

The Cap Constitutional Challenge – Where Do We Go From Here?

Associate Chief Justice Wittmann's decision on the Constitutional Challenge of the Alberta Minor Injury Regulation was handed down on February 8, 2008. The Court struck down the Minor Injury Regulation in a lengthy decision cited as **Morrow v. Zhang**, 2008 A.B.Q.B. 98. The Minor Injury Regulation was found not to offend Section 7 of the Canadian Charter but it did offend Section 15. This Section of the Charter is frequently termed the "equality provision". Justice Wittmann concluded that the Minor Injury Regulation treated those with minor injuries as defined by the Regulation differently than those with other injuries arising out of motor vehicle accidents. In so doing, he stated

"The evidence before me suggests strongly that Minor Injuries victims, particularly those suffering from a whiplash associated disorder, are subjected to stereotyping and prejudice. In sum, they are often viewed as malingerers who exaggerate their injuries or their effects in an effort to gain financially. The fact that these injuries are often not objectively verifiable may contribute to this perception." (at para. 205)

...

"By limiting the amount of non-pecuniary damages available to those suffering from Minor Injuries, the legislature has effectively categorized that group of injury victims as less worthy of non-pecuniary damages. The basis of this distinction is the type of injury from which they suffer ... As a result, the MIR perpetuates the unfortunate stereotype that I find exists in relation to Minor Injury victims." (at para. 215)

In coming to his conclusion, Justice Wittmann did acknowledge the increase in Section B benefits which came into place at the same time the Minor Injury Regulation came into force. However, this was not sufficient to save the Minor Injury Regulation.

Justice Wittmann had some rather harsh words about the Regulation and the insurance industry as a whole. For example, at para. 232 he stated,

"In my view, the MIR sacrifices the dignity of Minor Injury victims at the altar of reducing insurance premiums. Specifically, the message is that their pain is not as worthy of conventional non-pecuniary damages because of the nature of their injuries, despite that their injuries may be more painful and enduring than other types of injuries."

And at para. 241,

"In assessing whether the MIR meets the needs, capacities and circumstances of the claimant group, the reasonable person in the shoes of the claimant would be aware that, in effect, the Government has attempted to finance the resolution of what it perceived to be a

[insurance premium] crisis, on the backs of a discreet group of injury victims who are disabled as a result of a particular type of injury.”

Justice Wittmann also found that the Minor Injury Regulation could not be saved by Section 1 of the Charter. In that analysis, Justice Wittmann did look at the other options the Government considered when enacting the Minor Injury Regulation including that of adopting a definition of Minor Injury that applied to all injuries arising from motor vehicle accidents rather than limiting its application to whiplash associated disorders and the like.

He held that the appropriate remedy was nullification of the Minor Injury Regulation as a whole. He declared it to be inconsistent with the Charter and of no force and effect. He declined to suspend the application of his decision as was requested by the IBC and instead, struck the MIR down immediately. Justice Wittmann did note in his decision that the Crown did not request a temporary suspension of the MIR if his decision was to strike it down as the Government stated there would be an appeal if that was the decision and it would apply for a stay pending appeal.

The question to be addressed now is what are insurers to do with their pending claims and those that have already settled under the Minor Injury Regulation. With respect to pending claims, it is recommended that insurers essentially abeyance their files and await the Government’s reaction to Justice Wittmann’s decision. The decision itself suggests that the Government may very well appeal this decision and then apply for a stay of its application pending that appeal. There is also speculation that the Government may instead enact different legislation in place of the Minor Injury Regulation. Insurers are therefore well advised to abeyance their files where the injuries are likely to fit the definition of a “Minor Injury” for the time being. This is not unlike what many Plaintiffs’ counsel were trying to do with their files pending the Charter challenge decision.

Media reports have already surfaced about a potential class action lawsuit that individuals who settled for damages within the Cap may commence. This threat should not mean that insurers need to re-open their files that they settled under the Cap and potentially pay more money for those injuries. Any class action lawsuit would likely be against the Government rather than private insurers and it is not expected that settlements reached while the Minor Injury Regulation was in full force and effect could be changed or revisited.

The lawyers at Chomicki Baril Mah LLP will continue to follow these developments with most interest and we will be updating our website (www.cbmlp.com) as developments occur.

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