Manitoba

Automobile Injury Compensation Appeal Commission

IN THE MATTER OF an Appeal by [the Appellant]
AICAC File No.: AC-08-113

PANEL:	**Mr. Mel Myers, Q.C.**
APPEARANCES:	**The Appellant, [text deleted], appeared on his own behalf [Appellant's potential representative] was represented by [text deleted];** **The Manitoba Law Society was represented by [text deleted]** **Manitoba Public Insurance Corporation ('MPIC') was represented by Mr. Dean Scaletta.**
HEARING DATE:	**April 17, 2009**
ISSUE(S):	**Whether the Appellant can be represented by a non-lawyer**
RELEVANT SECTIONS:	**Sections 174 and 182(3) of The Manitoba Public Insurance Corporation Act ('MPIC Act') and Section 20(2) of The Legal Profession Act of Manitoba ("LP Act")**

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

On April 17, 2009, the Commission conducted a pre-hearing to determine whether [Appellant's potential representative] of [text deleted] could represent [the Appellant] in respect of his appeal before the Commission from an Internal Review Decision issued by MPIC's Internal Review Officer, [text deleted], on September 2, 2008.

On April 23, 2008 [text deleted] MPIC's Internal Review Officer, wrote to [Appellant's potential representative] at [text deleted]. In this letter, [MPIC's internal review officer] stated:

> "It is my understanding you intend to provide the services to claimants seeking benefits under MPIC's Personal Injury Protection Plan Legislation.
>
> The Manitoba Court of Appeal has restricted the role of persons assisting a self-represented person in Court as follows: "Lending a helping hand to a self-represented litigant, without fee on an isolated occasion." Your organization's role in representing MPIC's customers extends beyond those limitations.
>
> While the MPIC Act does appear to contemplate claimants being represented by agents, we are inclined to the view that the relevant sections, probably do not provide sufficiently "clear authority" to create an exception under Section 20 of *The Legal Profession Act* so as to permit representation by agents which goes beyond that described by the Court of Appeal…
>
> As you may be aware, I am a lawyer employed by MPIC. Chapter 17 of our professional "Code of Professional Conduct" reads: "The lawyer should assist in preventing the unauthorized practice of law." The potential consequences of not complying with that directive are obvious. I have discussed this matter with counsel for The Law Society of Manitoba.
>
> Therefore, in conclusion, until you provide us with a letter from The Law Society that your activities in representing MPIC claimants do not constitute the unauthorized practice of law, our position is that MPIC is not to deal with you or your organization in determining claimant's entitlement to seeking benefits under the MPIC Personal Injury Protection Plan legislation, since this is an unauthorized practice of law."

A copy of this letter was sent to the Appellant, [the Appellant]

On May 12, 2008, [text deleted], General Counsel for The Law Society of Manitoba wrote to [Appellant's potential representative], and enclosed a copy of Section 20 of *The Legal Profession Act* of Manitoba which prohibits the practice of law by unauthorized persons.

> "It has come to our attention that you are attempting to assist an individual ([the Appellant]) with respect to his rights relating to a claim for benefits in respect of an accident that took place on February 29, 2008.
>
> In addition, please be advised that we recently became aware of an advertisement for your company that was printed in the [text deleted] edition of the [text deleted]. For your ease of reference, a copy of the said advertisement is enclosed with this correspondence. Your advertisement talks about good faith and how your company can

> make a difference in terms of dealings with persons who have been victims of bad faith at the hands of their insurer. It goes on to stipulate that your team of expert consultants and analysts are highly qualified to assist in all aspects of a claim. Specifically, your advertisement refers to MPI, Workers Compensation and Disability Insurance matters. Based upon the assertions contained in the said advertisement and in light of your attempt to represent a specific claimant, [the Appellant], with respect to his claim and any benefits that he may have under *The Manitoba Public Insurance Corporation Act*, it is our view that your actions contravene the provisions of Section 20 of *The Legal Profession Act.*
>
> In order to represent the interests of a claimant such as [the Appellant], you would be required to provide advice on the meaning and effect of legislation, carry out investigations and inspections and consider the advisability of obtaining expert opinions, conduct negotiations on his behalf, and appear before MPI to make submissions on behalf of the claimant at hearings including an internal review hearing. Such activities would constitute an attempt to carry on the practice of law, which is prohibited by Section 20(2) of *The Legal Profession Act*.
>
> In addition, we draw your attention to Section 20(3) of *The Legal Profession Act*. The said section sets out that a person who directly or indirectly, for or in the expectation of a fee or reward, draws or revises a document for use in a proceeding, whether judicial or extra-judicial is **deemed** to be "carrying on the practice of law."
>
> In light of the foregoing, we request that you cease and desist such activities immediately. In the event that you do not comply with our request, The Law Society of Manitoba will consider further action in accordance with the provisions of *The Legal Profession Act*. Such action may include an application in the Court of Queen's Bench for an injunction enjoining you from continuing such activities.
>
> Please be advised that we have been provided with a copy of [MPIC's internal review officer]'s correspondence to you dated April 23, 2008. The Law Society takes the position that *The Manitoba Public Insurance Act* does not permit commercial representation by agents in the manner you are contemplating."

On May 20, 2008 the Appellant wrote to [MPIC's internal review officer] objecting to MPIC's position on either [Appellant's potential representative] or anyone else at [text deleted] representing him at the Internal Review Hearing. In response [MPIC's internal review officer] on June 5, 2008 stated:

> "As I indicated previously, Mr. [Appellant's potential representative] is not to be present, nor is anyone else at [text deleted]. Should you appear at the hearing with anyone who I regard may be attempting to engage in the practice of law, I will request them to leave, and will continue the hearing without them. Should you choose to leave the hearing, I will proceed to render my decision. Should you choose to not attend on

> June 26, 2008 for the hearing, I will also proceed to render my decision. No further delays will be permitted."

On June 26, 2008, [MPIC's internal review officer] conducted an Internal Review Hearing in respect of an application for review made by the Appellant regarding the termination of his PIPP benefits. The Appellant attended the hearing without Mr. [Appellant's potential representative].

INTERNAL REVIEW OFFICER'S DECISION

On September 2, 2008 [MPIC's internal review officer] issued a decision and stated:

> "**ISSUE**
>
> The issue on this review is whether your benefits were correctly terminated for knowingly providing MPI with false or inaccurate information under Section 160(a) and whether you are required to repay all IRI received by you subsequent to August 1, 2007.
>
> **REVIEW DECISION**
>
> This review confirms the decision of your case manager dated January 4, 2008 to terminate all PIPP benefits under Section 160 and to require you to reimburse to MPIC all IRI received subsequent to August 1, 2007."

In her decision, [MPIC's internal review officer] then provided the reasons why she confirmed the case manager's decision and dismissed the Appellant's application for review.

NOTICE OF APPEAL

On November 6, 2008 the Appellant filed a Notice of Appeal to the Commission. He indicated that [Appellant's potential representative] would represent him at the appeal hearing before the Commission.

On January 15, 2009 the Commission wrote to the Appellant:

"The Commission notes that you filed a Notice of Appeal to this Commission dated November 6, 2008. The Commission further notes that this Notice of Appeal indicates that Mr. [Appellant's potential representative] of [text deleted] will represent you in connection with your Appeal before this Commission.

I am enclosing herewith for your information a copy of a letter written by the Law Society of Manitoba to Mr. [Appellant's potential representative] dated May 12, 2008, which advises Mr. [Appellant's potential representative], President of [text deleted], to cease and desist from acting for claimants who are seeking benefits from the Manitoba Public Insurance Corporation. As a result, the Commission has decided to conduct a pre-hearing to determine whether [Appellant's potential representative], of [text deleted] may represent you in connection with your appeal before the Commission.

I am enclosing herewith for your information:

1. a copy of Section 20 of the Legal Profession Act of Manitoba which deals with the unauthorized practice of law;

2. a Notice of Hearing fixing the date of the pre-hearing addressed to the following person:

a. yourself
b. [Appellant's potential representative] of [text deleted]
c. [text deleted], legal counsel, MPIC
d. [text deleted], Manitoba Law Society.

At the hearing, any of the parties who have received a notice of this hearing will be entitled to make submissions in respect of the above mentioned issue."

Copies of this letter were sent to [Appellant's potential representative], [text deleted], Legal Counsel for MPIC and Ms [general counsel for the Law Society of Manitoba], General Counsel for The Law Society of Manitoba.

On January 27, 2009 the Appellant wrote to the Commission and stated in part:

"I wish to acknowledge receipt of your letter dated January 21, 2009 in which you suggest that [Appellant's potential representative] cannot represent me in the course of my appeal. I am most upset with your letter, as I do believe AICAC is wishing to deny me entitlement to the very choice of personal representative that is outlined in your guidelines, in which it states:

3.*REPRESENTATIVES*

9.1 Parties to an appeal may represent themselves or be represented by someone else of their own choosing who may, but need not necessarily, be a lawyer. The Claimant Adviser Office, which may be contacted at 945-7413, or Toll-free at 1-800-

282-8069, ext 7413, is available to help people who want to appeal MPIC's Internal Review Decisions to AICAC.

3.2 Representative means legal counsel, a Claimant Adviser Officer, or an agent who AICAC is satisfied is authorized to represent a party in the appeal.

I intend to have my rights respected in this matter, and as such, I am not prepared to participate in a pre-hearing, involving parties who do not have respect or concern for my best interests. They have agendas which do not include principles of fairness and reasonableness. This is nothing more than a self-serving exercise designed to prejudice my rights.

The Law Society has no authority over me. The Guidelines are clear in stating that I can be represented by someone else of my own choosing who may, but need not be a lawyer. I am exercising my right of choice and that person is [Appellant's potential representative] AICAC does not have the authority to arbitrarily amend its guidelines, and attempt to restrict my right of choice. What you are in effect doing is to say that I can have paid representation as long as you, MPI and the Law Society agree with my choice. Otherwise I am out of luck.

I wish to make it clear that [Appellant's potential representative] is not being paid to assist me with my appeal. There is no commercial relationship involved. He and I have developed a close relationship; and he has agreed to act as my personal representative. I am enclosing a new letter of authority, which confirms his representation is being done on a personal basis. MPI acknowledges that I can have someone who is either a family member or a friend. Now they wish to try to tell me who I choose as my friend? Neither you nor MPI have the legal right to deny my selection."

On February 5, 2009, the Commission wrote to the Appellant and stated:

"The Commission acknowledges receipt of your submission dated January 27, 2009 wherein, amongst other things, you indicate that you are not prepared to participate in the Case Conference Hearing which has been scheduled for March 17, 2009 commencing at 9:30 A.M.

I do urge you to reconsider your position in this regard since, if you do not attend the Case Conference Hearing, you will not be in a position to hear or respond to the submissions put forward by representatives of MPI and the Law Society of Manitoba nor to answer any questions that the Commission may have.

If you do not attend the Case Conference Meeting on March 17, 2009, the Commission will proceed in your absence, hear submissions from the parties, consider your written submission dated January 27, 2009 and make a determination as to whether [text deleted] (Mr. [Appellant's potential representative]) may represent you in connection with the appeal before the Commission."

Copies of this letter were sent to [Appellant's potential representative], [text deleted] of MPIC, and [text deleted] of The Law Society of Manitoba.

On February 9, 2009, the Appellant wrote to the Commission requesting which part of the MPIC Act or any other Act gave the Commission authority to interpret legal statutes. In addition the Appellant requested which part of the MPIC Act or any other Act gave the Commission authority to decide whether or not the Appellant could be represented by a friend.

On February 16, 2009, [Appellant's potential representative] wrote to the Commission and stated in part:

> "I have reviewed the MPI Act, the Legal Profession Act and the Interpretation Act, and I am unable to find any basis for your authority to decide in such a matter. AICAC has published guidelines, which have been existence every its formation (sic). Interpretation of legislation is a matter of law, which defers to the decision of the courts if legislation is to be challenged. Until such time a court of law has made a ruling to the contrary, AICAC does not have discretionary authority in this matter and therefore has no alternative than to carry on with its operations as per your guidelines…
>
> In regard to [the Appellant] there are absolutely no grounds for debate. The fact that I own a business of assisting injured accident victims does not disqualify [the Appellant] and I from having a personal friendship. Your concerns might have some merit if I were suggesting every client was a friend, which is not the case. Our relationship is not commercially based. If it is your intent to carry on with the pre-hearing for his appeal, we will require some manner of legal reference to support your position. To deny [the Appellant] the privilege and right to choose his friends in unconscionable, and a violation of the rights and freedoms set forth under the Canadian Charter, of which I am certain you are well informed…
>
> I have to admit to having some serious concerns given the fact that this matter is being driven by the Law Society and MPI's Legal Department, and now has your involvement. Every person involved other than me, [the Appellant] and [text deleted] are lawyers and members of the Law Society. The question of bias certainly has a reasonable foundation. This further supports my position that AICAC does not have authority to rule in a matter whereby there are clear and obvious grounds for a conflict of interest."

On February 17, 2009 the Commission wrote to [Appellant's potential representative] and stated:

> "The Commission is in receipt of and has reviewed the contents of your letter dated February 16, 2009 and advises that the matters raised in that letter may be raised at the Case Conference Meeting on March 17, 2009."

Copies were sent to the Appellant, [text deleted] of MPIC, and [text deleted] of The Law Society of Manitoba.

On March 2, 2009, [Appellant's potential representative] wrote to the Commission on [text deleted] stationery and stated:

> "It seems that you are failing to grasp the seriousness of the issues involved in this matter, which do not directly affect MPI or the Law Society. Before I can agree to attend any proposed hearing I need you to affirm (and provide evidence thereof) that you have the legal authority to rule in the matter of whether or not I, in the capacity as a friend, may represent [the Appellant] at his Appeal. As stated in my letter of February 16, 2009, I am not able to find any statutory grounds for you to make such a determination. This is integral to my ability to prepare properly for this hearing…
>
> Accordingly, I require a formal response from you as to what legal authority you have, to unilaterally void my Charter of Rights and Freedoms. This is not a matter which requires input from MPI or the Law Society. It is between AICAC and [Appellant's potential representative]…
>
> Complaints have also been filed with [text deleted], President of MPI; the Minister for MPI; the Minister for Crown Corporations; Attorney General's office; Premier [text deleted]; [text deleted] (Leader of Official Opposition); Prime Minister [text deleted]; Federal Minister of Justice; the Federal Competition Bureau; and a great many other interested individuals. I do not take this matter lightly and will take whatever action necessary to ensure that justice prevails. I am not about to let you, MPI and the Law Society adopt a high-handed position so you can railroad a decision that you appear to have already reached. Responses from each of these entities are required before the hearing can proceed.
>
> I am not all interested in hearing what MPI or the Law Society has to say about the matter of your authority and responsibilities. This is a matter between [Appellant's potential representative] and AICAC. Until such time you provide a respectful response, which this matter deserves, I will not attend your proposed hearing. You have a duty to speak to the issues I have raised with regard to what I perceive to your self-declared authority.

> Your efforts to thwart every reasonable effort made by [the Appellant] and me, to obtain a proper foundation and understanding as to the issues, which are to be decided upon at the proposed hearing certainly has created a substantial impression that you are exercising judgment as a member of the Law Society, as opposed to that as Chief Commissioner for AICAC. Your perceived bias is evident."

The Commission wrote to [Appellant's potential representative] on March 5, 2009 in response to his letter of March 2, 2009 (copies of which were sent to MPIC and to The Manitoba Law Society) and stated:

> "Section 182(3) of *The Manitoba Public Insurance Act* gives the Commission authority to determine its own practice and procedure. Attendance by an agent as a representative is a matter of procedure.
>
> On January 15, 2009, I wrote a letter to [the Appellant], which was copied to you, to MPIC and to the Law Society. That letter included the following sentence:
>
> > "[…] the Commission has decided to conduct a pre-hearing to determine whether [Appellant's potential representative], of [text deleted] may represent you in connection with your appeal before the Commission."
>
> Yet, you assert in your letter that the Commission has already reached a decision on the matter. Clearly, you have misunderstood the purpose of the pre-hearing that will be held on March 17, 2009. As I have already written, that pre-hearing will be held to determine the issue of whether you will be representing [the Appellant] on the appeal. In other words, no decision has been made yet, and the very purpose of the pre-hearing is to allow the Commission to find out everything it needs to know before it makes a decision.
>
> At the pre-hearing, the Commission would like to hear from both you and [the Appellant]. You will be allowed to make the arguments that you consider pertinent – including any or all of the issues that you have raised so far in your written communications. But the Commission also wants to hear from MPIC and the Law Society. While you assert in your letter that you have no interest in hearing what they might have to say on this issue, be advised of this: at the pre-hearing, you will have an opportunity to respond to anything that they might raise and argue on the matter.
>
> It will therefore be in your best interests (as well as the best interests of [the Appellant]) for you to attend at the pre-hearing of March 17. Should you choose to not attend, then both you and [the Appellant] will be taking a serious risk, as the Commission will then find itself in a position of deciding the issue without first having heard, in full, your position and your responses to the points raised by others."

On March 9 2009, [Appellant's potential representative] wrote to the Commission on [text deleted] stationery and stated:

> "I take note in your letter you claim that you (AICAC) have authority to rule in this matter, as per Section 182(3) of the Manitoba Public Insurance Corporation Act. I do not agree that this extends the authority to you as you suggest.
>
> *182(3) The commission shall determine its own practice and procedure and shall give full opportunity to the appellant and the corporation to present evidence and make submissions.*
>
> It is clear that the reference to practice and procedure applies to the presentation of evidence and offering of submissions by the appellant and the corporation. There is no reference to AICAC being granted authority to setting law through interpretation of a regulation or statute.
>
> My position is further supported by Section 186(1) of the MPI Act, which states:
>
> *186(1) The commission may, of its motion or on the application of the appellant or the corporation, state a case in writing for the opinion of The Court of Appeal on a question of law or jurisdiction.*
>
> It is clear that when a matter concerns a question of law or jurisdiction that it would be appropriate for such matters to be referred to the Courts.
>
> Contrary to your suggestion I have not misunderstood the purpose of the pre-hearing. I know exactly what purpose is being held out. The problem I have is that whether you like it or not, there is a substantial perception of bias, conflict of interest, and abuse of power and privilege, which suggests that a decision has already been made against us.

In this letter [Appellant's potential representative] refers to provision 3 of the Commission's published guidelines which state:

> ***"3. REPRESENTATIVES***
>
> *3.1 Parties to an appeal may represent themselves or be represented by someone else of their own choosing who may, but need not necessarily, be a lawyer. The Claimant Adviser Office, which may be contacted at 945-7413, or Toll-free at 1-800-282-8069, ext 7413, is available to help people who want to appeal MPIC's Internal Review Decisions to AICAC.*

3.2 Representative means legal counsel, a Claimant Adviser Officer, or an agent who AICAC is satisfied is authorized to represent a party in the appeal.

[The Appellant] and [text deleted] have complied with your guidelines, and have chosen the person they wish to represent them. It is offensive that you would attempt to hold out having such authority and privilege and then request a pre-hearing for further consideration. The only reason you are doing so is because you are refusing to stand up to the Law Society who obviously do not believe you have the authority to decide who can or cannot represent a claimant in an appeal. If you truly have this authority then why are you simply not standing up to MPI and the Law Society, in support of your very own "*practice and procedure?"*

The only logical response to this question can be that you are acquiescing to the abuse of power and persuasion by the Law Society…

Conflict of Interest
As one would expect, our perception of bias is intertwined with what we believe to be a conflict of interest. As a member of the Law Society you have duty to support their initiatives and rules of governance, of which the unauthorized practice of law is deemed to be an infraction. It is most difficult to believe that you are not in conflict given your pre-disposition of refusing to respond the specific matters of concern which apply specifically to AICAC…

I honestly do not believe you can effectively administer justice in this very sensitive and highly politically charged matter. From our perspective you have already shown a favour to the Law Society and MPI by simply refusing to deal with the specific matters of concern we have addressed with AICAC about AICAC. If you aren't listening to our concerns now, why would we believe you will at a hearing when you will be amongst friends and associates from the legal profession, and Law Society?

The public already has a jaundiced view of AICAC's impartiality, due to the fact that AICAC is funded by MPI. The manner in which you are dealing with this entire matter has done nothing but enhance the perception of bias.

Abuse of Power & Privilege
I believe AICAC is attempting to bully its way through this matter. You have received ample notice of the legal opinion which [the Appellant], [text deleted], other MPI claimants, and citizens in general are seeking from an out-of-province lawyer. You obviously have to appreciate that this opinion is critical to their position, yet you wish to strong-arm them into a hearing where you wish to decide their fate. This is hardly reflective of justice. You obviously are quite accepting of the fact that they will not be sufficiently prepared for March 17, 2009, and are quite willing to proceed in spite of this critical factor."

APPEAL

Relevant Provisions:

The relevant provisions of *LP Act* and the *MPIC Act* are as follows:

LP ACT

PART 3

AUTHORITY TO PRACTISE LAW

GENERAL

Authority to practise law

20(1) Subject to any restrictions imposed by or under this Act, a practising lawyer may practise law in Manitoba.

Unauthorized practice of law

20(2) Except as permitted by or under this Act or another Act, no person shall

(a) carry on the practice of law;

(b) appear as a lawyer before any court or before a justice of the peace;

(c) sue out any writ or process or solicit, commence, carry on or defend any action or proceeding before a court; or

(d) attempt to do any of the things mentioned in clauses (a) to (c).

Activities deemed to be carrying on the practice of law

20(3) A person who does any of the following, directly or indirectly, for or in the expectation of a fee or reward is deemed to be carrying on the practice of law:

(a) draws, revises or settles any of the following documents:

(i) a document relating to real or personal property,

(ii) a document for use in a proceeding, whether judicial or extra-judicial,

(iii) a document relating to the incorporation, administration, organization, reorganization, dissolution or winding-up of a corporation,

(iv) a will, deed, settlement, trust deed or power of attorney, or any document relating to the guardianship or estate of a person,

(v) a document relating to proceedings under any statute of Canada or of Manitoba;

(b) negotiates or solicits the right to negotiate for the settlement of, or settles, a claim for loss or damage founded in tort;

(c) agrees to provide the services of a practising lawyer to any person, unless the agreement is part of, or is made under

(i) a prepaid legal services plan,

(ii) a liability insurance policy, or

(iii) a collective agreement or collective bargaining relationship;

(d) gives legal advice.

Exceptions

20(4) Subsection (2) does not apply to the following:

(a) a public officer acting within the scope of his or her authority as a public officer;

(b) a notary public exercising his or her powers as a notary public;

(c) a person preparing a document for his or her own use or to which he or she is a party;

(d) a person acting on his or her own behalf in an action or a proceeding;

(e) an officer or employee of an incorporated or unincorporated organization preparing a document for the use of the organization or to which it is a party.

S.M. 2008, c. 27, s. 3.

Practice by students

21 The benchers may make rules permitting and regulating the practice of law by students

MPIC ACT

Commission to determine its practice and procedure

182(3) The commission shall determine its own practice and procedure and shall give full opportunity to the appellant and the corporation to present evidence and make submissions.

At the commencement of the pre-hearing, the Commission advised the parties that there were four issues that the Commission had to determine and they were:

1. The jurisdiction of the Commission to conduct a pre-hearing to determine whether [Appellant's potential representative] may represent the Appellant in respect of a decision by MPIC's Internal Review Officer dated September 2, 2008 dismissing the Appellant's Application for Review of MPIC's case manager's decision dated January 4, 2008.
2. [Appellant's potential representative]'s allegation that the Commission is biased and involved in a conflict of interest.
3. The application of Section 20 of *The Legal Profession Act CCSM c.l107* to Section 182(3) of the *MPIC Act*.
4. The competency of [Appellant's potential representative] to represent the Appellant in his appeal before the Commission.

(1) JURISDICTION OF THE COMMISSION:

In correspondence to the Commission, [Appellant's potential representative] has challenged the jurisdiction of the Commission to determine his status as a representative of the Appellant in his appeal before the Commission.

Neither the representatives of MPIC or the Law Society of Manitoba raised any objection to the jurisdiction to determine [Appellant's potential representative]'s status before the Commission. [Appellant's potential representative]'s legal counsel advised the Commission that [Appellant's potential representative] had withdrawn any objection he had to the jurisdiction of the Commission and acknowledged that the Commission does have the jurisdiction pursuant to

Section 182(3) of the *MPIC Act* to determine [Appellant's potential representative]'s status as the representative of the Appellant.

Section 182(3) of the Act states:

> **Commission to determine its practice and procedure**
>
> 182(3) The commission shall determine its own practice and procedure and shall give full opportunity to the appellant and the corporation to present evidence and make submissions.

The case of *R. v. Lemonides* (1997) O.J. 3562 (Ont. Gen. Div.) stands as authority for the principle that decisions about representation of the parties are decisions of procedure. That is, they are part of a decision making body's inherent authority over its process. The Court stated at paragraph 30 of its decision:

> "As a matter of procedure, it is logical for legislation to determine what category of person may appear in what capacity. Such a procedural decision in the legislation may be part of an overall approach geared to the way in which the legislature wishes the issue dealt with. So, for example, the *Criminal Code* may authorize that certain types of cases be conducted in a procedurally less complex manner, as has historically been the case for summary convictions. In my view, the procedural power includes the decision of whether the matter requires that a lawyer be the only professional authorized to assist a party, or whether a non-lawyer agent may appear, just as it includes the power to determine whether the party must appear personally or whether appearance by way of an agent is acceptable. This is a matter reasonably termed procedural. Once this determination is made (whether in criminal or civil matters) by the appropriate authority (which is clearly federal if the matter is criminal, as here) one looks to the provincial legislation governing the regulation of that category of professional to determine if the person falls within the requisite group. In this way the procedural power works in conjunction with the power to regulate the practice of the legal profession. If the Ontario legislature determines that the public interest requires legislation regulating the practice of agents, it can clearly enact legislation as other provinces have."

The authors of Macaulay: Practice and Procedure Before Administrative Tribunals loose leaf edition at page 12-174.4 citing R v. Lemonides (supra) stated

> "In the absence of any statutory direction, the ability of an individual to be represented by a non-lawyer is a matter of procedure and thus falls within the general authority of an agency over its procedure."

The Commission finds that Section 182(3) of the *MPIC Act* codifies the common law rule that provides that Administrative Tribunals such as this Commission have inherent authority to control their own practice and procedure. The Commission further finds that Section 182(3) of the *MPIC Act* permits the Commission to determine whether a non-lawyer may represent the Appellant before the Commission.

(2) **BIAS AND CONFLICT OF INTEREST:**

In [Appellant's potential representative]'s correspondence with the Commission he alleged that the Commission's Chair was biased and involved in a conflict of interest.

At the commencement of the pre-hearing the Commission reviewed with the parties [Appellant's potential representative]'s correspondence to the Commission containing these allegations. In response, his legal counsel advised that [Appellant's potential representative] was withdrawing these allegations and had no objection to the Commission's Chair presiding over these pre-hearing proceedings.

(3) APPLICATION OF *THE LEGAL PROFESSIONS ACT*, SECTION 182(3) OF THE *MPIC ACT*:

The Submission of the Law Society of Manitoba:

In its submission to the Commission, legal counsel for the Law Society of Manitoba stated that [Appellant's potential representative] could not represent the Appellant before the Commission because in doing so he would be engaged in "an unauthorized practice of law" contrary to the *LP*

Act; and [Appellant's potential representative] would be circumventing the "Claimant Adviser" scheme set forth in the *MPIC Act.*

The Law Society's legal counsel submitted that:

1. In representing the Appellant before the Commission [Appellant's potential representative] will be called upon to present evidence and make oral and/or written submissions on behalf of the Appellant.
2. This would necessarily involve consideration of legal principles and their application to the facts of the appeal.
3. In doing so, he would be acting contrary to the provisions of the *LP Act*.

The Law Society's legal counsel reviewed the *LP Act* and stated:

- "The relevant provisions of *The Legal Profession Act* are found in Part 3 – "Authority to Practice Law".
- Section 20(2)(a) prohibits a person from "carry(ing) on the practice of law", except as permitted by *The Legal Profession Act* or another Act.
- Section 20(3) goes on to carve out certain acts that are "deemed" to constitute "carrying on the practice of law", including:
    - drawing, revising or settling a document "for use in a proceeding, whether judicial or extra-judicial", or a document "relating to proceedings under any statute" [s. 20(3)(a)(i) and (v)];
    - agreeing to "provide the service of a practicing lawyer to any person" [s. 20(3)(c)] and
    - giving "legal advice" [s. 20(3)(d)].
- If [text deleted] or [Appellant's potential representative] were to represent [the Appellant] before the Commission, they would be in violation of section 20 the *The Legal Profession Act*, for the very same reasons that [text deleted] would be in violation of Mr. Justice Hanssen's judgment."

The Law Society's legal counsel further submitted that if [Appellant's potential representative] represented the Appellant before the Commission he would be in violation of Section 20 of *The*

Legal Professions Act in the following way:

- In representing [the Appellant] before the Commission… Mr. [Appellant's potential representative] would likely "draw", "revise" and/or "settle" a document "for use" in the appeal, and/or a document "relating to" the appeal.
- As well, by appearing before the Commission – where they would be called upon to "present evidence and make submissions" –… Mr. [Appellant's potential representative] would be evidencing their agreement "to provide the services of a practicing lawyer".
- This would involve giving "legal advice" in conducting the appeal… Mr. [Appellant's potential representative] would have to consider legal principles and their application to the facts of the appeal.
- In sum, his appearance before the Commission would involve actions that are "deemed" under *The Legal Profession Act* to constitute "carrying on the practice of law"."

The Law Society's legal counsel referred to the decision of the Manitoba Court of Appeal case in *Moss v. NN Insurance Co., 2004 MBCA 10 (Tab 4),* and stated:

> "The Court of Appeal considered a self-represented person showing up in court "with a friend or relative who indicates that he or she is there to assist or to speak fort the self-represented litigant in the presentation of the case" (paragraph 6).
>
> The Court deemed the following to be permissible" "lending a helping hand to a self-represented litigant, without fee and on an isolated occasion" (paragraph 13).
>
> The Appellant was not simply "lending a helping hand…on an isolated occasion". They purport to act as a lawyer or claimant adviser would systematically, for members of the public, like the Appellant. The Appellant is now characterized by [Appellant's potential representative] as a friend who is not being charged a fee is irrelevant.
>
> To use the Court of Appeal's phrase in *Moss,* above, the appearance of the Appellant before the Commission would amount of "play[ing] the role of a substitute lawyer" (paragraph 8)."

The Law Society's legal counsel also referred to the provisions of the *MPIC Act* which permits non-lawyers to represent Appellants before the Commission as Claimant Adviser Officers. In his submission, the Law Society legal counsel referred to Section 174 of the *MPIC Act* which established the Claimant Adviser Office and which permitted the Claimant Adviser:

1. To assist the Appellant in appealing a review decision to the Commission

2. To provide advice about the meaning and effect of the provisions of the Act and regulations and decisions made under the Act.
3. To communicate with or appear before the Commission on a person's behalf.

The Law Society's legal counsel further submitted that:

1. the Claimant Adviser staff are paid out of the consolidated funds of Manitoba, they are presumably trained prior to being appointed and are presumably subject to removal for bad behaviour.
2. The Appellant thus has a degree of protection when dealing with Claimant Advisers and in turn are immune from a loss in connection with these services.
3. The Appellant was not regulated under the *MPIC Act* in any way whatsoever
4. If the Appellant was permitted to perform a Claimant Adviser's functions than, under the provisions of the *MPIC Act* regarding Claimant Advisers, the law would be rendered moot which the legislation obviously did not intend.

The Law Society's legal counsel also referred to the Commission's Guidelines for Hearings (Guideline 3.1) which provides:

> "Parties to an appeal represent themselves or be represented by someone else of their own choosing who may, but need not necessarily, be a lawyer."

He submitted that "properly interpreted, someone else" in these guidelines means a Claimant Adviser. Otherwise, he asserted, the statutory Claimant Adviser scheme would be rendered meaningless.

The Law Society's legal counsel further submitted only a Claimant Adviser Officer or a lawyer could represent the Appellant before the Commission. However, MPIC's legal counsel did agree with the suggestion of the Commission in regard to the comments of Mr. Justice Huband in *Moss v. NN Insurance Co.* (supra) that a self-represented person could show up before the Commission as "a substitute lawyer" without fee on an isolated occasion.

The Law Society's legal counsel further submitted that:

1. [Appellant's potential representative] had acknowledged to the Commission that he was conducting a business and wished to assist individuals with respect to their claims under the *MPIC Act*.
2. In these circumstances whether or not being paid a fee for a service was attempting to carry on the practice of law which was contrary to Section 20(2)(a) of the *LP Act*.

The Submission of MPIC:

MPIC's legal counsel in a brief submission supported the submission of the Law Society's legal counsel.

The Submission of [Appellant's potential representative]:

[Appellant's potential representative]'s legal counsel disagreed with the submissions of legal counsels for the Law Society of Manitoba and MPIC. In his submission, [Appellant's potential representative]'s legal counsel referred to Section 182(3) of the *MPIC Act* which statutorily gave the Commission the right to determine whether or not [Appellant's potential representative] could appear before the Commission. He further asserted that the Commission in exercising this power under this provision was complying with its Guidelines which state:

"Parties to an appeal represent themselves or be represented by someone else of their

own choosing who may, but need not necessarily, be a lawyer."

[Appellant's potential representative]'s legal counsel further submitted that:

"1. Section 20 of the *LP Act* could not override the provisions of Section 182(3) of the *MPIC Act*.

2. The Commission had jurisdiction to determine whether or not [Appellant's potential representative] could appear before the Commission even though he was a non lawyer and his intent, as part of his business, was to represent Appellants before the Commission."

DISCUSSION

The essential prohibition regarding non-lawyers is found in Section 20(2) of the *LP Act* which creates three separate categories of prohibitions, as follows:

- Only a practising lawyer can "carry on the practise of law" – clause 20(2)(a)
- Only a practising lawyer can appear as a lawyer before a court or a justice of the peace – clause 20(2)(b)
- Only a practising lawyer can initiate or defend an action in court – clause 20(2)(c).

The Commissions notes that these prohibitions are not absolute because the opening stem of Section 20(2) creates an exception and allows non-lawyers to partake in any of the activities enumerated in clause a through c, as long at it is "permitted by or under" *The Legal Professions Act* or any other Act.

The prohibition set out in clauses 20(2)(b) and 20(2)(c) of the *LP Act* has no application to matters before the Automobile Injury Compensation Appeal Commission because the

Commission is an administrative tribunal and not a court of law. However, Section 20(2)(a) of the *LP Act* does provide that non-lawyers are prohibited from carrying on the practise of law (unless it is otherwise permitted by statute).

In considering the prohibition set out in Section 20(2)(a) of the *LP Act* the Commission must consider whether the activities of [Appellant's potential representative] "carry on the practise of law". As well, even if these activities "carry on the practise of law" the question arises as to whether these activities nevertheless are permitted under another statute such as, in this case, Part 2 of the *MPIC Act.*

Section 20(3) of the *LP Act* (deeming provision) does describe certain activities that define the carrying on the practise of law. This provision applies only to those people who are engaged "directly or indirectly, for or in the expectation of a fee or reward". Clearly if there is no expectation of a fee or reward the deeming provision does not apply. However, the Commission finds that even if the deeming provision does not apply, the essential question before the Commission remains as to whether the person who is a non-lawyer is "carrying on the practise of law", and therefore acting in a manner which is contrary to Section 20(2)(a).

Section 182(3) of the *MPIC Act* states:

> **Commission to determine its practice and procedure**
>
> 182(3) The commission shall determine its own practice and procedure and shall give full opportunity to the appellant and the corporation to present evidence and make submissions.

On its face, Section 182(3) appears to be little more than a codification of the common law rule

that says administrative tribunals, such as this Commission, have inherent authority to control their own practice and procedure. But the fact of elevating a common law rule into a statutory rule is of particular significance to the manner in which Section 20(2)(a) of the *LP Act* applies to this Commission.

As the Commission has noted in *R. v. Lemonides,* [1997] O.J. No. 3562 (Ont. Gen. Div.) stands as the authority for the principle that decisions about representation of parties are decisions of procedure. That is, they are part of a decision-making body's inherent authority over the process. Since the Commission has inherent authority at common law to control practice and procedure before it, and therefore the authority to control who appears before it, Section 182(3) also gives the Commission that same authority, but under statute. In other words, the Commission's authority at common law to permit a non-lawyer to appear as agent now appears to be statutory authority.

The Commission determines:

1. It has been given statutory authority to make procedural decisions, such as whether to allow a non-lawyer to appear as an agent in any proceeding before it.
2. To the extent that the Commission exercises its authority to allow a non-lawyer to appear, it is making a decision that has been contemplated within the exemption from the prohibition at Section 20(2)(a).
3. Section 20(2)(a) is not inconsistent with the Commission's authority to decide to allow a lawyer to appear as an agent.

The Commission, in coming to this conclusion, is mindful of the Manitoba Courts in such cases

as *Aasland v. Mirecki* [2002] Man. J. No. 502, *Moss v. NN Life Insurance Co. of Canada* 2004 MBCA 10, and *Law Society of Manitoba v. Pollock*, 2008 MBCA 61 (see also 2007 MBQB51).

The most crucial distinction between these cases and the case before the Commission is that in those cases, the issue was always whether an agent would be prohibited from appearing in court on behalf of another individual. In this case the issue is whether an agent should be prohibited from appearing before an administrative tribunal (which is not a court of law) on behalf of another individual.

In *Aasland* (supra), Mr. Justice Clearwater found that the prohibition in the previous statute, Section 56 of *The Law Society Act*, left no room for even a discretionary decision by the Queen's Bench to allow a non-lawyer to appear as an agent in a court of law.

In *Pollock* (supra), Chief Justice Monnin of the Queen's Bench dealt with questions about a non-lawyer's authority to appear as an agent in various settings – mostly court settings, but one administrative tribunal setting. With respect to the one administrative tribunal setting – immigration matters before federal immigration tribunals – it was recognized that the relevant legislation did in fact contemplate the possibility. For that reason, an injunction was granted in relation to the non-lawyer appearing before various court settings, but not in relation to the immigration tribunal settings. The Court of Appeal upheld the Chief Justice's decision.

In *Moss* (supra), the Court of Appeal determined that clause 20(2)(a) of *The Legal Profession Act* "appears to be aimed at those who would pass themselves off as lawyers, but claim a fee or reward for their services, even though they lack professional qualifications." (parag.12).
However, the Court of Appeal was not required to discuss the issue of whether that prohibition

had application to Administrative Tribunals or whether that provision would not apply as a result of a provision in another statute such as Section 182(3) of the *MPIC Act*.

The Commission's Guidelines for Hearings provides (at Guideline 3.1) ""Parties to an appeal represent themselves or be represented by someone else of their own choosing who may, but need not necessarily, be a lawyer."

In arriving at its decision, the Commission rejects the submission of The Law Society's legal counsel that the term "someone else" in the guidelines means only the Claimant Adviser under Section 174 of the *MPIC Act*. The Commission finds that Section 174 of the *MPIC Act* does not restrict the Commission's statutory authority under Section 182(3) of the Act. Section 182(3) of the Act gives the Commission the statutory authority to make procedural decisions such as whether or not to allow a non-lawyer (excluding the Claimant Adviser Officer) to appear as an agent in any proceedings before it.

For these reasons the Commission rejects the submission of the Law Society's legal counsel that Section 20(2)(a) of the *LP Act* and Section 174 of the *MPIC Act* prohibit [Appellant's potential representative] from representing the Appellant before the Commission. For the same reasons, the Commission rejects the position of MPIC's legal counsel who agreed with the submissions of the legal counsel for The Law Society of Manitoba.

At the commencement of the pre-hearing, the Commission indicated that in determining the

matters before it, it would have to consider the provisions of Section 20(2) of *The Legal Profession Act* and Section 174 of the *MPIC Act* in determining whether or not [Appellant's potential representative] could represent the Appellant before the Commission. The Commission also indicated that if it is determined that these provisions had no application to [Appellant's potential representative], the Commission would then have to consider whether or not [Appellant's potential representative] was competent to represent the Appellant before the Commission.

The Commission, in the past, has permitted an Appellant's friend or relative to give the Appellant advice when advancing argument or in cross-examination and performing other functions that legal counsel usually does. However, the Commission does have the authority, under Section 182(3) of the *MPIC Act* on a case by case basis to determine whether a "friend or relative" had the ability to assist the Appellant.

In the present case, [Appellant's potential representative] has held himself out to be available as an agent to all and sundry for which he charges fees.

In a letter from the Law Society of Manitoba to [Appellant's potential representative] dated May 12, 2008, [general counsel for the Law Society of Manitoba], General Counsel of the Law Society of Manitoba, stated:

> "It has come to our attention that you are attempting to assist an individual ([the Appellant]) with respect to his rights relating to a claim for benefits in respect of an accident that took place on February 29, 2008.
>
> In addition, please be advised that we recently became aware of an advertisement for your company that was printed in the [text deleted] edition of the [text deleted]. For your ease of reference, a copy of the said advertisement is enclosed with this correspondence. Your advertisement talks about good faith and how your company can make a difference in terms of dealings with persons who have been victims of bad faith at the hands of their insurer. It goes on to stipulate that your team of expert consultants

> and analysts are highly qualified to assist in all aspects of a claim. Specifically, your advertisement refers to MPI, Workers Compensation and Disability Insurance matters."

During the course of the proceedings, the Commission asked [Appellant's potential representative]'s counsel to obtain instructions from his client as to whether or not these comments were accurate, and [Appellant's potential representative]'s counsel, after consulting with his client, informed the Commission that they were accurate.

The Appellant, in a letter to the Commission dated January 27, 2009, stated:

> "I wish to make it clear that [Appellant's potential representative] is not being paid to assist me with my appeal. There is no commercial relationship involved. He and I have developed a close relationship; and he has agreed to act as my personal representative. I am enclosing a new letter of authority, which confirms his representation is being done on a personal basis. MPI acknowledges that I can have someone who is either a family member or a friend. Now they wish to try to tell me who I choose as my friend? Neither you nor MPI have the legal right to deny my selection."

In a letter dated February 16, 2009, [Appellant's potential representative] wrote to the Commission and stated:

> "In regard to [the Appellant] there are absolutely no grounds for debate. The fact that I own a business of assisting injured accident victims does not disqualify [the Appellant] and I from having a personal friendship. Your concerns might have some merit if I were suggesting every client was a friend, which is not the case. Our relationship is not commercially based. If it is your intent to carry on with the pre-hearing for his appeal, we will require some manner of legal reference to support your position. To deny [the Appellant] the privilege and right to choose his friends in unconscionable, and a violation of the rights and freedoms set forth under the Canadian Charter, of which I am certain you are well informed."

The Commission has agreed with [Appellant's potential representative]'s counsel that Section 182(3) of the Act gave the Commission the statutory authority to determine whether [Appellant's potential representative] could represent the Appellant and that Section 20(2) of the *LP Act* does not restrict the Commission from exercising this authority. The Commission finds that whether

[Appellant's potential representative] is carrying on the business of assisting injured accident victims for a fee or wishes to represent the Appellant on the basis of a personal friendship without charging a fee does not restrict the Commission's statutory authority pursuant to Section 182(3) to determine whether or not [Appellant's potential representative] is competent to appear as an agent on behalf of the Appellant.

The Commission further notes that at the commencement of the pre-hearing, the Commission indicated to all counsel that one of the issues the Commission would have to determine is whether it had the jurisdiction to hear [Appellant's potential representative]'s application to represent the Appellant and whether or not [Appellant's potential representative] was competent to do so. The Commission further advised [Appellant's potential representative]'s legal counsel that if the Commission decides that it has jurisdiction, then a separate hearing would be held on [Appellant's potential representative]'s competency.

The Commission therefore is adjourning these proceedings and will arrange for a new date with legal counsel to hear testimony and submissions on the issue of [Appellant's potential representative]'s competency.

Dated at Winnipeg this 16th day of June, 2009.

MEL MYERS, Q.C.