

INSURANCE LITIGATION LEGAL ALERT

Application for stay of judgment striking down MIR refused

FEBRUARY 26, 2008

Alberta Court of Queen's Bench Associate Chief Justice Neil Wittmann's decision striking down the Alberta Minor Injury Regulation (A.R. 123/04) (the "MIR") and the \$4,000 cap on non-pecuniary damages (see *Morrow v. Zhang* 2008 ABQB 98) has been appealed to the Alberta Court of Appeal by both the Alberta Government and Insurance Bureau of Canada ("IBC").

On February 25, 2008, Wittmann A.C.J. heard an application by the Alberta Government and IBC for a stay of his decision, pending the outcome of their appeals. Wittmann A.C.J. rendered a decision that same day, dismissing the stay application.

In his written reasons (see *Morrow v. Zhang* 2008 ABQB 125), Wittmann A.C.J. concluded that, although there is a serious issue arising on the appeal (i.e. the constitutional validity of the MIR), no "irreparable harm" would result if the stay was not granted, and that the "balance of convenience" did not favour the granting of a stay. Wittmann A.C.J. was not convinced that the potential for increases in insurance rates or other financial harm would result in irreparable harm to the public interest. He also concluded that any "disruption" that would result if the stay were not granted, failed to outweigh "the perpetuation of the stereotype against Minor Injury victims" that would continue if the stay were granted.

Given Wittmann A.C.J.'s refusal to grant a stay, his judgment striking down the MIR and the \$4,000 cap for "minor injuries" as unconstitutional remains in force. In the result, until such time as the Court of Appeal agrees to grant a stay or overturns Wittmann A.C.J.'s decision to strike down the MIR, the MIR and the \$4,000 cap is not applicable to any unresolved

personal injury claims arising out of motor vehicle accidents that occurred after October 1, 2004.

However, in the course his Reasons, Wittmann A.C.J. suggested that no claimants were likely to litigate their claims until the Court of Appeal confirmed the law; and, if they did, he said, it was "likely this Court would grant a stay except in hardship or other meritorious cases". He then stayed execution of his judgment in favour of one of the test case plaintiffs on the condition that the amount awarded for non-pecuniary damages in excess of the cap was paid into trust pending the Court of Appeal's decision.

For more information on the above decision and its impact, please contact 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.