission finds that there was an automobile involved in this appeal, there was no more than an incidental or gratuitous connection between the automobile and the injuries which occurred. The relevant legal authorities were appropriately discussed and reviewed by the Internal Review Officer. Although in this case, those authorities do not apply, as counsel considered this appeal to involve manufactured evidence, the Internal Review Officer was correct in finding that the incident described by the Appellant did not constitute injuries sustained as the result of an accident, since the injuries did not result from the ordinary and well-known activities to which automobiles are put and there was no causal relationship between the Appellant's injuries and the ownership, use or operation of a vehicle.

In response to the Commission's request for written submissions, counsel for MPIC provided the Commission with a letter dated June 26, 2012. He reviewed the evidence covered at the hearing at some length, as well as the case law referred to by counsel for the Appellant and by the Internal Review Officer. He submitted that the Appellant was not credible and that it could not be established on a balance of probabilities that the incident occurred in the way the Appellant

had described. He also submitted that it could not even be said, if the incident did occur as described by the Appellant, that the alleged vehicle was a properly registered and insured vehicle.

Counsel noted that there was no record of treatment at [hospital] and that the [text deleted] Police Services had advised that although there was an incident report, it did not involve a motor vehicle, it was only a victim statement involving a violent/illegal act. He noted:

> "The Appellant is asking this Commission to accept his viva voce evidence in this context uncorroborated by any supporting witnesses, with no verification of him occupying an actual automobile and no substantiation of the information he provided from either the hospital or the police...
>
> For there to be any consideration of entitlement to PIPP benefits, the Appellant's information, on a balance of probabilities, had to be verified and, in this case, the Appellant has clearly failed to meet the requisite burden of proof that he was even occupying a known automobile at the time of the alleged incident..."

Counsel also submitted that [text deleted] can occur at any time or place and that the use of an automobile is not an integral component of conducting such an undertaking.

> "The incident as described by the Appellant does not satisfy the application of the requisite legislation which must be given its plain and ordinary meaning. The language of Section 70(1) of the *The Manitoba Public Insurance Corporation Act* should not be stretched beyond those situations where injury results from the ordinary and well-known activities to which automobiles are put. Furthermore, public policy dictates against a legislative intent that provides benefits arising from illegal activity. To conclude that this act encompasses compensation for anti-social criminal behaviour is illogical and would result in a perverse interpretation that would be incongruous with its objectives and remedial nature of this legislation."

Counsel also addressed the recent decision of the Supreme Court of Canada in *The City of Westmount v. Rossy* (supra) indicating that it was of no assistance to the Appellant and is distinguishable on the facts. In that case, counsel submitted the victim was occupying and using an automobile in the normal fashion of transporting himself when a tree unexpectedly fell on the vehicle. In this Appeal, if an automobile was involved (which had not been proven), it was not

put to an ordinary or well-known use but rather to conduct illegal activity fraught with anticipated peril in what can be described as tantamount to a "war zone".

Counsel submitted that the appeal should be dismissed and the decision of the Internal Review Officer upheld.

Case Conference Hearing:

In considering the submissions of counsel, the panel reviewed references made by both counsel to the existence of a [text deleted] Police Services Incident Report in connection with the incident described by the Appellant. Both counsel had referred to a case manager's note dated September 1, 2009 which stated:

> "Incoming call from [text deleted] re: incident report
>
> [Text deleted] advised that it looks like the incident did not involve an MVA – it's a victim statement. She advised that I would have to make a formal request for the report but she's not sure what info would be made available to me. She advised that it appears this incident involved a violent/illegal act."

Counsel for MPIC relied upon this memorandum in his submission. Counsel for the Appellant however, pointed out that there was no evidence on file establishing that the case manager ever made a formal request to obtain this report.

The panel, noting that both parties had referred to the report, scheduled a Case Conference to discuss obtaining and reviewing a copy of the report in connection with its assessment of whether the Appellant could be considered a victim who suffered a bodily injury in an accident.

However, at a Case Conference Hearing held to discuss the matter on September 24, 2012, counsel for the Appellant and for MPIC objected to the panel's suggestion. Both indicated that

attempting to obtain such a report would not be helpful or desirable. Accordingly, no request was made to [text deleted] Police Services to obtain the report and the Commission proceeded to decide the Appellant's appeal without it.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities, that he is entitled to PIPP benefits as a result of a motor vehicle accident.

The MPIC Act provides:

> **Definitions**
>
> 70(1) In this Part,
>
> **"accident"** means any event in which bodily injury is caused by an automobile; (« accident »)
>
> **"victim"** means a person who suffers bodily injury in an accident.
>
> **Application of Part 2**
>
> 71(1) This Part applies to any bodily injury suffered by a victim in an accident that occurs on or after March 1, 1994.
>
> **Bodily injury to which Part 2 does not apply**
>
> 71(2) Notwithstanding subsection (1), this Part does not apply to bodily injury that is
>
> (a) caused, while the automobile is not in motion on a highway, by, or by the use of, a device that can be operated independently and that is mounted on or attached to the automobile;
>
> **Lump sum indemnity for permanent impairment**
>
> 127 Subject to this Division and the regulations, a victim who suffers permanent physical or mental impairment because of an accident is entitled to a lump sum indemnity of not less than $500. and not more than $100,000. for the permanent impairment.
>
> **Reimbursement of victim for various expenses**

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

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

(b) the purchase of prostheses or orthopedic devices;

(c) cleaning, repairing or replacing clothing that the victim was wearing at the time of the accident and that was damaged;

(d) such other expenses as may be prescribed by regulation.

Reduction of indemnity where victim convicted under *Criminal Code*

161(1) An indemnity to which a victim is entitled under Division 2 or 4 shall be reduced if the victim is, in respect of the accident, convicted under any of the following provisions of the *Criminal Code* (Canada):

(a) section 220 (cause death by criminal negligence);

(b) section 221 (cause bodily harm by criminal negligence);

(c) section 236 (manslaughter);

(d) clause 249(1)(a) or subsection 249(2) (dangerous operation of a motor vehicle), or subsection 249(3) (dangerous operation causing bodily harm) or subsection 249(4) (dangerous operation causing death);

(d.1) section 249.1 (flight from police officer);

(e) subsection 252(1) (failure to stop at the scene of an accident);

(f) section 253 or subsection 255(1) (operating a motor vehicle while impaired), or subsection 255(2) (impaired driving causing bodily harm) or subsection 255(3) (impaired driving causing death);

(g) subsection 254(5) (failure to comply with a demand for breath sample);

(h) section 334 (theft), where the property stolen is a motor vehicle;

(i) subsection 335(1) (take motor vehicle without consent).

The panel has reviewed the testimony of the Appellant as well as the evidence on his indexed file and the submissions of counsel.

> "The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject the story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of the witness in such a case must be its harmony with the preponderance of the possibilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions..." *Faryna v. Chorny* [1952] 2 DLR 354

The Commission accepts the evidence of the Appellant that the incident in question occurred, largely as he described in his testimony before the Commission.

The panel carefully reviewed the testimony of the Appellant before the Commission. He was honest and openly admitted to misdeeds in the past. He described himself as [text deleted], freely admitting to participating in criminal activity in the past and attempting to recall this particular incident in as much detail as possible. He then described the efforts at rehabilitation he has made since that time and the events and information which led him to file a claim with MPIC so long after the event occurred. The panel found the Appellant to be a credible and consistent witness.

The case manager and Internal Review Officer for MPIC also seem to have come to a similar conclusion. Following their investigation and analysis of the Appellant's claim, neither concluded that the event had not occurred as described by the Appellant or that the event had not occurred at all.

Rather, both apparently believed the Appellant's account of the incident but considered that it did not meet the legal tests set out in the MPIC Act and case law which would lead to the incident being treated as an "accident" and the Appellant as a "victim" under the statute.

Counsel for MPIC then questioned whether the incident had occurred and whether the Act could be applied to it at all. He noted the absence of a doctor's report resulting from the Appellant's visit to the hospital. However, the panel notes that the Appellant's explanation and description of how he attempted to hide the criminal nature of his activities from the doctors and the hospital is consistent with the absence of this report from the Appellant's file.

Counsel for MPIC also noted the absence of a police report confirming the incident in question. He cited the case manager's note that she was advised on September 1, 2009, that there was an incident report which did not involve a motor vehicle accident and was only a victim statement involving a violent illegal act.

However, when the Commission offered to assist in obtaining this report, counsel for MPIC objected, thereby effectively failing to challenge the testimony of the Appellant. As a result, the Appellant's evidence describing the event, after having been accepted by both the case manager and the Internal Review Officer, was not contradicted by any evidence produced by MPIC.

When the Commission considers the reference to the existence of such a police report regarding an incident occurring on that date, and MPIC's failure and disinclination to obtain or produce it in order to rebut the Appellant's version of events, the panel is left to accept the Appellant's testimony and conclude that the evidence before us indicates that the incident did occur as the Appellant described.

Based on the evidence of the Appellant and the weight of the material on the Appellant's indexed file, the panel accepts the Appellant's description of the incident in question. We find that the

Appellant has met the onus of showing, on a balance of probabilities, that he suffered an injury to the head as a result of gun or pellet shots, while a passenger in a moving vehicle.

Counsel for MPIC also submitted that there was insufficient evidence to establish that the alleged vehicle was properly registered and insured.

However, the Commission finds that this is not relevant to the question of whether the Appellant is entitled to coverage and PIPP benefits under Part 2 of the MPIC Act. Section 71(1) of the MPIC Act provides that Part 2 applies to any bodily injuries suffered by a victim in an accident after March 1, 1994. Section 70(1) of the MPIC Act defines a victim as a person who suffers bodily injury in an accident, bodily injury as any physical or mental injury, including permanent physical or mental impairment and death, and accident as any event in which bodily injury is caused by an automobile.

The question for the Commission does not concern whether the vehicle was properly registered, but rather whether the Appellant can be considered a victim who suffered a bodily injury in an accident.

The panel has reviewed the exceptions set out in Section 71(2) of the MPIC Act and agrees with counsel for the Appellant that Section 71(2) does not exclude persons involved in illegal activities from coverage under the MPIC Act. None of the exclusions covered in Section 71(2) in any way purport to deny benefits to an insured involved in an illegal activity.

We have also reviewed Section 161(1) of the MPIC Act and agree with counsel for the Appellant that Section 161(1) only authorizes reduction of indemnities where a criminal conviction is made out in respect of the accident. The Appellant's illegal activity was clearly not within the scope of Section 161(1), nor was he charged or convicted of any of the offences set out in that Section, or of any criminal offence.

Accordingly, the panel agrees with counsel for the Appellant that he is not excluded from PIPP benefit coverage as a result of the illegal nature of his activities on the night of the incident in question.

The question which must then be addressed is that set out by the Internal Review Officer on April 22, 2010. This question centers on whether the Appellant's injuries were caused by an automobile, and as such can be categorized as bodily injury caused by an automobile, or an accident, under Section 70(1) of the MPIC Act. In this regard, although the Commission has reviewed the decisions referred to by the Internal Review Officer and by both counsel in *McMillan v. Thompson, Mitchell v. Rahman, Amos v. ICBC* and *C.Z.*, (supra), we have closely examined the decision of the Supreme Court of Canada in the *City of Westmount v. Rossy,* (supra). In that decision, the respondent was killed when a tree fell on the vehicle he was driving in the City of Westmount. The City argued that the injury resulted from an accident caused by an automobile and therefore that any compensation for personal injury was covered by the *Automobile Insurance Act.* The Supreme Court of Canada found that this Act was considered remedial legislation and must be given a large and liberal interpretation to insure that its purpose is attained. In determining whether the Act applies, a Court must not look for a traditional causal link between fault and damage as is routinely done in delictual or quasi-delictual civil liability cases.

> "Each case must be considered on its facts. However, at a minimum, an accident arising out of the use of a vehicle as a means of transportation will fall within the definition of "accident" in the Act and will therefore be "caused by an automobile" within the meaning of the Act. Any civil action in connection with the damage caused by that accident will be barred and victims will have to file a claim with the SAAQ. The vehicle's role in the accident need not be an *active* one. The mere use or operation of the vehicle, *as a vehicle*, will be sufficient for the Act to apply."

The victim was using the vehicle as a means of transportation when the accident occurred and this was enough to find that the damage arose as a result of an accident within the meaning of the Act, such that the no-fault benefits of the scheme were triggered.

The Commission has accepted that the Appellant was injured while a passenger in a moving vehicle. As noted by the Supreme Court of Canada, the mere use or operation of the vehicle as a vehicle is sufficient for the Act to apply, and for the Appellant's injuries to be considered to have been caused by an automobile under Section 70(1) of the MPIC Act. Therefore, the Commission concludes that the use of that vehicle as a means of transportation means that the incident and injuries which occurred arose out of the use of a vehicle and the incident falls within the definition of "accident" in the MPIC Act.

Accordingly, the Appellant's appeal is allowed, and the decision of the Internal Review Officer dated April 22, 2010 is overturned. Assessment of the Appellant's entitlement to PIPP benefits for treatment and/or permanent impairment, arising out of his injuries sustained in the motor vehicle accident, will be referred back to the Appellant's case manager for determination.

Dated at Winnipeg this 25th day of October, 2012.

LAURA DIAMOND

DR. SHELDON CLAMAN

JACQUELINE FREEDMAN