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Another stay of judgment denied in the challenge to Alberta's cap on damages for soft tissue injuries

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Cases Considered:

Morrow v. Insurance Bureau of Canada, 2008 ABCA 248

The latest judgment in the constitutional challenge to Alberta's $4,000 cap on non-pecuniary damages for soft tissue injuries incurred in motor vehicle accidents was handed down on June 27, 2008 by Madam Justice Patricia Rowbotham of the Alberta Court of Appeal. State Farm Insurance Company, the insurer of the defendant in the personal injury action, had applied for a stay of the February 8, 2008 judgment of Associate Chief Justice Neil Wittmann. He had declared the Minor Injury Regulation, Alta. Reg. 124/2004 (MIR) unconstitutional, thus ending the $4,000 cap. See *Morrow v. Zhang*, 2008 ABQB 98 and the previous post on this judgment by Jennifer Koshan, "Not on Their Backs: Cap on Damages for Soft Tissue Injuries Struck Down; Court Denies Stay of Remedy Pending Appeal." Justice Rowbotham denied State Farm's application.

Justice Wittmann had already denied an application for a stay by the Province of Alberta on February 25, 2008: Morrow v. Zhang, 2008 ABQB 125. At the same time, he had granted the application of the defendant in the personal injury action, imposing a stay of the money judgment in excess of the $4000 cap pending the outcome of the Province of Alberta and Insurance Bureau of Canada appeal of his February 8 decision. State Farm, the insurer of the defendant, had conceded that it would pay the amount of the judgment and so the stay granted by Justice Whittman was, in effect, a stay for the benefit of State Farm. In the application before Justice Rowbotham, State Farm was seeking a broader stay than they had been awarded by Justice Whittman. The insurer was seeking a stay of all claims, very similar to the stay unsuccessfully sought by the Province of Alberta four months earlier. In the alternative, State Farm sought a stay of the enforcement of all judgment against State Farm customers that might be affected by the appeal.

As Professor Koshan noted in her post, a stay will only be granted if the following questions are answered in the affirmative:

1. Is there a serious issue arising on the appeal?
2. Will irreparable harm result if the stay is not granted?

3. Does the balance of convenience favour granting the stay?

That three-part test was used by Justice Rowbotham in her oral judgment denying State Farm's application. As had happened before Justice Whittman, all parties agreed that there was a serious issue arising on the appeal and the first question in the test was therefore satisfied. The second question asks whether refusing a stay could so adversely affect the applicant's interest that the harm could not be remedied. The third question looks at the potential harm to the respondent as well as the applicant.

Could State Farm demonstrate that it would suffer irreparable harm without a stay? The evidence the insurance company produced indicated that it had approximately 1,000 claims affected by the constitutional challenge to the cap and approximately ten percent of those claims would, in the normal course, be settled or tried before the September 2008 hearing of the appeals. In their experience, once money was paid to claimants, it was nearly impossible for them to recover the money if the payments turned out to have been made in error. It was this risk that was the main basis of their application. State Farm also argued that the premiums it charged had been based on the cap and if they had to pay out in excess of the cap, they would be providing coverage for which they had never been paid. On the other hand, if they increased their premiums and then won the appeals, they would be overcharging their customers. A stay, they concluded, would preserve the *status quo*. The Insurance Bureau of Canada argued that all of State Farm's points applied to the Alberta automobile insurance industry as a whole and therefore a stay of all claims should be granted.

Justice Rowbotham agreed with Justice Whittman's assessment of State Farm's evidence and arguments, disagreeing with State Farm that the evidence of irreparable harm was greater four months later. There could be no impact on State Farm in terms of settlements they agreed to because State Farm could not be forced to settle for an amount greater than the cap. With respect to judgments it might have to pay, State Farm could not point to any claim which was in trial or about to go to trial before the appeals are heard in September. The risk of State Farm paying out in excess of the cap and then trying to recover the excess if the appeals were successful could also be dealt with in other ways. State Farm could pay the judgment into court or apply for a stay on a case-by-case basis, as the defendant had done in this case. Justice Rowbotham therefore held that State Farm had failed to demonstrate irreparable harm.

Although she did not need to consider the third factor - the balance of convenience - Justice Rowbotham did go on to note that the balance of convenience did not favour a stay. Here she referred to the public interest, an interest not represented in the application before her. A stay, she held, would perpetuate the stereotypes described in Justice Wittmann's decision. Justice Rowbotham also noted (at para. 18) that granting a stay "would harm the public interest in failing to uphold *Charter* rights and would negatively affect claimants by interfering with their actions." The potential harm of not granting a stay to State Farm, on the other hand, was financial and could be dealt with by stay applications on a case-by-case basis.

In this short oral judgment, Justice Rowbotham has continued the generous approach to upholding section 15 equality rights that was adopted by Justice Whittman when he initially struck down the cap. None of the parties before Justice Rowbotham represented the interests of the public. The Province of Alberta, for example, took no position in the application by State Farm. Nevertheless, Justice Rowbotham held that the Court must consider the interests of the public in this stay application. Suspending *Charter* rights would not be in the public interest.

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