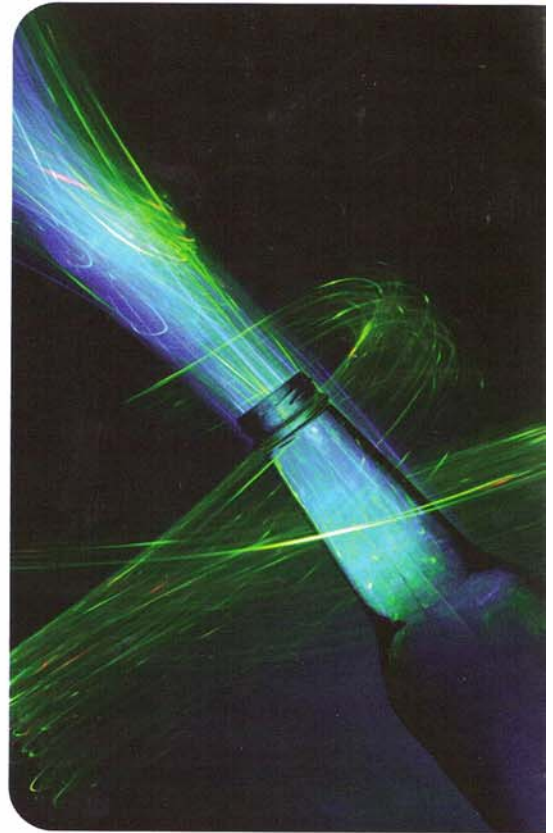


# Blowing the Lid Off the CAP

*Alberta's Court of the Queen's Bench has rejected the province's Cdn\$4,000 cap on auto insurance minor injury claims. In doing so, the court has effectively called into question the use of a cap as the linchpin of many of Canada's auto insurance reforms.*



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McLennan Ross LLP is a member of the ARC Group Canada Inc., an affiliation of independent law firms across Canada practicing in the areas of insurance law and risk management.

Associate Chief Justice Neil Wittmann of the Court of Queen's Bench of Alberta in February 2008 issued his long-awaited decisions in *Morrow v. Zhang et al* and *Pedersen v. Thournout et al.* (collectively "Morrow"), the ramifications of which are sure to stoke the firestorm of debate surrounding insurance reform — not only in Alberta, but across Canada.

The issue in *Morrow* was whether s. 6 of Alberta's *Minor Injury Regulation* (MIR) was contrary to Sections 7 and 15(1) of the *Canadian Charter of Rights and Freedoms*. S. 6 of the MIR imposed a Cdn\$4,000 cap on non-pecuniary general damages for "minor injuries" caused by

the use or operation of a motor vehicle. In the MIR, minor injury is described as follows:

- (h) "minor injury," in respect of an accident, means:
- (i) a sprain;
  - (ii) a strain; or
  - (iii) a WAD injury caused by that accident that does not result in a serious impairment.

After hearing evidence led at trial, Wittmann found that, if it hadn't been for the Cdn\$4,000 cap, Peari Morrow's injuries would have yielded non-pecuniary general damages of Cdn\$20,000. Similarly, in *Pedersen*, the judge found the injuries of Brea Pedersen would have

yielded non-pecuniary general damages of Cdn\$15,000.

Of particular importance to the outcome of this case was what the court described as the cyclical nature of the insurance industry, characterized by periods of "soft markets" and "hard markets." A soft market, for example, is characterized by periods of strong competition among insurers, in which underwriting standards are relaxed and insurers keep premium prices relatively stable or reduced in order to increase market share. During this time, premium pricing will often not allow insurers to fully recover their expenses; they will rely on investment income to be profitable. When

profitability inevitably declines, or reaches an unacceptable level, the hard market cycle gradually begins.

In hard markets, insurers seek to increase profitability by being more selec-

## THE CHARTER CHALLENGE

### Section 7

The court analyzed whether the MIR violated s. 7 of the Charter. Section 7 reads as follows: "Everyone has the right to life,

injury claimants, including the prospect or prevalence of soft tissue injury fraud and malingering by soft tissue injury victims. In his decision, Wittmann emphasizes media quotes from Jim Rivait of the



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tive about the risks they insure. Premiums often increase sharply during hard market times, since the insurers clamour to recover their underwriting expenses.

Historically, Alberta reached a peak hard market cycle in 2003, at which time the industry cycle began moving towards a new soft market. This caused a decrease in premiums written, it has been argued, likely due to the rate freeze the Klein Government imposed in 2003 as well as the introduction of the premium grid, which set maximum amounts for premiums based on driving records.

In analyzing the rationale behind Alberta's 2004 insurance reforms, including changes to the MIR, Wittmann recognized the "all-comers" rule in s. 613.1 of the *Insurance Act*, which provides that all Albertans, subject to some exceptions, will have access to insurance at a cost less than or equal to a premium capped under the premium grid. Insurance premiums have decreased since the implementation of the reforms, which included a premium freeze, mandated rate reductions and the impact of the premium grid system.

Wittmann found that: "It is clear from the evidence that, in the years preceding the insurance reforms, the Government of Alberta had good reason to be concerned about the significance of non-pecuniary damages with respect to bodily injury costs. However, it is also clear that premiums do not vary solely as a function of bodily injury costs. There are other significant factors that influence the rates, including the cyclical nature of the insurance market which, if not regulated, will affect premiums differently depending on whether the period is a soft market or a hard market."

liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

The court found one's right to life, liberty and security of the person as guaranteed by s. 7 of the Charter is not violated by the Cdn\$4,000 cap on non-pecuniary general damages. Specifically, the court found s. 7 of the Charter does not protect the civil right to bring an action for damages for personal injury beyond the statutory Cdn\$4,000 cap.

### Section 15

Section 15 of the Charter and its relationship to s. 6 of the MIR constitutes the heart of the decision in these two cases.

Section 15(1) of the Charter reads as follows: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

In attempting to determine whether the MIR was discriminatory in nature, the court compared two groups: 1) individuals who suffered motor vehicle accident-related injuries defined as "minor injuries" under the MIR, and 2) motor vehicle accident victims who suffered injuries other than those defined as "minor injuries." This comparator group was selected because it was the definition of "minor injury" that distinguished one group from another and this distinction was the basis of the MIR.

Evidence was led at trial concerning the views of society towards soft tissue

Insurance Bureau of Canada that were less than complimentary to minor injury victims. The court saw these quotes as evidence of the stereotypical views held in society in relation to soft tissue injury claimants.

Based on this evidence, the court found that: "By limiting the amount of non-pecuniary damages available to those suffering from minor injuries, the legislature has effectively categorized the 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. In limiting non-pecuniary damages in relation to the complainant group, the MIR effectively signals that the pain and suffering resulting from these medically unverifiable injuries are less deserving of damages than that caused by other injuries. As a result, the MIR perpetuates the unfortunate stereotype that I find exists in relation to minor injury victims."

The court went on to find that the purpose of the 2004 Alberta insurance reforms — including the MIR — was to reduce automobile premiums. This purpose was seen as having nothing to do with needs of the claimant group (minor injury victims) and everything to do with keeping the costs of insurance premiums down for policyholders not suffering any loss.

The court found the government had attempted to finance the resolution of what it perceived to be an insurance crisis on the back of a discreet group of injury victims who were disabled but not seen as being worthy of compensation beyond Cdn\$4,000. In other words, Alberta drivers at large — and more specifically,

high-risk drivers — could obtain more affordable insurance due to the imposition of the “cap” imposed on minor injury victims.

Wittmann therefore held s. 6 of the MIR contravened Section 15(1) of the Charter. He then went on to determine whether the discriminatory limitation found in s. 6 of the MIR was saved by s. 1 of the Charter. Section 1 of the Charter saves laws otherwise contrary to Charter principles so long as such laws represent “reasonable limits” that could be justified in our society.

### Section 1

Section 1 of the Charter reads as follows: “*The Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

In assessing whether the imposition of the cap was reasonable, having regard to all of the circumstances, the court again highlighted the objective of the cap was to

reduce insurance premiums — a saving realized by all, except perhaps those who suffered minor injuries. The judge specifically rejected the Crown’s submission that the cap was a measure imposed to control rising claim costs relative to soft tissue injuries. Bodily injury costs were a legitimate cause for concern in the years before the insurance reforms were implemented, Wittmann observed, but they were not the only factor causing premium rates to rise.

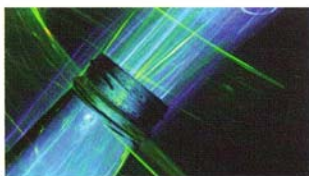
The court found it was reasonable for the government to perceive an insurance crisis existed or was imminent and that mandatory automobile insurance was becoming inaccessible to many Albertans. However, although maintaining affordable mandatory automobile insurance was a pressing and substantial objective, it was not justifiable to place the burden of widespread premium decreases on the shoulders of minor injury victims, the court found. The court noted other available alternatives were less intrusive and would also fulfill the underlying objective of the legislation. In short, the court found the cap “plainly overshoots the mark” in

terms of the interference it entails in relation to the rights of the claimant group (minor injury victims).

The court thus found s. 6 of the MIR — the provision instituting the Cdn\$4,000 cap — was unconstitutional, since it violated s. 15(1) of the Charter and could not be saved under s. 1. The court also held that without s. 6, the MIR could not independently survive. Therefore, the entire regulation was struck down on a retroactive basis. As a result, all claims dating back to Oct. 1, 2004, when the “cap” went into effect, survive without the limitation of the cap. Now an opportunity exists for claimants to seek and obtain retroactively more than Cdn\$4,000 for non-pecuniary general damages.

### THE MORROW EFFECT

This decision has many significant implications. Literally thousands of claims that had been held in abeyance — and that otherwise would have been capped at Cdn\$4,000 for non-pecuniary general damages — are now expected to move forward.



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Furthermore, some unrepresented minor injury victims who settled their claims for Cdn\$4,000 or less due to the cap may attempt to have their cases reopened. To do so, they would seek to demonstrate that insurers misled them into believing their Charter challenge would not be successful, or that they had no chance of recovering more than the Cdn\$4,000 cap.

It is also worthwhile noting the *Morrow* decision was issued less than a month before the Mar. 3, 2008 Alberta provincial election. Consequently, it is perhaps understandable the province elected to appeal the judgment as of Feb. 12, 2008 rather than impose new legislation.

Wittmann recently heard and, as

expected, denied a stay of the decision. The basis for refusing the stay was that there was no evidence of irreparable harm brought forward by the applicants; further, the balance of convenience favoured the plaintiffs. As such, the decision that the MIR is unconstitutional remains in effect and will remain in effect subject to the decision of the Court of Appeal either in relation to a further stay application and the appeal of the judgment.

No mainstream political party appeared to have any appetite to make insurance reform an election issue during the campaign leading up to the Feb. 28 provincial election. Now that the Conservatives have regained a majority government in the Alberta legislature, it remains to be seen whether it will have the

political will to try to re-write the legislation before the appeal is heard.

Meanwhile, certain other Canadian jurisdictions such as Nova Scotia, New Brunswick and P.E.I. have Cdn\$2,500 caps on non-pecuniary general damages; they will no doubt have taken notice of this decision. Other jurisdictions may also heed the words of Wittmann and his strongly written judgment. The ultimate outcome of these issues remains uncertain, but one thing is clear: interesting times lay ahead for the automobile insurance industry. Insurers will begin the task of determining the best strategies for dealing with these types of claims pending further legislative reform or determination of these issues on appeal. ☐