

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-15-198**

PANEL: Ms Jacqueline Freedman, Chair
Ms Nikki Kagan
Mr. Brian Hunt

APPEARANCES: [The Appellant] represented himself.
Manitoba Public Insurance Corporation (“MPIC”) was represented by Mr. Matthew Maslanka.
The Attorney General (“AG”) of Manitoba was represented by [text deleted].
The Attorney General of Canada, although given notice of these proceedings, did not participate in the hearing.

HEARING DATE: November 24, 2016
Additional Submission from the Appellant received November 25, 2016
Replies from the AG of Manitoba and MPIC received December 6, 2016 and December 14, 2016

ISSUE(S): Whether the Appellant, [text deleted], is entitled to benefits under the Personal Injury Protection Plan (“PIPP”) provisions of The Manitoba Public Insurance Corporation Act (the “MPIC Act”) in connection with the theft of his vehicle.

Whether the provisions of subsections 70(1) and 71(1) of the MPIC Act are of no force and effect, on the grounds that they offend sections 9 and 13 of the Manitoba Human Rights Code (the “Code”).

Whether the provisions of subsections 70(1) and 71(1) of the MPIC Act are of no force and effect, on the grounds that they offend subsection 15(1) of the Canadian Charter of Rights and Freedoms (the “Charter”).

RELEVANT SECTIONS: Subsections 70(1) and 71(1) of the MPIC Act, sections 1, 9, 13 and 52 of the Code, and sections 1 and 15 of the Charter.

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

Reasons For Decision

Background:

The Appellant, [text deleted], is a commercial truck driver. On May 22, 2015, his truck was stolen. The Appellant's personal vehicle had also been stolen, one day earlier. The Appellant's truck was recovered within a few weeks, but it was not in good condition. MPIC and the Appellant negotiated a settlement of the claim on his truck. The Appellant ultimately got his truck back, had it repaired and was able to return to work. However, he had missed several weeks of work, during the period after his truck was stolen, while it was being assessed by MPIC and then being repaired. He sought what he refers to as "wage-loss protection" from MPIC for the period from the theft of his truck, until the time the truck was operational, approximately September 10, 2015.

The case manager considered this request. By decision letter dated June 29, 2015, the case manager advised the Appellant as follows:

You reported that as a result of the theft of your motor vehicle you have sustained a loss of income due to business interruption. As discussed no entitlement exists under the PIPP for the loss you have reported.

This decision has been made in accordance with the Personal Injury Protection Plan (PIPP). PIPP is a statutory plan that provides a range of benefits to individuals who sustain injuries as a result of a motor vehicle accident. ...

The Appellant disagreed with the decision of the case manager and filed an Application for Review. The Internal Review Officer, by decision letter dated October 14, 2015, confirmed the decision of the case manager and stated as follows:

PIPP provides coverage for rehabilitation costs and economic losses incurred as a result of injuries caused by an automobile. Section 70(1) outlines what event must happen in order to access PIPP coverage. The theft of your tractor trailer is outside the scope of insurance coverage outlined in the PIPP legislation. You did not sustain any injury which would allow you access to PIPP benefits.

It is from that Internal Review decision that the Appellant now appeals to the Commission.

Constitutional Issues:

At a Case Conference Hearing held on September 12, 2016, to discuss pre-hearing matters, the Appellant identified that in addition to asserting that he should be entitled to benefits under the MPIC Act, he would be raising constitutional and human rights issues in his appeal. Specifically, the Appellant asserted that the provisions of subsection 70(1) and 71(1) of the Act are of no force and effect, on the grounds that they offend section 9 of the Code and subsection 15(1) of the Charter. Accordingly, a Notice of Constitutional Question was prepared under the Constitutional Questions Act and signed by the Appellant. It was served on September 23, 2016, on MPIC, the Attorney General of Canada and the Attorney General of Manitoba. The Attorney General of Canada advised, by faxed letter dated October 6, 2016, that he would not be participating in these proceedings, and he did not do so.

Issues for Determination:

The issues that the Commission has to determine in this appeal are:

1. Whether the Appellant is entitled to benefits under the PIPP provisions of the MPIC Act in connection with the theft of his vehicle; and if not,

2. Whether the provisions of subsections 70(1) and 71(1) of the MPIC Act are of no force and effect, on the grounds that they offend sections 9 and 13 of the Code; and
3. Whether the provisions of subsections 70(1) and 71(1) of the MPIC Act are of no force and effect, on the grounds that they offend subsection 15(1) of the Charter.

Decision:

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

1. The Appellant is not entitled to benefits under the PIPP provisions of the MPIC Act in connection with the theft of his vehicle;
2. The provisions of subsections 70(1) and 71(1) of the MPIC Act do not offend sections 9 and 13 of the Code; and
3. The provisions of subsections 70(1) and 71(1) of the MPIC Act do not offend subsection 15(1) of the Charter.

Procedural Matters:

The evidence at the hearing consisted of the 14 documents on the indexed file, together with one exhibit that was submitted by counsel for MPIC at the hearing. No witnesses were called by any of the parties.

All of the parties provided oral arguments in support of their positions at the hearing. In addition, in advance of the hearing, the Appellant and counsel for the AG of Manitoba both provided written submissions, which were appreciated by the panel.

Following the conclusion of the hearing that was held on November 24, 2016, the Commission received an email from the Appellant on November 25, 2016, which contained an additional written submission to the panel.

As a general rule, once an appeal hearing is concluded, the Commission does not typically accept further submissions from the parties, unless it has indicated during the hearing that it would be prepared to do so, and even then, such submissions would need to be circulated to all parties for their response. The panel reviewed this matter, and determined that the panel had no record or recollection of having given leave to the Appellant to provide an additional submission after the conclusion of the hearing.

Rather than reject the submission out of hand, however, the panel forwarded the Appellant's additional submission to counsel for MPIC and counsel for the AG of Manitoba, for their review and consideration. The panel asked counsel to advise the Commission as to whether either party would have an objection to allowing the panel to receive and consider the Appellant's additional submission, and if not, as to whether either party would like to provide a written submission in response. After consideration, both counsel for the AG of Manitoba and counsel for MPIC indicated that they had no objection to the Commission receiving and considering the additional submission sent to the Commission by the Appellant on November 25, 2016, and neither would be providing the Commission with any submissions in response. As a result, the Commission accepted and considered the Appellant's November 25, 2016 submission.

Relevant Legislation:

The relevant provisions of the MPIC Act are as follows:

Definitions

70(1) In this Part,

"accident" means any event in which bodily injury is caused by an automobile;

...

"bodily injury caused by an automobile" means any bodily injury caused by an automobile, by the use of an automobile, or by a load, including bodily injury caused by a trailer used with an automobile ...

...

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.

The relevant provisions of the Code are as follows:

Definitions

1 In this Code

...

"social disadvantage" means diminished social standing or social regard due to

- (a) homelessness or inadequate housing;
- (b) low levels of education;
- (c) chronic low income; or
- (d) chronic unemployment or underemployment; (« désavantage social »)

...

"Discrimination" defined

9(1) In this Code, **"discrimination"** means

- (a) differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit; or
- (b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or
- (c) differential treatment of an individual or group on the basis of the individual's or group's actual or presumed association with another individual or group whose identity or membership is determined by any characteristic referred to in subsection (2); or

(d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).

Interpretation

9(1.1) In this Code, "discrimination" includes any act or omission that results in discrimination within the meaning of subsection (1), regardless of

- (a) the form of the act or omission; and
- (b) whether the person responsible for the act or omission intended to discriminate.

Applicable characteristics

9(2) The applicable characteristics for the purposes of clauses (1)(b) to (d) are

- (a) ancestry, including colour and perceived race;
- (b) nationality or national origin;
- (c) ethnic background or origin;
- (d) religion or creed, or religious belief, religious association or religious activity;
- (e) age;
- (f) sex, including sex-determined characteristics or circumstances, such as pregnancy, the possibility of pregnancy, or circumstances related to pregnancy;
- (g) gender identity;
- (h) sexual orientation;
- (i) marital or family status;
- (j) source of income;
- (k) political belief, political association or political activity;
- (l) physical or mental disability or related characteristics or circumstances, including reliance on a service animal, a wheelchair, or any other remedial appliance or device;
- (m) social disadvantage.

Discrimination on basis of social disadvantage

9(2.1) It is not discrimination on the basis of social disadvantage unless the discrimination is based on a negative bias or stereotype related to that social disadvantage.

...

Discrimination in service, accommodation, etc.

13(1) No person shall discriminate with respect to any service, accommodation, facility, good, right, licence, benefit, program or privilege available or accessible to the public or to a section of the public, unless bona fide and reasonable cause exists for the discrimination.

...

Onus of proof

52(1) In any proceeding under this Code, the onus of proving that a provision of this Code has been contravened lies on the person alleging the contravention, but the onus of proving

- (a) the existence of a bona fide and reasonable cause for discrimination; or
 - (b) that a requirement or qualification for an employment or occupation is bona fide and reasonable; or
 - (c) that reasonable accommodation has been made or is not possible in the circumstances; or
 - (d) the applicability of any other exception to the prohibitions enacted by this Code;
- lies on the respondent.

Onus to prove bias or stereotype re social disadvantage discrimination

52(2) When it is alleged that a person has engaged in discrimination on the basis of social disadvantage, the onus of proving that the discrimination is based on a negative bias or stereotype lies on the person making the allegation.

The relevant provisions of the Charter are as follows:

GUARANTEE OF RIGHTS AND FREEDOMS**Rights and freedoms in Canada**

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

...

EQUALITY RIGHTS**Equality before and under law and equal protection and benefit of law**

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

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

Submission for the Appellant:

The Appellant submitted that the true nature of the PIPP provisions of the MPIC Act is to provide wage loss protection for Manitobans, rather than to compensate people who suffer personal injuries. He argued that it is the loss of income, not the loss of body functionality, or pain and suffering, that MPIC looks at, when providing compensation to Manitoba drivers. He submitted that not even MPIC understands the true nature of the insurance protection under the MPIC Act. MPIC has confused the purpose of the legislation by defining the meaning of the term “accident” to require a bodily injury, which is not within the ordinary meaning of the term.

When the true nature of the MPIC Act is understood, the Appellant argued, not all Manitoba drivers have access to the same insurance protection, and this is unfair. Specifically, domestic drivers, and some commercial drivers, if they are bodily injured, do have access to basic insurance protection under the MPIC Act. However, commercial drivers who are not bodily injured are denied access to this same basic coverage when they suffer the loss or theft of their vehicle. The Appellant pointed out that commercial drivers are an identifiable group, and if they lose their vehicles, their ability to earn an income is taken away, thus lessening their human dignity and causing them to suffer discrimination. This discrimination has been in place since the PIPP provisions were enacted in 1994, and it is contrary to the Code and the Charter. Accordingly, the Appellant submitted that the provisions of the MPIC Act which would deny benefits to commercial drivers in those circumstances should be considered to be of no force and effect.

With specific reference to the Code, the Appellant argued that MPIC, by providing a program of insurance protection to all domestic drivers, but not to all commercial drivers, was guilty of discrimination within the meaning of section 9 of the Code. The Appellant submitted that this discrimination placed him at a social disadvantage within the meaning of that provision. He

noted that socially disadvantaged persons may also face discrimination on the basis of their source of income; these characteristics often intersect. He further argued that a negative bias or stereotype was placed upon commercial drivers in these circumstances, by the suggestion that they are unworthy of receiving the same insurance protection as bodily injured drivers.

The Appellant also addressed the provisions of the Charter. He submitted that MPIC, in applying the PIPP provisions of the MPIC Act, is bound to observe the equality rights provisions of section 15 of the Charter. He argued that the fact that commercial drivers in Manitoba do not have wage loss protection, while all other drivers in Manitoba do have such protection, constitutes discrimination on the basis of his employment status. He said that while this is not listed as a prohibited ground in subsection 15(1) of the Charter, this should be considered to be an analogous ground, and further that the immutability of such characteristics is not a definitive requirement in the determination of what constitutes an analogous ground. He further argued that this discrimination cannot be justified under section 1 of the Charter.

The Appellant submitted that the fundamental purpose of MPIC is to protect all Manitobans against auto-related loss. Therefore, any form of insurance protection, such as wage loss protection, which is provided by MPIC to Manitobans, should apply to all persons equally. He submitted that this must include wage loss protection for commercial drivers, even if they are not bodily injured.

The Appellant therefore submitted that he should be entitled to PIPP benefits under the MPIC Act in connection with the theft of his vehicle.

Submission for MPIC:

Counsel for MPIC addressed the issue of whether subsections 70(1) and 71(1) of the MPIC Act offend the Code, noting that counsel for the AG of Manitoba would address the Charter.

Counsel for MPIC submitted that the Internal Review decision was correct. He noted that it is not in dispute that the Appellant was not involved in an accident. The issue is whether the Appellant is nevertheless entitled to benefits under the PIPP provisions of the MPIC Act. The Internal Review decision held that the theft was outside the scope of the PIPP provisions. The Appellant submits that the provisions of the MPIC Act are discriminatory under the Code. Counsel argued that no discrimination has occurred. He noted that in order to offend the Code, not only would there have to be discrimination but also a prohibited form of conduct, which he submitted does not exist here.

Counsel pointed out that under the provisions of paragraph 9(1)(b) of the Code, the Appellant has the burden of showing that he suffered differential treatment on the basis of a particular characteristic enumerated in subsection 9(2) of the Code. The Appellant argued that he was treated differently on the basis of his “social disadvantage”, which is referred to in paragraph 9(2)(m). Counsel noted that “social disadvantage” is defined in section 1 of the Code to mean “diminished social standing or social regard” due to four specific factors. He submitted that none of those factors is applicable to the Appellant.

Counsel also addressed the issue of whether the Appellant may have been treated differently on the basis of his “source of income”, which is referred to in paragraph 9(2)(j) of the Code. Counsel argued that this characteristic was inapplicable in the Appellant’s circumstances. He submitted that the reference to “source of income” in paragraph (j) must be read in context with all of the other characteristics listed under subsection 9(2), which are all personal characteristics.

He submitted that if the legislature had meant to refer to occupation, that's what the legislature would have said. Rather, counsel submitted that the phrase "source of income" is intended to refer to social assistance. In support of this argument, he referred the panel to a fact sheet dealing with Discrimination and Rental Housing found on the website of the Manitoba Human Rights Commission, which provides that:

It is illegal for a landlord, rental agent, or a tenant who sublets to refuse to rent to someone on the basis of a protected characteristic, such as source of income (for example, income assistance).

In the alternative, counsel submitted that if the panel were to find that discrimination under section 9 of the Code had occurred, regard must be had to subsection 13(1), which prohibits discrimination in the provision of a service or program, unless bona fide and reasonable cause exists for the discrimination. He submitted that such reasonable cause exists here, and while it would be addressed more fully in the submission of counsel for the AG of Manitoba, he did touch on it. Counsel noted that the purpose of the PIPP provisions of the MPIC Act is to carve out a legislative scheme to provide for people who are injured in a motor vehicle accident and he submitted that it serves that purpose. The purpose is not to insure for any type of loss, as it would not be feasible to provide compensation for all losses, such as theft, particularly where loss of use insurance is available for purchase.

Counsel submitted that the Appellant cannot fit into any definition under section 9 of the Code and further, that even if he does fit into a definition, any discrimination was reasonable under section 13. Accordingly, the PIPP provisions of the MPIC Act do not offend the Code and the Internal Review decision should be upheld. Counsel submitted that the Appellant's appeal should be dismissed.

Submission for the AG of Manitoba:

Counsel for the AG of Manitoba noted that the issue of the constitutionality of the PIPP provisions of the MPIC Act does not arise if the Appellant's loss is due to the choice not to purchase loss of use insurance and not due to any possible differential treatment. Nevertheless, he addressed the issue of whether such provisions offend the Charter.

Counsel referred the panel to a recent Supreme Court of Canada case which dealt with section 15 of the Charter, *Quebec v. A*, [2013] 1 S.C.R. 61. In that case, Justice Abella articulated the test for determining whether there has been discrimination under section 15 as follows, at paragraph 323:

In sum, the claimant's burden under the *Andrews* test is to show that the government has made a distinction based on an enumerated or analogous ground and that the distinction's impact on the individual or group perpetuates disadvantage. ...

The enumerated grounds are listed in subsection 15(1), and include race, national origin, colour, religion, sex, age and mental or physical disability. Counsel pointed out that this list is not exhaustive and the courts have found a few other characteristics which are not listed there but are considered to be analogous grounds. He noted that these are personal characteristics, which are unchangeable, or immutable, except with great difficulty or personal cost, such as gender or religion. Counsel submitted that Canadian case law has found only three analogous grounds: citizenship (in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143), marital status (in *Quebec v. A*) and sexual orientation (in *Vriend v. Alberta*, [1998] 1 S.C.R. 493). He noted that to a limited extent, place of residence has also been considered an analogous ground in the context of aboriginal residence when looking at on-reserve versus off-reserve residence.

Counsel pointed out that the Appellant's position is based on the premise that his occupation, that of being a commercial driver (or possibly a non-injured commercial driver), is an analogous ground for the purposes of subsection 15(1) of the Charter. Counsel submitted, however, that "occupation" has been found not to be an analogous ground. He referred the panel in particular to the 2007 decision of the Supreme Court of Canada in *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, [2007] 2 SCR 391, which held that there was no discrimination under subsection 15(1) because, as the court found at paragraph 165:

... The differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are. ...

On this basis, counsel submitted, there would be no need to go further. However, counsel proceeded to review the second part of the test under subsection 15(1) as articulated in *Quebec v. A*. Specifically, he considered whether, if the panel found that there was a distinction, such distinction perpetuated a disadvantage. As a starting point, he submitted that it would be necessary to find a historical disadvantage to which commercial drivers were subject, thus laying the groundwork for something to be perpetuated. Counsel referred specifically to paragraph 332 of the *Quebec v. A* decision, which provides as follows:

The root of section 15 is our awareness that certain groups have been historically discriminated against, and that the perpetuation of such discrimination should be curtailed. If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory. ...

Counsel submitted that commercial drivers have not been subject to a historical disadvantage. He reviewed the history of the enactment of the PIPP legislation. He noted that the purpose of the legislation is to provide compensation for injuries suffered in motor vehicle accidents. Counsel referred to the transcript of the Legislative Assembly of Manitoba Debates and Proceedings (Hansard) from May 26, 1993, when the PIPP legislation was introduced. He noted that the Minister responsible for MPIC stated as follows when introducing the legislation:

This bill calls for the introduction of a no-fault injury compensation plan for Manitoba. It will provide accident victims with fair compensation for their injuries and, at the same time, help stabilize Autopac rates over the long run.

He noted that in *Krzysik v. MPIC*, 2008 M.B.C.A. 29, the Manitoba Court of Appeal held that the purpose of the PIPP provisions of the MPIC Act was to provide immediate benefits to individuals to compensate them for bodily injuries suffered in motor vehicle accidents. Counsel referred the panel to the 2003 Supreme Court of Canada case of *Nova Scotia (WCB) v. Martin*, [2003] 2 S.C.R. 504 and noted that if the distinction made by the legislation fits the purpose of the legislation, it is generally not considered to be discriminatory.

Counsel submitted that there had been no differential treatment of the Appellant based on an analogous ground under subsection 15(1) of the Charter. Even if there had been, such treatment was not discriminatory, because it did not perpetuate a historical disadvantage. In his written argument, counsel submitted further that even if there had been a breach of subsection 15(1), any such breach would be justified under section 1 of the Charter. He argued that limiting compensation to the real economic loss caused by car accidents is a pressing and substantial objective, and excluding persons who have not suffered an accident injury is rationally connected to this objective.

Counsel therefore submitted that the PIPP provisions of the MPIC Act do not offend the Charter, and the Appellant's appeal should be dismissed.

Discussion:

The onus is on the Appellant to show, on a balance of probabilities, that the decision of the Internal Review Officer of October 14, 2015, is incorrect. In particular, the Appellant needs to

show, on a balance of probabilities, that he is entitled to benefits for lost wages under the MPIC Act as a consequence of the theft of his vehicle. In order to do so, he needs to show that he falls within the PIPP provisions of the MPIC Act, or that subsection 70(1) and 71(1) of the MPIC Act are of no force and effect because they offend sections 9 and 13 of the Code or subsection 15(1) of the Charter.

The MPIC Act:

The PIPP provisions of the MPIC Act are embodied in Part 2 of that legislation. As noted above, subsection 71(1) of the MPIC Act provides as follows:

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.

An “accident” is defined in subsection 70(1) of the MPIC Act to mean “any event in which bodily injury is caused by an automobile”. The Appellant argued that to require an accident to include a bodily injury creates an expanded definition of the word “accident”, which is outside its ordinary meaning; however, he did not point the panel to any case law or rule of interpretation which would suggest that the legislature, in enacting legislation, is not free to define terms in enacting legislation, or which would require a narrow interpretation to be put on the word “accident”. On the contrary, section 6 of the Manitoba Interpretation Act, which applies to the interpretation of all provincial legislation, provides as follows:

Rule of liberal interpretation

6 Every Act and regulation must be interpreted as being remedial and must be given the fair, large and liberal interpretation that best ensures the attainment of its objects.

The panel has considered whether the definition of the word “accident” in subsection 70(1) is consistent with the object and purpose of the PIPP provisions of the MPIC Act. Both counsel for MPIC and counsel for the AG of Manitoba have argued that the purpose of these provisions is to provide compensation to Manitobans who are injured in motor vehicle accidents.

The Minister responsible for MPIC, when introducing these provisions in the Legislative Assembly, stated as follows (as recorded in Hansard, cited above):

Mr. Speaker, the changes proposed by this government and as outlined in Bill 37 represent another progressive step to reinforce confidence in Manitoba’s automobile insurance system. No-fault compensation, I believe, is a humane, fair and equitable solution to rising injury claim costs and one that I believe is supported by the majority of Manitobans. ...

...

In these amendments and through this bill, we are bringing a further dimension to how people will be reimbursed for their injuries as part of that automobile insurance plan. People may well choose to buy additional insurance, as they do today. ...

It seems clear, on the basis of these comments, that the intended purpose of the PIPP legislation was to provide compensation for automobile injuries. The Manitoba Court of Appeal, in *Krzysik v. MPIC* (cited above), had an opportunity to consider this issue, and came to the same conclusion as follows at paragraph 49:

Indeed, in *McMillan*, Helper J.A. said the legislature in the *Act* “created an all-encompassing insurance scheme to provide immediate compensatory benefits to all Manitobans who suffer bodily injuries in accidents involving an automobile” (at para. 54). ...

The Appellant argues that the purpose of the PIPP legislation is to provide wage loss protection, rather than to compensate people who suffer personal injuries. Certainly individuals who do suffer bodily injuries in motor vehicle accidents may receive compensation for lost income; however, the panel rejects the Appellant’s argument on this point and accepts the conclusion of

the Manitoba Court of Appeal regarding the purpose of the legislation. On this basis, the panel determines that the definition of “accident” contained in subsection 70(1) is consistent with the object and purpose of the PIPP provisions of the MPIC Act.

There is no dispute that the Appellant’s truck was stolen and that he did not suffer any bodily injury. Therefore, his circumstances do not meet the definition of “accident” contained in subsection 70(1) of the MPIC Act or fall within the terms of subsection 71(1) of the MPIC Act. Accordingly, the panel finds that the Appellant does not fall within the PIPP provisions of the MPIC Act.

The Appellant argues that even if he does not fall within the provisions of subsection 70(1) and 71(1), such provisions should be considered to be of no force and effect, because they are discriminatory as they offend both the Code and the Charter.

The Code:

The Appellant argued that due to the application of subsections 70(1) and 71(1) of the MPIC Act, he suffered discrimination under the Code. Specifically, he said that he suffered differential treatment under paragraph 9(1)(b) of the Code, on the basis of a characteristic listed under subsection 9(2): paragraph (m) “social disadvantage”. The Appellant argued that commercial drivers who are denied insurance protection are placed at a social disadvantage.

“Social disadvantage” is defined in section 1 of the Code, as follows:

"social disadvantage" means diminished social standing or social regard due to

- (a) homelessness or inadequate housing;
- (b) low levels of education;
- (c) chronic low income; or

(d) chronic unemployment or underemployment; (« désavantage social »)

The Appellant did not adduce any evidence to establish that he fell within this definition, and the panel finds that he did not establish, on a balance of probabilities, that he suffered differential treatment or discrimination on the basis of this characteristic.

The panel also considered whether the Appellant could be considered to have suffered differential treatment on the basis of his “source of income”, which is an enumerated characteristic found at paragraph 9(2)(j) of the Code, and further whether “source of income” could be considered to include occupation. Counsel for MPIC argued that in determining the meaning of the phrase “source of income” in subsection 9(2), it is necessary to read that phrase in the context of all the other characteristics listed in that subsection. Such characteristics include: ancestry, nationality, ethnic background, religion, age, sex, gender identity, sexual orientation, marital or family status, political belief and physical or mental disability. All of these characteristics have the trait of being personal and immutable, not able to be changed without difficulty or significant personal cost. The panel accepts the argument of counsel for MPIC that if the legislator had intended for “source of income” to include occupation, it could have said so, but it did not. In this context, the panel finds that a reasonable interpretation of “source of income” would not include occupation, but would instead be limited to the genesis of the income. For example, an information sheet entitled “You Can Support Human Rights in Rental Housing”, found on the website of the Manitoba Human Rights Commission, provides that:

It is also illegal for a landlord, rental agent, or a tenant who sublets, to refuse applicants for tenancy on the basis of a protected characteristic, such as source of income. For example, it is contrary to *The Code* to refuse to rent or sublet an apartment to someone because their source of income is social allowance.

The panel finds that the characteristic of “source of income” contained in paragraph 9(2)(j) cannot be stretched to include occupation. The Appellant not adduce any evidence to establish that he otherwise fell within the definition of “source of income”, and thus the panel finds that he did not establish, on a balance of probabilities, that he suffered differential treatment or discrimination on the basis of this characteristic.

In the alternative, if we are incorrect and the application of the PIPP provisions of the MPIC Act to the Appellant does result in discrimination under section 9 of the Code, it is necessary to consider subsection 13(1) of the Code, which prohibits discrimination in the provision of a service or program unless “bona fide and reasonable cause exists for the discrimination.” Counsel for MPIC argued that reasonable cause exists here.

The panel notes the comments of the Supreme Court of Canada in *Auton (Guardian ad litem of) v. B.C. (A.G.)*, [2004] 3 S.C.R. 657 at paragraph 42, referred to in the written submission of counsel for the AG of Manitoba:

... If a benefit program excludes a particular group in a way that undercuts the overall purpose of the program, then it is likely to be discriminatory: it amounts to an arbitrary exclusion of a particular group. If, on the other hand, the exclusion is consistent with the overarching purpose and scheme of the legislation, it is unlikely to be discriminatory. ...

As noted above, the purpose and scheme of the PIPP legislation is to provide compensation to persons who suffer bodily injuries in a motor vehicle accident. We accept counsel’s argument that it would not be feasible or economical for MPIC to insure all losses, such as theft, particularly where loss of use insurance is available for purchase. The panel notes that contained in the indexed file is a document which contains a description of the Special Risk Extension insurance (Loss of Use Endorsement), which is available for purchase from MPIC, to cover such losses. We conclude that to exclude from the PIPP scheme persons who do not suffer a bodily

injury is reasonable and not discriminatory. On that basis, we determine that the Appellant has not suffered discrimination under subsection 13(1) of the Code and has not shown that the PIPP provisions of the MPIC Act offend the Code.

The Charter:

The Appellant argued that due to the application of subsections 70(1) and 71(1) of the MPIC Act, his equality rights were violated under subsection 15 (1) of the Charter, which provides as follows:

Equality before and under law and equal protection and benefit of law

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

Although not specifically enumerated, the Appellant argued that his status as a commercial driver, or more particularly a non-injured commercial driver, was deserving of protection as a ground analogous to those listed under subsection 15(1).

Counsel for the AG of Manitoba argued that “occupation” has not been found to be an analogous ground for the purposes of section 15. The panel notes the comments of the Supreme Court of Canada in the 2007 *Health Services and Support* case (cited above), as follows, at paragraph 165:

The courts below found no discrimination contrary to s. 15 of the *Charter*. We would not disturb these findings. ... The differential and adverse effects of the legislation on some groups of workers relate essentially to the type of work they do, and not to the persons they are. Nor does the evidence disclose that the Act reflects the stereotypical application of group or personal characteristics. Without minimizing the importance of the distinctions made by the Act to the lives and work of affected health care employees, the differential treatment based on personal characteristics required to get a discrimination analysis off the ground is absent here.

As can be seen, in order to find an analogous ground, the court requires a personal, unchangeable characteristic to be present. This would not be the case with an occupation, or, in other words, “the type of work” that someone does. This concept of immutability is also reflected in a decision of the Alberta Court of Appeal, *Morrow v. Zhang*, 2009 A.B.C.A. 215, referred to in the written submission of counsel for the AG of Manitoba. In that case, the court stated as follows at paragraph 79:

Section 15 prohibits discrimination by reason of the claimant’s possession of a characteristic either listed in section 15(1), or analogous thereto. This notion is described by Professor Hogg at 55-22:

The limitation of s. 15 to listed and analogous grounds restricts judicial review to laws that distinguish between individuals on the basis of their inherent attributes as opposed to their behaviour. Section 15 has nothing to say about laws that make special provision for those who have committed a crime, made a will, entered into a contract, became insolvent, manufactured food or drugs, joined the legal profession, purchased a taxable good or service, etc. It is true that individuals may claim to be treated unfairly by the law for conditions that are their own responsibility, but this kind of claim even if fully justified does not warrant a constitutional remedy. ...

The panel concludes that “occupation” is not an analogous ground and therefore that the Appellant’s occupation as a commercial driver (or a non-injured commercial driver) does not fall within the parameters of subsection 15(1) of the Charter.

In the event that we are incorrect in this regard, and there has been a distinction made of the Appellant on the basis of an analogous ground within the meaning of subsection 15(1), the test as articulated in *Quebec v. A* requires an analysis of whether that distinction has perpetuated a disadvantage to which commercial drivers have historically been subject.

The Appellant has argued that non-injured commercial drivers have, since the introduction of the PIPP legislation, been ineligible for PIPP benefits, and this is a disadvantage. While it is true that

non-injured individuals have always been ineligible for PIPP benefits, this ineligibility is not restricted to commercial drivers. Any person who suffers the theft of his or her vehicle but does not suffer a bodily injury is not eligible for PIPP benefits. Therefore, no distinction is made by the legislation between non-injured commercial drivers and non-injured domestic drivers; they are both subject to the same fate. The panel finds that this is consistent with the purpose of the MPIC legislation, as is discussed above. The Appellant has not established that commercial drivers, to the exclusion of other drivers, have been subject to a historical disadvantage. Therefore, the panel finds that the provisions of the PIPP legislation do not offend subsection 15(1) of the Charter.

In the alternative, in the event that we are incorrect and there has been a breach of subsection 15(1), we have considered the application of section 1 of the Charter, which would permit a breach in circumstances where it can be demonstrably justified as a reasonable limit in a free and democratic society. The Supreme Court of Canada recently commented on the test under section 1 in *Quebec v. A* as follows at paragraph 434:

The state bears the burden of establishing justification on a balance of probabilities. The state must demonstrate (1) a sufficiently important objective to justify an infringement of a *Charter* right, (2) a rational connection between that objective and the means chosen by the state, (3) that the means are minimally impairing of the right at issue, and (4) that the measure's effects on the *Charter*-protected right are proportionate to the state objective: *R. v. Oakes*, 1986 CanLII 46 (SCC), [1986] 1 S.C.R. 103.

As noted above, the purpose of the PIPP legislation is to provide compensation to persons who suffer bodily injuries in a motor vehicle accident. The panel considers this purpose to be of sufficient importance and notes the following comments from *Morrow v. Zhang* at paragraph 110:

Mandatory automobile insurance is a public policy choice which reflects the societal interest in ensuring the availability of money to compensate injured persons for losses incurred as a result of motor vehicle accidents: Brown, *Insurance Law in Canada*, vol.

1, looseleaf (Toronto: Thomson Carswell, 2006) at 1-7. ... The taxpayers who pay insurance premiums are not an infinite source of funds, and ensuring adequate compensation and affordable and accessible insurance is clearly a matter of public policy.

The PIPP provisions exclude from their scope persons who have not been injured in a motor vehicle accident. The panel finds that this exclusion is rationally connected to the objective of providing compensation to those who have been bodily injured in a motor vehicle accident. The panel notes that loss of use insurance is available for purchase, for situations where there has been a loss of a vehicle but no bodily injury. The panel finds that accordingly, subsections 70(1) and 71(1) are minimally impairing of section 15 and are a proportionate response. Therefore, we conclude that any breach which may have occurred under section 15 of the Charter is justified under section 1. On that basis, we determine that the Appellant has not shown that the PIPP provisions of the MPIC Act offend the Charter.

Conclusion:

Accordingly, after a careful review of all the documentary evidence filed in connection with this appeal and after careful consideration of the submissions of the Appellant and counsel for MPIC and counsel for the AG of Manitoba and taking into account the provisions of the relevant legislation, the panel finds as follows:

1. The Appellant is not entitled to benefits under the PIPP provisions of the MPIC Act in connection with the theft of his vehicle;
2. The provisions of subsections 70(1) and 71(1) of the MPIC Act do not offend sections 9 and 13 of the Code; and
3. The provisions of subsections 70(1) and 71(1) of the MPIC Act do not offend subsection 15(1) of the Charter.

Disposition:

Therefore, the Appellant's appeal is dismissed and the decision of the Internal Review Officer of October 14, 2015, is upheld.

Dated at Winnipeg this 15th day of February, 2017.

JACQUELINE FREEDMAN

NIKKI KAGAN

BRIAN HUNT