

Automobile Injury Compensation Appeal Commission

**IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-08-42**

PANEL: Mr. Mel Myers, Chairperson
Mr. Trevor Anderson
Ms Lorna Turnbull

APPEARANCES: The Appellant, [text deleted], was represented by [text deleted];
Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Morley Hoffman;
The Attorney General of Manitoba was represented by [Attorney General].

HEARING DATE: April 23, 2010

ISSUE(S): Whether Section 105 of the MPIC Act violates Section 15 of the Canadian Charter of Rights and Freedoms

RELEVANT SECTIONS: Sections 105 of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 15 of the Canadian Charter of Rights and Freedoms

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

Reasons For Decision

The brief of the Attorney General of Manitoba succinctly sets out the essential facts in respect of this appeal.

1. The Appellant was hit by a car on February 20, 2003. MPIC rejected his application for an income replacement indemnity ("IRI"), finding that he was "regularly incapable before the accident of holding employment" within the meaning of s. 105 of the *MPIC Act* ("Act"). MPIC reached this conclusion in light of a combination of factors, including his lack of any work history, a lengthy criminal record resulting in substantial periods of incarceration for most of his adult life and chronic alcoholism (Review Decision of [text deleted], dated April 24, 2008).

2. The Appellant appealed MPIC's decision to the Commission and on June 17, 2009, he served a Notice of Constitutional Question challenging the constitutional validity of s. 105 of the Act on the basis that it violates s. 15 of the Charter. By agreement of the parties, the Commission adjourned the constitutional issue pending a determination of whether s. 105 applied to the Appellant.
3. On September 29, 2009, this Commission upheld MPIC's determination that the Appellant was not entitled to an IRI because he was "regularly incapable before the accident of holding employment" and therefore did not suffer any real economic loss. The Commission cited the Appellant's lack of any work history since the age of 18, his lengthy periods of incarceration for a variety of offences, a consistent pattern of anti-social behaviour and alcohol addiction.
4. The Appellant now pursues the constitutional challenge to s. 105 of the MPIC Act.

The Commission notes that the relevant provision in respect of the constitutional challenge is Section 105 of the MPIC Act which states:

No entitlement to I.R.I. or retirement income

[105](#) Notwithstanding sections 81 to 103, a victim who is regularly incapable before the accident of holding employment for any reason except age is not entitled to an income replacement indemnity or a retirement income.

The relevant provisions of the Canadian Charter of Rights and Freedoms are:

PART 1
Canadian Charter of Rights and Freedoms

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

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.

The Commission heard submissions from legal counsel for the Appellant, MPIC and the Attorney General of Manitoba. No witnesses were called by any of the parties.

In his written submission, the Appellant's counsel asserted that:

1. Section 105 of the MPIC Act is in direct conflict with Section 15 of the Charter of Rights and Freedoms which prohibits discrimination on the basis of a disability.
2. MPIC denied the Appellant IRI benefits on the grounds that the Appellant was alleged to have the disability of alcoholism.

In support of his written submission, the Appellant's legal counsel referred to the decision of *Law v. Canada* (Minister of Employment and Immigration) [1999] S.C.R. 497 and stated that:

In this case, S. 105 meets the requirements set out in the Law decision, because it draws a formal distinction between the claimant and the others in purpose and effect on the basis of personal characteristics.

The differential treatment which Section 105 imposes is based on a physical and mental disability which is an enumerated ground under the Charter.

The purpose of section 15(1) of the Charter is stated in Law to "...prevent the violation of essential human dignity through the imposition of disadvantage, stereotyping or political and social prejudice..."

The Law case mentions four factors which are of assistance in determining whether the impugned legislation has a discriminatory effect. These factors are:

- a. Is there the presence of a pre-existing disadvantage, vulnerability, stereotyping or prejudice directed at the person or group;
- b. Is there a correspondence or a lack thereof between the ground upon which the differential treatment is based and the actual needs, characteristics and circumstances of the effected person or group?
- c. What is the ameliorative purpose or effect of the legislation upon a more disadvantaged group?
- d. What is the nature and scope of the interest affected by the legislation?

In respect of the first factor set out in *Law v. Canada* (supra) the Appellant's legal counsel asserted in his written submission that there was no question at all that alcoholics have a pre-existing disadvantage in the sense that there is a widespread stereotype and prejudice against alcoholics. In respect of the second factor, the correspondence with the Appellant's needs, capacities and circumstances and the impugned legislation, the Appellant's legal counsel stated:

- A. Section 105 certainly does not accommodate the claimant's needs, capacities and circumstances. It prevents these suffering from disabilities from claiming the same benefits as other unemployed persons. Those persons who have never worked in their life and have no intention of ever working are entitled to Autopac I.R.I. benefits, only the disabled are excluded from these benefits. Section 105 focuses on disability rather than on work history.
- B. The third factor mentioned in Law is the ameliorative purposes and effect of the impugned legislation. Certainly Section 105 does nothing to improve the situation of the disabled who become involved in motor vehicle accidents. It merely worsens that situation by providing them with less benefits than the non-disabled.
- C. The final factor mentioned in Law is the nature of the interest affected. It is submitted that the denial of I.R.I. benefits to the disabled is of fundamental constitutional or societal significance. Manitoba is the only province or territory of Canada which has such legislation. The legislation in the other provinces focuses on employment history or offers claimants a choice to take under the tort system. Furthermore, no financial benefits are awarded in the M.P.I.C. Act to the disabled to replace the benefits denied in section 105.
- D. The tort system also focused on employment history rather than on disability since a disabled person could recover. Loss of income would be based on actual loss of income, which would not include periods of incarceration. There would still be a possibility for future wage loss, although this could be reduced to reflect the possibility of a return to prison. Still, [the Appellant] would get something for loss of income under the tort system.

- E. Any constitutional challenge must also take into account section 1 of the Charter to determine if the violation is reasonable and demonstratively justified.
- F. However, where section 105 is concerned, there is a clear violation of a s. 15(1) of the Charter, and there is no reason why the MPIC Act cannot focus on employment history. Accordingly, it is submitted that the Charter breach is so apparent in s. 105 of the M.P.I.C. Act that this section is not saved by s. 1 of the Charter.

Discussion:

The Commission rejects the submission of the Appellant's legal counsel that Section 105 of the MPIC Act violates Section 15 of the Charter of Rights and Freedoms and agrees with the Attorney General and MPIC that Section 105 of the MPIC Act does not violate Section 15 of the Charter of Rights and Freedoms.

MPIC Submission:

Legal counsel for MPIC submitted that:

1. It was not necessary for the Commission to deal with the Charter argument since the Commission had ruled that as a result of a number of factors such as a lack of work history, anti-social behaviour, periods of incarceration as well as an alcoholic addiction, the Appellant's claim for IRI benefits was rejected.
2. The Commission in its decision did not reject the Appellant's request for IRI on the ground that due to his alcoholism he was incapable of holding employment.
3. There was no evidence that because of a "disability" the Appellant was denied IRI benefits.

MPIC's legal counsel further stated in his written submission:

Accordingly, on these facts alone, no constitutional issue is even raised because AICAC has already found a legitimate basis to apply Section 105, irrelevant to Appellant's alcoholism. In other words, Appellant cannot assert a challenge that he is discriminated against because of his status as an alcoholic since his alcoholism had nothing to do with AICAC's decision. For this reason, the Appeal should be dismissed.

MPI recognizes that AICAC also concluded in its September 29, 2009 decision that as a result of Appellant's alcoholic addiction and use of other chemicals or drugs, he would have been unable to regularly hold employment. While it is unnecessary to delve into this constitutional issue for reasons previously mentioned above, MPIC does note that there is no evidence that being an alcoholic is itself a disability. Appellant seems to assume that he is "disabled" because he is an alcoholic, but MPI does not concede this.

It is only necessary to delve into the Charter argument if AICAC had ruled that solely because of his status as a disabled alcoholic, Appellant was regularly incapable of holding employment prior to the motor vehicle accident. But as stated above, AICAC found numerous other reasons why Section 105 applied, irrelevant to Appellant's alcoholism.

In respect of the Charter analysis, legal counsel for MPIC adopts the position of the Attorney General of Manitoba, that Section 105 is not discriminatory and does not violate the Charter.

Attorney General's Submission:

In his written submission, the legal counsel for the Attorney General of Manitoba stated:

To assess a claim of discrimination, it is vital to consider the overall purpose of the legislative scheme at issue. Excluding access to certain benefits is unlikely to be found discriminatory when it is supported by the larger objectives pursued by the legislation.

Nova Scotia (WCB) v. Martin, [2003] 2 S.C.R. 504, 2003 SCC 54 at para. 94

Auton (Guardian ad litem of) v. B.C. (A.G.), [2004] 3 S.C.R. 657, 2004 SCC 78 at para. 42

The Supreme Court of Canada in *Auton (Guardian ad litem of) v. B.C. (A.G.)* (supra) stated:

A statutory scheme may discriminate either directly, by adopting a discriminatory policy or purpose, or indirectly, by effect. Direct discrimination on the face of a statute or in its policy is readily identifiable and poses little difficulty. Discrimination by effect is more difficult to identify. Where stereotyping of persons belonging to a group is at issue, assessing whether a statutory definition that excludes a group is discriminatory, as opposed to being the legitimate exercise of legislative power in defining a benefit, involves consideration of the purpose of the legislative scheme which confers the benefit and the overall needs it seeks to meet. If a benefit program excludes a particular group in a way what 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. Thus, the question is

whether the excluded benefit is one that falls within the general scheme of benefits and needs which the legislative scheme is intended to address. (underlining added)

The Attorney General's legal counsel further states in his written submission:

Section 105 must be interpreted in accordance with the ordinary meaning of its words and in context of the overall scheme of the *Act*. The Manitoba Court of Appeal has described the MPIC Act as an all-encompassing insurance scheme intended to compensate victims of automobile accidents for "real economic loss".

Re [the Appellant's] Appeal (29 September 2009) AC-08-42 (Automobile Injury Compensation Appeal Commission) at p. 17 (citing *Menzies v. MPIC* et al., 2005 MBCA 97)

Krzysik v. MPIC, 2008 MBCA 29 at para. 25

The specific purpose of IRI is to insure against the income-related consequences of automobile accidents. IRI compensates automobile accident victims for the lost earning capacity caused by the accident. A person who was already regularly incapable of holding employment at the time of the accident did not suffer any loss of earning capacity due to the accident and consequently, has no income loss to replace. Of course, the victim may still be eligible for other insurance benefits provided under the *Act*, such as impairment benefits for injuries sustained.

While the *Act* replaces the tort regime with a no-fault system, it was not intended to throw out common law principles altogether or expand the category of claimants entitled to recover compensation. Common law principles are respected except to the extent the *Act* provides otherwise. Further, the Legislature may determine the breadth of the pool of eligible claimants.

Krzysik v. MPIC, *supra* at paras. 43, 59-64

Section 105 reflects traditional common law principles of compensation. In tort law, victims are only entitled to compensation for damages actually caused by the wrongdoing (or here, the accident). Compensation must not put the victim in a better position than his or her "original position" before the tort (or, the accident). Therefore, a claimant is not entitled to compensation for any debilitating effects of a pre-existing condition that is inherent in one's original position (e.g. unemployable). The victim would have experienced those effects anyway. This is also known as the "crumbling skull" doctrine.

Athey v. Leonati, [1996] 3 S.C.R. 458, 1996 CanLII 183 at paras. 13-16, 35

Blackwater v. Plint, [2005] 3 S.C.R. 5, 2005 SCC 58 at paras. 74, 78, 80

The Commission finds that a motor vehicle accident does not cause any compensable loss in any capacity if the victim was already regularly incapable of holding employment for any pre-existing reason.

In this appeal the Commission has determined the Appellant was not found to be “regularly incapable” of working solely because of his alcoholism. A number of other factors were at play in this determination, including an absence of any work history, a lack of education, a propensity for anti-social behaviour, criminal involvement and lengthy periods of incarceration. The Commission also found that contrary to the submission of the Appellant’s legal counsel, the work history of the Appellant was a critical factor in determining whether or not the Appellant was entitled to IRI benefits.

Legal counsel for the Attorney General further stated in his written submission:

The Supreme Court of Canada recently clarified the two-part test for discrimination under s. 15 of the *Charter*: (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping? Both questions must be answered in the affirmative to establish a s. 15 claim.

R. v. Kapp, 2008 SCC 41 at para. 17

The Commission notes that the central purpose of the equality analysis is to prevent the Government from making distinctions based on enumerated or analogous grounds which have the effect of perpetuating group prejudice or stereotyping. The Attorney General’s legal counsel asserted that Section 105 did not result in any differential treatment based on enumerated or analogous grounds and stated in his written submission:

Equality is necessarily a comparative concept. One must compare how the legislation treats the individual or group complaining of discrimination with another group that mirrors the characteristics of the claimant group in relation to the benefit sought or burden imposed, apart from the personal characteristic that is alleged to be the basis of

discrimination. The comparator group must align with the universe of people potentially subject to the statutory benefit or burden as well as the prohibited ground of discrimination.

Morrow v. Zhang, 2009 ABCA 215 at paras. 66-68

The Appellant alleges that s. 105 discriminates on the basis of disability, namely his alcoholism. However, he does not clearly identify the group to which he says he should be compared. Manitoba submits that to establish his claim, the Appellant must compare himself to individuals who are regularly incapable of holding employment but do not have a disability. This is because only those persons who are regularly incapable of holding employment come within the universe of people potentially excluded from IRI. And this group mirrors the claimant's group apart from his personal characteristic of disability, which is the basis of his discrimination claim.

The problem with the Appellant's argument becomes apparent: the scheme does not result in any differential treatment based on disability. Everyone who is regularly incapable of holding employment, for any reason, is treated the same. Section 105 does not purport to exclude anyone based on disability. Indeed, many persons with disabilities, including alcoholics, may readily qualify for IRI. The only legislative distinction is based on whether or not the victim was capable of holding employment at the time of the accident, for any reason. That distinction is not based on a personal characteristic that is enumerated or analogous ground under s. 15 of the *Charter* (like race, colour, religion, sex, age or disability).

Power v. Canada (A.G.), 2003 NLCA 17, 2003 CarwellNfld 100 at paras. 29-36

The Commission rejects the submission by the Appellant's legal counsel that the Appellant is an unemployed person who hasn't worked and nevertheless was entitled to IRI benefits as a non-earner. Section 70(1) of the MPIC Act defines a non-earner as someone who is able to work at the time of the accident. Non-earners are entitled to IRI under Section 85 and 86 of the MPIC Act as it is unfair to deny compensation to a victim who happens to be temporarily unemployed at the time of the accident. However, if the evidence establishes as a whole that a claimant is "regularly incapable of holding employment" Section 105 would apply and the claimant would not be entitled to IRI benefits.

In rejecting the Appellant's claim for appeal for IRI benefits, the Commission did not find that MPIC denied the Appellant benefits because he suffered from alcoholism. The Commission

found that because of a number of factors such as lengthy periods of incarceration, no work history, and anti-social tendencies, that the Appellant was regularly incapable of holding employment and therefore under Section 105 of the MPIC Act would not be entitled to IRI benefits.

Section 15 of the Charter

The Commission determines that Section 105:

1. Does not discriminate, but anyone who is “regularly incapable of employment” is treated the same as any other person who is found to have similar incapacity for employment.
2. Does not perpetuate group prejudice or stereotypes in respect of anyone with a disability.
3. Does not prejudge a situation or person’s actual needs based on a group to which he belongs.
4. Requires an individualized assessment of one’s capacity to work which the Supreme Court of Canada has found to be contrary to discrimination.

Nova Scotia (WCB) v. Martin, supra at para. 99

Morrow v. Zhang, supra at para. 98

R. (R.) v. Alberta (Child Welfare Appeal Panel), 2000 ABQB 1018, 2000 CarswellAlta 469 at para. 47

5. Requires MPIC to conduct a case by case assessment of whether the victim had any earning capacity at the time of the accident that merits compensation. If a person lacked earning capacity for any reason, then he or she is not entitled to IRI. As noted, many persons with severe disabilities, including alcoholics can and do work and would potentially be entitled to IRI.

Granovsky v. Canada (Minister of Employment and Immigration), [2000] 1 S.C.R. 703, 2000 SCC 28 at paras. 27-28

Smallwood v. Minister of Human Resources Development, Appeal CP09274, 1999 (CPP Pension Appeals Board) at 3-4

The Attorney General's legal counsel stated in his written submission:

The regular inability to hold employment prior to an accident is a logical and rational basis for denying IRI because there is simply no earning capacity to replace. Far from perpetuating prejudice or negative stereotypes, to do otherwise would be to grant a windfall to the claimant and undermine the whole purpose of the insurance scheme. As the Supreme Court remarked in the context of a discrimination challenge to the CPP disability insurance scheme, "a scheme aiming at '[earnings] replacement' can reasonably say, as a general matter, that a person who has been out of the work force for a long time no longer has a workplace income to replace".

The Supreme Court has often warned against taking a narrow or overly formalistic approach to equality. It must be looked at contextually and substantively. The Court has identified a number of contextual factors that may assist in assessing whether a legislative distinction is discriminatory. They are not intended to be a rigid checklist:

- i. Pre-existing disadvantage, stereotyping or prejudice. The Appellant adduced no evidence about pre-existing disadvantage of alcoholics. But even assuming that alcoholics suffer from pre-existing stereotypes, the Act does not target alcoholics or make any assumptions about persons with disabilities.
- ii. Degree of correspondence between the differential treatment and the claimant group's reality. The exclusion from IRI of persons regularly incapable of holding employment at the time of the accident corresponds precisely with the purpose of the insurance scheme which is to compensate real economic loss, here, lost earning capacity. Far from perpetuating stereotypes, s. 105 takes into account the actual personal circumstances of the individual in a manner that respects one's value as a human being.
- iii. Whether the law has an ameliorative purpose or effect to combat discrimination. Section 105 is not intended to be an ameliorative program under s. 15(2) of the *Charter*. As such, this factor has little relevance in the present case.
- iv. Nature of the interest affected. The IRI benefit is an economic benefit designed to insure against a loss of earning capacity caused by the accident. It is not designed to provide an economic windfall to anyone injured in an automobile accident.

R. v. Kapp, supra at paras. 19-23

A review of the four contextual factors in this case supports the conclusion that s. 105 is not discriminatory, in purpose or effect. Nothing about s. 105 perpetuates group disadvantage or stereotypes in any way. To the contrary, the purpose and effect of s. 105 corresponds very closely to the overall purpose of the *MPIC Act*, the IRI scheme in particular and to the reality of each individual's actual circumstances.

The Commission finds that the purpose of a person receiving IRI benefits is to minimize the financial difficulties faced by that person who has suffered real economic loss due to a motor vehicle accident. Section 105 is entirely consistent with this overarching purpose because it only excludes persons who have not suffered such a loss. As a result, Section 105 does not perpetuate group disadvantage merely by excluding those who should not be eligible for IRI benefits because they have suffered no economic loss.

As the Attorney General's counsel stated in his submission:

The question is not just whether the Appellant has been deprived of a financial benefit under the *Act* - he has - but rather whether the *Act* promotes the view that persons suffering from alcoholism are less capable, less worthy of recognition or value as human beings, equally deserving of concern, respect and consideration: *Granovsky, supra* at para. 58. It does not.

Section 1 of the Charter

In the alternative if the Commission is incorrect in determining that Section 105 does not violate Section 15 of the *Charter*, then the Commission finds that any breach of s. 15 is justified as a reasonable limit in a free and democratic society under s. 1 of the *Charter*.

In this respect, the Commission adopts the submission of the Attorney General's legal counsel who stated in his written submission:

Limiting compensation to the real economic loss caused by car accidents is a pressing and substantial objective. Those who pay insurance premiums are not an infinite source of funds. Ensuring adequate compensation and affordable and accessible insurance is a legitimate matter of public policy: *Morrow v. Zhang, supra* at paragraph 110. Excluding persons who have not suffered a loss of earning capacity from IRI is rationally connected to this objective. The *Act* does not exclude everyone who was not working at the time of the accident, but only those who were regularly incapable of working because such persons did not suffer any real financial loss. In this regard, s. 105 is minimally impairing of s. 15 and a proportionate response.

For the reasons as set out herein, the Commission rejects the submission of the Appellant's legal counsel and dismisses the Appellant's appeal.

Dated at Winnipeg this 27th day of May, 2010.

MEL MYERS, Q.C.

TREVOR ANDERSON

LORNA TURNBULL