Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-00-129

PANEL:	**Dr. Lorna Turnbull, Chair** **Ms Jacqueline Freedman** **Mr. Paul Taillefer**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf; Manitoba Public Insurance Corporation ("MPIC") was represented by Mr. Morley Hoffman on the first day of the hearing, but was not present on the second day of the hearing.**
HEARING DATE(S):	**April 25 and October 16, 2018**
ISSUE(S):	**Preliminary Issue:** **Where the Appellant has requested a French language hearing, is MPIC required to attend at the Commission with counsel prepared to conduct the hearing in French?** **Main Issue:** **1. Is the Appellant's appeal regarding his claim for reimbursement for the purchase of medication moot?** **2. Even if his appeal is moot, should the Commission exercise its discretion to hear the Appellant's appeal?**
RELEVANT SECTIONS:	**Paragraph 136(1)(d) and sections 150 and 171 of The Manitoba Public Insurance Corporation Act ("MPIC Act") and Section 38 of Manitoba Regulation 40/94.**

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

Reasons For Decision

Background:

[Text deleted] (the "Appellant"), was struck by a car while riding his bicycle on September 24, 1994. He attended to the emergency room of [hospital] and received treatment. He missed two

days of work as a result of the motor vehicle accident (MVA). Approximately two months later he was terminated by his employer. The Appellant attributed this job loss to the MVA. The Appellant made an unsuccessful claim to MPIC for Income Replacement Indemnity (IRI) benefits, which he appealed to this Commission. A decision denying the appeal was issued on November 6, 1998 (AC-98-90) and the Appellant filed an application for leave to appeal with the Manitoba Court of Appeal on [text deleted].

In October of 1999, the Appellant also asked MPIC to reimburse him $34.77 for the prescription drug Celecoxib, which he had purchased to treat left elbow lateral epicondylitis. This request was denied by the case manager in March of 2000, and in October of the same year an Internal Review Officer (IRO) upheld the decision of the case manager, finding there was no evidence of causation linking the subsequently developed left elbow lateral epicondylitis to the MVA. The Appellant filed a Notice of Appeal, in French, to this Commission on November 23, 2000 and it is this appeal which is the subject of these Reasons for Decision.

The present appeal was held in abeyance while the leave application regarding the IRI benefits was heard and decided. In the spring of 2013, MPIC filed a motion for an order dismissing the Appellant's application for leave to appeal to the Court of Appeal for delay, which was heard on [text deleted]. The motion was granted, and the Appellant's application for leave to appeal was denied by the Manitoba Court of Appeal on [text deleted]. The Appellant's subsequent application for leave to appeal to the Supreme Court of Canada was dismissed on [text deleted].

The present appeal resumed in 2016, when the Commission (AICAC) began communications with MPIC to set it down for a case conference, which was ultimately scheduled for June 27,

2017. We note that the Commission has communicated in writing and by telephone with the Appellant in French, as he has requested. We have communicated with MPIC in English. All case conferences and hearings, at the Appellant's request, were to be held in French.

At the June 27, 2017, case conference, the panel and the Appellant spoke French. Counsel for MPIC, who appeared without a translator, spoke English, and the panel translated his comments as necessary for the Appellant. At that case conference, the parties confirmed that the only outstanding issue concerned the Appellant's entitlement to reimbursement of $34.77 for the purchase of Celecoxib. Also at the case conference, the Appellant underlined again for the Commission that he wanted his right to be heard in French to be fully respected.

On August 2, 2017, MPIC sent a cheque for $50.66 to the Appellant. A copy of the accompanying letter was sent to the Commission, in English. The Commission was subsequently advised by counsel for MPIC that the letter sent by MPIC to the Appellant was written in French. The relevant portions of the accompanying letter read as follows:

> … We are not prepared to spend further rate payers' money by hiring a lawyer, and see no reason to incur the expense of a one or two day hearing.
>
> Instead we are enclosing herein a cheque for $34.77 plus interest since March 23, 2000 in the amount of $15.89, which makes a grand total of $50.66.
>
> We are paying this to you only to resolve this outstanding appeal. We are not admitting liability or causation of any kind. We are only paying this minimal expense to avoid the costs of a hearing.
>
> We will be submitting a letter to AICAC to the effect that AICAC no longer has jurisdiction to deal with this appeal and that they must order the appeal be dismissed if you are still unwilling to withdraw the appeal. It will be our position that as the prescription expense has been paid there is no issue for AICAC to deal with any longer.
>
> Please reconsider and withdraw your appeal to save everyone further time and expense.

In a letter to the Commission dated August 9, 2017, MPIC took the position that the matter involving the Appellant was moot and that the Commission had no further jurisdiction. Counsel for MPIC also indicated as follows:

> Although I had indicated earlier MPI would be retaining a French speaking lawyer to handle this going forward, in light of our decision to resolve this we will not be retaining such counsel. Moreover, it is not our intention to attend any further proceedings concerning this matter as there is nothing further in issue.

On August 17, 2017, the Commission wrote to the Appellant, asking him to indicate whether he agreed that the Commission no longer had jurisdiction to hear the matter. He did not agree, and declined to sign a notice of withdrawal in the matter. Accordingly, by letter dated October 26, 2017, the Commission notified the parties that a hearing would be scheduled, that it would be conducted in French, and that it would be restricted to the issue of the Commission's jurisdiction and would not deal with the merits of the Appellant's appeal.

The Commission also indicated that translation/interpretation assistance could be provided, stating in its letter of October 26, 2017 "If either party anticipates the need for translation or interpretation assistance in advance of or at the hearing, please advise the Commission as soon as possible." The parties were also invited, but not required, to provide written submissions. All submissions were required to be in French. MPIC provided a written submission, dated April 5, 2018, in both official languages. The Appellant did not provide any written submissions. A revised indexed file with all documents in both official languages was prepared.

In advance of the hearing, the Commission wrote to the Appellant subsequent to a telephone conversation. In the letter, dated March 6, 2018, the Commission confirmed:

> … that the Hearing will be in French. The Hearing Chair and the panellists all speak French, although the MPIC lawyer does not.
>
> During our telephone conversation, you agreed that for the comfort of the panellists, an interpreter can be present at the Hearing to interpret… as necessary. Please note that in spite of the presence of the interpreter, the primary language of the Hearing will be French and the Chair will address the parties in French.

The Appellant responded by telephone on March 14, 2018 to state his agreement with the presence of the interpreter. He also registered his objection to the paragraph in the letter that identified that the MPIC lawyer does not speak French. His responses were documented in a letter to him from the Commission, dated March 15, 2018. Copies of both letters were provided to counsel for MPIC.

Issues:

Based on the foregoing, a preliminary issue arose on the first day of the hearing, as follows:

> Where the Appellant has requested a French hearing, is MPIC required to attend at the Commission with counsel prepared to conduct the hearing in French?

In addition to the preliminary issue, the main issue which requires determination deals with the mootness of the Appellant's appeal, as follows:

1. Is the Appellant's appeal regarding his claim for reimbursement for the purchase of the medication Celecoxib (Internal Review Decision dated October 16, 2000 (French) and October 18, 2000 (English)), moot? and

2. Even if the Appellant's appeal is moot, should the Commission exercise its discretion to hear the Appellant's appeal?

Decision:

For the reasons set out below, the Commission finds as follows:

Regarding the preliminary issue: In the specific circumstances of this case, MPIC was required to attend at the hearing with counsel prepared to conduct the hearing in French.

Regarding the main issue:

1. The Commission finds that the Appellant's appeal is moot; and
2. The Commission declines to exercise its discretion to hear the Appellant's appeal.

Preliminary Issue:

The first day of the hearing was held on April 25, 2018, before a panel of three commissioners, all of whom were competent to hear the appeal in French. Two qualified interpreters were present, to assist the panel, if the need arose. They were [interpreter #1], Head, Interpretation Section, and [interpreter #2], Interpreter/Translator, both from Manitoba Translation Services. Mr. Morley Hoffman, an English speaker who was representing MPIC, appeared with [text deleted] to assist him. It was not made clear to the panel whether [text deleted] was an interpreter; she did not provide any qualifications to the panel. Mr Hoffman had not requested interpretation services to be provided. Although [text deleted] was present, counsel for MPIC did not appear to be seeking her input to assist him in understanding what was being said either by the Appellant or by the Chair during the proceeding. When counsel for MPIC spoke to the panel, he communicated in English, and did not ask [text deleted] to translate for him. The panel spoke to him in French, and translated his comments into French for the Appellant as necessary.

At the opening of the hearing, the Appellant made a preliminary objection to the fact that counsel for MPIC appeared at the hearing unprepared to conduct the matter in the French language, asking that the Commission adjourn the hearing until MPIC could appear with a lawyer able to proceed in French.

The purpose of the April 25, 2018 hearing was to hear from the parties regarding MPIC's motion that the Appellant's appeal was moot. However, the Commission was first required to address the Appellant's preliminary objection before it could hear from the parties on that motion.

In support of his objection, the Appellant argued that the duty of the Commission to provide service in French applies to MPIC as much as to the Commission and requires that MPIC should have a French speaking lawyer to represent the Corporation. He referred to the decision of the Manitoba Court of Appeal in his own case, where Justice Monnin stated "Prior to the beginning of the hearing of this matter, [the Appellant] confirmed that he was no longer pursuing what the parties have termed the constitutional issue; namely, the right to be heard in French by the AICAC. I note that since 2001, the AICAC has the ability to hear a party in French." The ability of the Commission itself to serve the Appellant in French is not in question.

Counsel for MPIC noted, in English, that he had submitted, in advance of the hearing, a written submission in English and in French. Although the panel offered counsel for MPIC the opportunity to respond to the Appellant's objection, counsel for MPIC stated that he had no comments to make beyond what was in his written submission. The Chair asked counsel if he understood what was being argued by the Appellant. At this point, [text deleted] did appear to be

providing some type of translation service to counsel, as the Chair was speaking. Counsel responded to the Chair by saying that he was not planning on making any oral submissions at the hearing. The Chair pressed further, saying that the Appellant raised an objection which was not addressed within the written material of MPIC, and counsel repeated that he did not intend to say anything beyond what he submitted in writing, in advance of the hearing.

The panel took a brief recess, to consider the Appellant's objection in light of the refusal of MPIC to respond. In the normal course of a dispute, if an objection is raised by one party, the other party will respond. In this case, MPIC declined to make any response. As a result, the Commission sustained the Appellant's objection.

As a result of the decision regarding the Appellant's objection, the Commission determined that it would be necessary to reconvene the hearing on another date when MPIC could appear with counsel who would be capable of conducting the hearing in the French language. The Chair indicated that the Commission wished to pose some questions to MPIC's counsel with regard to its written submission on the mootness issue. Counsel for MPIC asked why it was "necessary for MPIC to have a lawyer here" and the Chair advised that we would be reconvening the hearing in French to determine MPIC's motion to dismiss the appeal as moot. Counsel for MPIC responded "Whatever, okay."

Although the panel made its decision regarding the Appellant's objection on the first day of hearing, both the Appellant and MPIC addressed this issue subsequently. Accordingly, the Commission considers it necessary to set out their positions and to discuss this matter more fully.

Submission for the Appellant regarding the Preliminary Issue:

Throughout his interactions with the Commission, the Appellant asserted his right to be heard in the language of his choice. In his formal submissions before the Commission, he asserted that MPIC is supposed to provide service of equal quality in both languages, but they have not attended before the Commission with a French-speaking lawyer. The Appellant further alleged that he has never been able to phone and speak to any lawyer at MPIC who speaks French, so the decision of the Court of Appeal has not been respected.

On the second day of the hearing, the Appellant again raised the issue of his language rights, which he argued were not respected by MPIC. He stated that counsel for MPIC appeared in April unprepared to proceed in French and failed to appear at all at the October hearing. This, he said, was not respecting his right to have services provided in French. He argued that the Commission and MPIC have an obligation to provide services equally in French and English, and asserted that the decision of the Court of Appeal in his previous case affirmed that

Submission for MPIC regarding the Preliminary Issue:

MPIC did not make any direct submissions with respect to the Appellant's language rights.

MPIC advised the Commission, by letter dated August 16, 2018, that counsel would not be attending any further hearings in this matter. MPIC also stated in the letter:

> With respect, we do not believe that the Commission has the jurisdiction or the authority to direct, for this (or any other) hearing before it, any attributes a lawyer representing MPI must have, including the ability to speak French.

The Commission interpreted this comment as a submission directed at the Appellant's objection made on the first day of hearing, and advised MPIC that the time for making such a submission would have been at the April 25, 2018 hearing, when submissions were invited in response to the objection, and prior to the panel having made its ruling. Nonetheless, by letter dated August 29, 2018, the Commission advised MPIC of the reconvened hearing date with a formal notice of the hearing, and asked MPIC to advise should its position change in that regard. MPIC did not attend on the second day, October 16, 2018, and so the hearing proceeded in MPIC's absence.

Discussion regarding the Preliminary Issue:

The Appellant has chosen to have his appeal at the Commission heard in French. On the first day of the hearing, he made a preliminary objection to the fact that counsel for MPIC appeared at the hearing unprepared to conduct the matter in the French language, asking that the Commission adjourn the hearing until MPIC could appear with a lawyer able to proceed in French. Although the Commission gave counsel for MPIC several opportunities to respond to this objection at the hearing, counsel chose to offer no response at that time, and MPIC did not appear at the second day of hearing. The Appellant has asserted that MPIC has not respected his language rights.

We note that MPIC seems to have placed great emphasis on the fact that the amount at issue in this appeal is small, as they said in their letter to the Appellant of August 2, 2017, a "grand total of $50.66", and further, "We are only paying this minimal expense to avoid the costs of a hearing". However, the Commission notes that the amount in issue has, in other cases, not been a determining factor in matters where language rights are at issue. See, for example, the decision of the Manitoba Court of Appeal in *Forest v. Manitoba (Attorney General)*, 98 DLR (3d) 405,

affirmed [1979] 2 S.C.R. 1032, which concerned a $5 parking ticket and the validity of the Manitoba Official Languages Act.

Since it joined Canada in 1870, French and English have held equal status in Manitoba, at least in law, if not in fact. The *Manitoba Act - Enactment No. 2* (An Act to amend and continue the Act 32 and 33 Victoria chapter 3; and to establish and provide for the Government of the Province of Manitoba, 1870, 33 Vict., c. 3 (Can.) [*12th May, 1870*]) provides in section 23:

> **23. English and French languages to be used.**
> Either the English or the French language may be used by any person in the debates of the Houses of the Legislature, and both those languages shall be used in the respective Records and Journals of those Houses; and either of those languages may be used by any person, or in any Pleading or Process, in or issuing from any Court of Canada established under the British North America Act, 1867, or in or from all or any of the Courts of the Province. The Acts of the Legislature shall be printed and published in both those languages.

This language mirrors the language in section 133 of the *Constitution Act, 1867* which has been interpreted by the Supreme Court of Canada to support individuals' substantive rights. This has recently been reaffirmed in *Mazraani v. Industrial Alliance Insurance and Financial Services Inc.*, 2018 SCC 50. In paragraph 20 the Court stated as follows:

> English and French are the official languages of Canada. There are a number of laws that protect an individual's right to speak in the official language of his or her choice. In *R. v. Beaulac*, [1999] 1 S.C.R. 768, this Court established the principles that must guide the interpretation of any right that is intended to protect the equal status of Canada's official languages and to ensure full and equal access to the country's institutions by Anglophones and Francophones alike (paras. 15 and 25). First of all, language rights are substantive rights, not procedural rights (para. 28). This means that the state has a duty to ensure that they are implemented (para. 24), and also that they cannot be interfered with (para. 28). Next, "[l]anguage rights must in all cases be interpreted purposively, in a manner consistent with the preservation and development of official language communities in Canada" (para. 25 (emphasis in original)). Finally, language rights are distinct from the principles of fundamental justice, which require, for example, that an accused be able to understand and be understood at his or her trial (paras. 25 and 41). These

> rights have a purpose that is unique to them, namely the preservation and protection of "official language communities where they do apply" (para. 25). They do not relate to the person's ability to speak one language or another. Indeed, those who are bilingual are no less entitled to exercise them than those who are unilingual.

We take particular note that the Court refers to the "equal status of Canada's official languages and … full and equal access to the country's institutions by Anglophones and Francophones alike" (emphasis added). We interpret the use of the word "institutions" here to be broader than courts, and to be broad enough to include administrative tribunals.

In an earlier decision specifically concerned with the rights of minority language French speakers in Manitoba, the Supreme Court traced the history of these vital protections (*Re Manitoba Language Rights*, [1985] 1 S.C.R. 721 (per curiam)) at paragraphs 5 and 7:

> Section 23 of the *Manitoba Act, 1870* was the culmination of many years of co-existence and struggle between the English, the French, and the Metis in Red River Colony, the predecessor to the present day Province of Manitoba. Though the region was originally claimed by the English Hudson's Bay Company in 1670 under its Royal Charter, for much of its pre-confederation history, Red River Colony was inhabited by anglophones and francophones in roughly equal proportions. …
>
> …
>
> … The Bill passed through Parliament with no opposition from either side of the House, resulting in s. 23 of the *Manitoba Act, 1870*. In 1871 this Act was entrenched in the *British North America Act, 1871* (renamed *Constitution Act, 1871* in the *Constitution Act, 1982*, s. 53). The *Manitoba Act, 1870* is now entrenched in the Constitution of Canada by virtue of s. 52(2) (*b*) of the *Constitution Act, 1982*.

In current times, these rights are no less important. In furtherance of supporting these rights, in 2016 the Government of Manitoba enacted The Francophone Community Enhancement and Support Act, C.C.S.M. c. F157, the preamble of which states:

> WHEREAS a vibrant Francophone community has been present in Manitoba since the 18th century;
>
> AND WHEREAS, under the authority of section 23 of the *Manitoba Act, 1870*, French and English enjoy equal status in the legislative and judicial spheres in Manitoba;
>
> AND WHEREAS the government has adopted a policy whereby government departments and certain government agencies and other governmental bodies provide French language services in designated bilingual areas; …

By virtue of the definitions in section 1, both the Commission and MPIC are covered by the Act. Section 3 requires regard for the principle of "Active Offer" which is described as follows:

> **Active offer:** The active offer concept is the cornerstone for the provision of French language services whereby these services are to be made evident, readily available and easily accessible to the public and are to be of comparable quality to English language services.

Finally, section 18 provides "For greater certainty, nothing in this Act limits or derogates from any existing language rights."

In *Mazraani* (above), the Supreme Court reaffirmed the importance of language rights. At paragraphs 1 and 3, the Court stated:

> In Canada, the right to speak in the official language of one's choice in certain courts is a fundamental and substantive right that is recognized in both constitutional and quasi-constitutional laws. Any person who appears in the courts in question must be able to exercise this right freely. When a person asks a judge of one of these courts for permission to speak in the official language of his or her choice, the judge's answer must be yes.
>
> ...
>
> … In our opinion, a purposive interpretation of the language rights in question leads to the conclusion that judges are required to participate actively in protecting them. …

The Court went on to state at paragraph 32:

> With this in mind, it should be noted that it is the judge … who is primarily responsible for upholding the language rights of witnesses, of parties and of any individual who appears before him or her. … because language rights are "a fundamental tool for the preservation and protection of official language communities where they do apply" (*Beaulac*, at para. 25) and must be interpreted in a way that supports the achievement of that objective. …

The Court also acknowledged the additional burden on judges to protect language rights when a party appears without counsel (at paragraph 39). The court concluded at paragraph 42:

> … The right is not a right to speak in one's mother tongue or in a language that the court deems to be the person's language: it is the right to make a personal *choice*. If what the right protected was merely speaking in one official language or the other, it would protect nothing: a person *must* speak a language in order to talk and *must*, at least summarily, choose one of the two languages before speaking. What the courts concerned must protect is not just the fact of speaking in one of the official languages, but also the free and *informed* nature of the choice to speak in one of them rather than the other.

This was effectively the situation that confronted the Commission in this case. The Commission, although not a court, also bears the responsibility to ensure that the language rights of all who appear before it are respected. Here, the Appellant requested a hearing in the French language, and objected to the fact that MPIC appeared at the hearing unprepared to conduct the hearing in the official language of his choice. Counsel for MPIC failed to respond to the objection of the Appellant.

It is particularly relevant that in 2006, the Government of Manitoba announced a policy to promote the appointment to quasi-judicial tribunals of a greater number of persons fluent in both English and French. The fact sheet issued in 2006 states "The Government of Manitoba has decided within the scope of its French-Language Services Policy to increase the capacity of

quasi-judicial tribunals to hear citizens directly in the official language of their choice." (Fact Sheet – Appointment of a Greater Number of Bilingual Individuals to Quasi-Judicial Tribunals in Manitoba https://www.gov.mb.ca/fls-slf/pdf/quasi-judiciaires.pdf accessed January 29, 2019). The fact sheet further states that the Commission, as one of several specifically named tribunals in the policy "will have the capacity to hold hearings in which each tribunal member will be able to communicate with parties, witnesses and counsel directly in French or English without the assistance of a translator." The French-Language Services Policy states that Manitobans have the right "to use either official language before administrative tribunals." (French-Language Services Policy – May 2017 https://www.gov.mb.ca/fls-slf/pdf/fls_policy_en20170908.pdf accessed January 29, 2019).

As indicated above, faced with the Appellant's objection, and with no response from MPIC, the Commission sustained the Appellant's objection and determined that it would be necessary to reconvene the hearing on another date, when MPIC could appear with counsel who would be capable of conducting the hearing in the French language.

Conclusion regarding the Preliminary Issue:

On the basis of the French-Language Services Policy, the Fact Sheet, and the legislatively mandated principle of Active Offer, as well as Supreme Court's decision in *Mazraani*, we find that the Commission has the responsibility to give full effect to and participate actively in protecting the language rights of appellants appearing before it. To achieve this, MPIC, as a crown corporation which is an automatic party in all cases that are heard by the Commission, must be able to fully participate in the Commission's process, in the official language of the appellant's choice. Otherwise, the right of appellants to be heard at

the Commission in the language of their choice would be hollow. In the specific circumstances of this case, and for the reasons set out above, the Commission finds that MPIC was required to attend at the second day of hearing with counsel prepared to conduct the hearing in French.

The Commission agrees with the Appellant that the conduct of MPIC throughout this matter has reflected a disregard for the Appellant's language rights. The failure of counsel for MPIC to respond at the hearing to the preliminary objection raised by the Appellant, and the failure of MPIC to appear at the reconvened hearing, demonstrate an attitude that is not consonant with respect for the Appellant's language rights or with the duty imposed on MPIC under section 150 of the MPIC Act to "advise and assist claimants and … endeavour to ensure that claimants are informed of and receive the compensation to which they are entitled…".

Main Issue:

As noted above, the main issue for consideration by the Commission was MPIC's motion that, due to its payment to the Appellant of $50.66, the Appellant's appeal was now moot.

The Commission advised MPIC by letter dated July 11, 2018, that we had reviewed its April 5, 2018 written submission in advance of the April 25, 2018 hearing, and that the Commission had some questions with regard to its submission which MPIC had not come prepared to answer at the April 25, 2018 hearing. In particular, the Commission suggested that there may be more recent authorities that the parties should review and comment upon at the reconvened hearing (to be held October 16, 2018). Accordingly, the Commission provided those authorities to the parties (in French and English), for the parties' consideration with our July 11, 2018 letter.

It was also with this letter that the revised Supplemental Index (in French and English) was sent to the parties. The Commission asked that MPIC be represented by counsel who could conduct the hearing in French, and advised that the purpose of the second day of hearing was to hear from the parties regarding MPIC's motion that the Appellant's appeal is moot. The parties were asked to be prepared to address MPIC's April 5, 2018 submission, as well as the authorities sent by the Commission.

Counsel for MPIC did not attend on the second day of hearing. As noted above, MPIC had advised, by letter dated August 16, 2018, that counsel would not be attending any further hearings in this matter. Also as noted above, the Commission advised MPIC of the second day of hearing by letter dated August 29, 2018. That letter also stated as follows:

> … Regardless of whether MPIC sends a representative to the hearing, MPIC is still welcome, as indicated in our July 11 letter, to review and comment upon the more recent authorities included with that letter and now found in the Supplemental Index. If MPIC would like to provide an additional written submission (in French) prior to the October 16 hearing, that additional submission must be provided at least 30 days in advance of the hearing date, in order that a copy can be provided to [the Appellant].

Counsel for MPIC did not submit a further written submission to respond to the authorities provided by the Commission. Accordingly, on the second day of hearing, the Commission considered the April 5, 2018 written submission of MPIC and heard the oral submission of the Appellant on this issue. (Also, the Appellant made a submission regarding his language rights, which was dealt earlier in these Reasons.)

Submission for MPIC regarding the Main Issue:

In its written submission dated April 5, 2018, MPIC argued that the Commission "has no jurisdiction over this matter as the issue was resolved. There is no relief which can be granted" to the Appellant. MPIC stated the issue was for "reimbursement of a $34.77 medication expense incurred over 17 years ago. The Appellant has been reimbursed for this expense, with interest. Accordingly, there is no issue in dispute and AICAC has no jurisdiction." Citing from Mullan, Administrative Law (3rd ed 1996) § 671 MPIC stated that "if there is no live controversy, there is no relief that can be granted". Relying upon *Borowski v Canada* (AG) (1989) 1 S.C.R. 342 and *Wiebe v Alberta* (Labour Relations Board) 2001 204 DLR (4th) 169 (Alta CA), MPIC maintained that an appeal is moot if the issue is resolved, and a court should thus decline to decide it. MPIC argued that AICAC has accepted and applied these principles in previous cases (AC-09-144), that the issue in this appeal was not of any significant public importance and that the Commission should therefore decline to decide the case and dismiss the Appellant's appeal.

Submission for the Appellant regarding the Main Issue:

The Appellant argued that the questions between himself and MPIC have not been resolved, as MPIC has not admitted liability. The Appellant pointed to MPIC's letter of August 2, 2017, which stated "We are not admitting liability or causation of any kind" in support of his position. He noted that in the Commission's decision referred to by MPIC in their written submission (AC-09-144), MPIC had admitted liability, and as they have not done so in his case, that decision is not applicable. The Appellant also spoke about the cases that the Commission sent to the parties in advance of the hearing. With respect to *Sprague v. Rogers Blue Jays Baseball Partnership* (2017 HRTO 1339), which found that the dispute between the parties was not moot, he said his case was comparable because in both instances the opposing party did not accept responsibility, and therefore a hearing was required to determine that issue. He stated that the

issue in *Collins v. Abrams* (2002 BCSC 1774) was moot because one of the parties was deceased, and since that is not the case in the present appeal, his appeal is not moot. With respect to the excerpt on mootness from *Judicial Review of Administrative Action in Canada,* (Brown and Evans (2017)), the Appellant suggested that a resolution of the issue between the parties in his case would not be futile and could be implemented to cause benefits to be paid to him.

The Appellant also submitted that the amount owing to him as a result of his injuries has not yet been settled. When asked by the Chair if he had other receipts relating to his elbow injury, he said he did not have any other receipts, but he asserted that he has ongoing problems with his elbow (although he did not specify what these were). He also said that he wants to claim IRI benefits in respect of the elbow injury. At this point the Appellant produced the Emergency Record from [hospital] from his 1994 MVA, a report that had never previously been included in the Appellant's file, together with two accompanying letters from the hospital, dated respectively February 25, 1999 and May 8, 2017. After a brief recess, the Commission admitted the report and the letters and marked the documents as Exhibit 1, and they are attached to these Reasons as Appendix A. The Appellant asserted that the Emergency Record clearly shows that he sustained multiple injuries in the MVA, and since the medical review conducted by MPIC dealing with his IRI benefits never considered this report, that review could not be relied upon to deny him benefits. When asked by the panel if the Emergency Record showed an injury to the Appellant's left elbow, he responded "I don't know, it is not legible." He further asserted that MPIC's medical review also failed to consider the reports of a physiotherapist who treated him in 1994 and 1995, who wrote clearly that this was an injury that would never heal. The Appellant thus asserted that his appeal is not moot because his injury is still present even now.

The Appellant went on to argue that he wants IRI benefits, and that MPIC has refused to accept responsibility for IRI. When reminded by the panel that the matter of IRI benefits had been finally decided by the decision of the Court of Appeal in [text deleted], the Appellant responded that it wasn't correctly decided, and that he had other additional evidence that he wasn't able to submit because he had not been heard in French throughout the process of that appeal. As a consequence, the Appellant suggested that another matter still in issue between himself and MPIC is whether or not MPIC has any remaining responsibility towards him for the injury he sustained.

In particular, the Appellant argued that there are additional benefits he is seeking which have not yet been resolved by MPIC. He maintained that MPIC should cover all of his other costs since the accident, including his legal costs. He suggested that under Personal Injury Protection Plan, there should be something to make up for the wrong he suffered, including his loss of quality of life. When he was asked, however, if he had any other medical receipts, or evidence of any other expenses related to his elbow injury, he replied that he did not, other than his expenses for lawyers.

Discussion regarding the Main Issue:

MPIC has made a motion that the Appellant's appeal is moot, and therefore that his appeal should be dismissed. The Supreme Court of Canada stated in the leading case on this issue (*Borowski v. Canada (Attorney General)* [1989] 1 S.C.R. 342 at 353):

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of

> the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. … The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice.

As Justice Smith outlined in *Collins v. Abrams*, 2002 BCSC 1774 (at paragraph 6), in interpreting *Borowski*, the first question to be answered is whether the required tangible and concrete dispute has disappeared such that the issues have become academic. The second question to be answered, even if a case is moot, is whether the court should nevertheless exercise its discretion to hear the case. Three factors to be considered in exercising such discretion include the adversarial nature of the dispute, the judicial economy of proceeding with the hearing and the public importance of the matter in light of the appropriate law-making function of courts as compared with legislatures.

Thus, there are two questions for consideration:

1. Is the Appellant's appeal regarding his claim for reimbursement for the purchase of the medication Celecoxib moot? and

2. Even if the Appellant's appeal is moot, should the Commission exercise its discretion to hear the appeal?

Is the Appellant's appeal moot?

As noted above, the Appellant's appeal concerns his claim for reimbursement for the purchase of the medication Celecoxib. In order to be entitled to this funding, he needs to show:

A. Under paragraph 136(1)(d) of the MPIC Act, that the expense was "incurred … because of the accident"; and

B. Under section 38 of Manitoba Regulation 40/94, that the medication was "required for a medical reason resulting from the accident".

In other words, the Appellant must show that the injury, for which the Celecoxib was prescribed, was caused by the accident.

As indicated above, MPIC reimbursed to the Appellant the amount that he paid for the medication, together with interest. In the accompanying letter, counsel for MPIC stated MPIC's position that there was no longer any issue for the Commission to deal with. However, counsel also stated "We are paying this to you only to resolve this outstanding appeal. We are not admitting liability or causation of any kind."

The Appellant has therefore argued that there is still an issue between the parties, i.e. the issue of causation.

In *Sprague v. Rogers Blue Jays Baseball Partnership*, 2017 HRTO 1339, the Ontario Human Rights Tribunal held that the argument that the payment of the requested sum made the matter moot would be stronger if the cheque had not been sent on a "without prejudice" basis. The tribunal stated (at paragraphs 37-38):

> A payment … with no admission of liability is a common feature of a settlement of an application in mediation. In my experience … it would be very unusual for an applicant to value a monetary amount paid with no admission of liability the same as a monetary amount paid with an acknowledgement that the applicant experienced the discrimination alleged in the Application. Similarly, there is a value to the respondents in settling with no admission of liability.
>
> By sending the applicant the amount he [claimed] … without prejudice, the respondents were in effect trying to achieve a settlement but in a situation where the applicant did not want to settle... The applicant obviously was not required to agree to the settlement.

Similarly, in the case before us, MPIC was attempting to bring an end to the case, without any admission of liability based upon causation. As a result, the issue of causation may still be a tangible and concrete dispute between the parties, as MPIC does not concede that the Appellant's injury was caused by the MVA.

The panel takes note that the Commission, in its 1998 decision dealing with the Appellant's entitlement to IRI, made a finding that the Appellant's left elbow injury was not caused by the MVA (at pages 6 and 9):

> … He does not seem to have sought medical or other advice for this condition which, if it exists, is not in our view related to his MVA …
>
> …
>
> The appellant fell on his right side; the injury that he says has not completely healed is to the lateral side of the left elbow.
>
> In the absence of [Appellant's ER doctor's] report or a report from Emergency at [hospital] there is no supportive evidence that such an injury is related to the MVA of September 4[24], 1994…

This finding would seem to suggest that the matter of causation is, in fact, not in issue between the parties. However, on the second day of the hearing, the Appellant produced the Emergency Record from the [hospital]. Although we admitted the report into evidence, we agree with the Appellant that the document is essentially illegible and probably requires a physician to help interpret it. Without interpretation, it is not possible to ascertain whether the document would support the Appellant's position that there remains some dispute regarding the matter of causation. (There is also an open question as to why the report is suddenly available now, 24 years after the event, but was not available at the time of the IRI decision in 1998. The letters

produced by the Appellant with the report and attached to these Reasons as part of Appendix A indicate that the Appellant had received a copy of the report as early as 1999.)

Notwithstanding the possibility of causation being an issue between the parties, though, there remains the question of whether the decision of the Commission in the Appellant's appeal would "have the effect of resolving some controversy which affects or may affect the rights of the parties" (per *Borowski*, above). As the Supreme Court said, "If the decision of the court will have no practical effect on such rights, the court will decline to decide the case." Here, as noted above, MPIC has already reimbursed to the Appellant the cost of the medication that he purchased, together with interest. In his submission, the Appellant stated that he had no further medical expenses relating to his elbow injury beyond the costs of the Celecoxib that MPIC has already paid him. While he has brought forward the Emergency Record, the panel finds that its interpretation would have no practical effect on the outcome of his appeal, as he has already received the remedy he sought and he has admitted that he incurred no additional such expenses. For this reason, we find that the Appellant's appeal is moot.

Should the Commission hear the Appeal?

Even if the Appellant's appeal is moot, following the Supreme Court in *Borowski*, the Commission would still have the discretion to consider hearing the Appellant's appeal, upon consideration of three factors: the adversarial nature of the dispute, the judicial economy of proceeding with the hearing and the public importance of the matter.

Regarding the first factor, the Appellant has continued to express his concern regarding the conduct of MPIC throughout his case, and challenges MPIC's refusal to admit liability. The dispute is clearly adversarial. The second factor to be considered is the public importance of the matter. The outcome of this appeal would not have an impact on anyone but the Appellant, and in our view, there is no public significance to this case. The third factor for consideration is the judicial economy of proceeding with the hearing of the appeal (the "need to ration scarce judicial resources", *Borowski* at page 360).

As noted above, MPIC has already reimbursed to the Appellant the cost of the medication that he purchased, together with interest, and the Appellant stated that he had no further such expenses. The Appellant argued before us that he wishes to receive IRI benefits, but that matter has been litigated up to the Supreme Court of Canada and so the Commission has no jurisdiction to reopen this issue. He also raised the issue of legal fees; however, the Commission has no jurisdiction under the MPIC Act to award reimbursement of legal fees (see, for example, AC-14-198). The Appellant also submitted that the Personal Injury Protection Plan should afford some benefits for him for loss of quality of life. However, the MPIC Act does not provide compensation for pain and suffering. As the Manitoba Court of Appeal stated in *Menzies v. MPIC*, 2005 MBCA 97, at paragraph 36: "The *Act* is intended to provide compensation based on 'real economic loss' " [citations omitted]. The Appellant has not asked for any other relief. Given that the Appellant is not seeking any relief that the Commission is able to award to him, in our view it would not be an economical use of the Commission's resources to proceed to hear his moot appeal.

Weighing all of the relevant factors, we decline to exercise our discretion to have the Commission hear the Appellant's appeal, because the Appellant has now received the remedy he

sought and is not seeking any further remedy in respect of his left elbow injury that the Commission has the ability to award.

Conclusion regarding the Main Issue:

After careful review of all of the documents and legal authorities filed in connection with this appeal and after careful consideration of the submissions of counsel for MPIC and of the Appellant, the Commission finds that the Appellant's appeal is moot. The only remedy which the Appellant sought in his appeal and which the Commission has the power to award was reimbursement for his prescription for Celecoxib, and that has been provided by MPIC. Therefore, the Commission will not exercise its discretion to hear the Appellant's appeal.

The Commission sympathizes with the Appellant's circumstances, in that it appears that the Emergency Record from [hospital] was not considered when his IRI claim was originally adjudicated, although we note that the onus is upon a claimant to establish his claim. The Appellant is free to bring this document forward to a case manager at MPIC for consideration under section 171 of the MPIC Act (and to be served in the official language of his choice). Subsection 171(1) of the MPIC Act provides:

> **Corporation may reconsider new information**
>
> 171(1) The corporation may at any time make a fresh decision in respect of a claim for compensation where it is satisfied that new information is available in respect of the claim.

The Appellant would need to show that the Emergency Record from September 1994 would qualify as "new information" within the meaning of this section.

Disposition:

Based on the reasons set out above, the Appellant's appeal is dismissed and the Internal Review Decision dated October 16, 2000 (French) and October 18, 2000 (English) is upheld.

Dated at Winnipeg this 28th day of February, 2019.

LORNA TURNBULL

JACQUELINE FREEDMAN

PAUL TAILLEFER