

INSURANCE LITIGATION LEGAL ALERT

\$4000 cap for minor injuries struck down

FEBRUARY 8, 2008

Alberta Court of Queen's Bench Associate Chief Justice Neil Wittmann rendered his long awaited decision in the constitutional challenge to the Alberta *Minor Injury Regulation* Alta. Reg. 123/2004 ("MIR") on February 8, 2008, striking down the \$4,000 cap on non-pecuniary damages for "minor injuries", along with the entire the MIR, as unconstitutional (see *Morrow v. Zhang* 2008 ABQB 98).

In his 87 page decision, Wittmann A.C.J. assessed the evidence and arguments advanced by the Plaintiffs, the Defendants, and the two interveners, the Alberta Government and the Insurance Bureau of Canada ("IBC"), and held that the MIR violated section 15(1) of the Canadian *Charter of Rights and Freedoms*, as it discriminated against a particular class of people on the basis of a physical disability. Wittmann A.C.J. then went on to conclude that the primary objective of the MIR was to reduce insurance premiums and that this objective was not sufficient to "save" the MIR under section 1 of the Charter.

After declaring the MIR to be of no force or effect, Wittmann A.C.J. dismissed IBC's submission that his decision should only apply from February 8, 2008 *forward* (i.e., that it should not apply to any outstanding "minor injury" claims that arose between October, 2004, when the MIR came into force, and February 8, 2008). In rejecting IBC's argument, Wittmann A.C.J. confirmed that his decision to strike down the MIR is *retroactive*, such that any unresolved claims that would have otherwise fallen under the MIR, are now to be treated as regular tort claims. It remains to be seen what effect, if any, Wittmann A.C.J.'s decision will have on "minor injury" claims that have already been settled.

Wittmann A.C.J. also rejected IBC's request for a "temporary suspension" of his decision for at least one year. As such, pending an appeal of Wittmann A.C.J.'s decision to the Court of Appeal, and a successful application for a stay, the MIR and the \$4,000 cap for "minor injuries" is no longer "the law" in Alberta.

Wittmann A.C.J.'s decision dealt only with the MIR. The whole of the 2004 automobile insurance reform package, including the MIR's companion Regulations, the *Automobile Accident Insurance Benefits Amendment Regulation* and the *Diagnostic and Treatment Protocols Regulation*, remain in force.

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.