

Long Constitutional Challenge to \$4,000 Cap on Minor Injuries Over

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On December 17, 2009 the Supreme Court of Canada decided not to hear the plaintiffs' appeal from the Alberta Court of Appeal's June 12, 2009 decision upholding the \$4,000.00 cap on non-pecuniary damages for "minor injuries", as defined in the *Minor Injury Regulations*, A.R. 123/2004 ("the MIR"). That decision brought to an end the constitutional challenges to the enforceability of key portions of the automobile insurance reforms implemented by the Alberta government at the end of 2004.

The constitutional challenges started in 2005 with the claim that the MIR had not been enacted properly by the government. That claim was dismissed on November 21, 2005 but the challenges continued. It was claimed in *Morrow v. Zhang* and in *Pedersen v. Van Thournout* that the minor injury cap discriminated contrary to section 15 of the Canadian Charter of Rights and Freedoms against plaintiffs injured in motor vehicle accidents and also that the cap deprived the plaintiffs' of life liberty and security of person contrary to section 7 of the Charter.

The Charter challenge was subject to close case management by the Associate Chief Justice of the Court of Queen's Bench and went to trial in April – May 2007. On February 8, 2008 the Associate Chief Justice found that section 7 did not apply but he found that the MIR did discriminate contrary to section 15:

2008 ABQB 98. Insurance Bureau of Canada appealed, as did the government and the defendant Zhang.

Parlee McLaws partners Rick Davison and David Rolf, acting for the Appellant Insurance Bureau of Canada, argued before the Court of Appeal in September 2008, as they had at trial, that the MIR did not discriminate against injured persons because it was part of a whole scheme of insurance reforms that responded to the needs and circumstances of accident victims; because it recognized the legitimacy of their pain; because it recognized that their injuries required increased, immediate and individualized treatment by health care professionals of their choice; and, because it did not perpetuate a stereotype or historic disadvantage. The Court of Appeal agreed: 2009 ABCA 215.

The Supreme Court's December 17, 2009 decision means that the Alberta Court of Appeal's judgment stands and that the cap on non-pecuniary damages for minor injuries as defined in the MIR is constitutional and in full force and effect in Alberta.

It is interesting to note that on December 15, 2009 the Nova Scotia Court of Appeal concluded that the Nova Scotia cap on non-pecuniary damages imposed under a different automobile insurance regulatory scheme also did not discriminate contrary to section 15 of the Charter: 2009 NSCA 130. That Court too found that a cap on non-pecuniary damages did not perpetuate a stereotype or historic disadvantage.

For more information on this decision and its impact, please contact David C. Rolf (drof@parlee.com) or any member of our Insurance Litigation Practice Group.

This legal alert is intended to provide general information concerning developments in the law and is not intended to provide legal advice in respect of any particular situation.