

**In the Court of Appeal of Alberta**

**Citation: Morrow v. Insurance Bureau of Canada, 2008 ABCA 248**

**Date:** 20080627

**Docket:** 0801-0041-AC

0801-0067-AC

**Registry:** Calgary

**Docket:** 0801-0041-AC

**Between:**

**Peari Morrow and Brea Pedersen**

Respondents (Plaintiffs)

and

**Insurance Bureau of Canada**

Appellant (Intervener)

and

**Her Majesty the Queen in Right of Alberta**

Appellant  
(Statutory Intervener)

**Docket:** 0801-0067-AC

**And Between:**

**Peari Morrow and Brea Pedersen**

Respondents (Plaintiffs)

and

**Jian Yue Zhang and Xiao Fei Wei**

Appellants (Defendants)

and

**Insurance Bureau of Canada**

Appellant (Intervener)

and

**Her Majesty the Queen in Right of Alberta**

Appellant  
(Statutory Intervener)

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**Oral Reasons for Decision of  
The Honourable Madam Justice Patricia Rowbotham**

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Application for a Stay Pending Appeal

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**Oral Reasons for Decision of  
The Honourable Madam Justice Patricia Rowbotham**

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**Introduction**

[1] This is an application by State Farm Insurance Company (State Farm) for a stay of the judgment of Wittmann A.C.J. declaring the *Minor Injury Regulation*, Alta. Reg. 124/2004, unconstitutional, and of no force and effect, thereby, ending the imposition of a \$4,000 cap on non-pecuniary damages for minor injuries caused by a motor vehicle accident. State Farm seeks a stay generally, or, in the alternative, a stay respecting claims against State Farm only.

**Background facts**

[2] State Farm is the insurer of the appellants involved in a motor vehicle accident with the respondent Morrow. The trial judge awarded Morrow non-pecuniary damages in excess of \$4,000. He also awarded judgment for non-pecuniary damages in excess of the cap to the respondent Pedersen. Those judgments are under appeal to this Court. The appeals and cross-appeals are scheduled to be heard on September 12, 2008.

[3] On February 25, 2008, 13 days after the trial judgment, the Crown in its capacity as statutory intervener, applied to the trial judge for a stay of enforcement pending appeal for those portions of the trial judgment declaring the *Minor Injury Regulation* to be of no force and effect. The Insurance Bureau of Canada, as intervener in the trial and on appeal, supported the stay sought by the Crown. On the same date, State Farm brought a separate motion before the trial judge for a stay of the payment of the non-pecuniary damages award to Morrow.

[4] The trial judge's stay decision is reported at *Morrow v. Zhang*, 2008 ABQB 125. He dismissed the Crown's application for a stay. With respect to Morrow, he imposed a stay of the money judgment in excess of what would have been awarded had the cap remained in place.

[5] The test applied by the trial judge is the same test applied by this Court in determining whether to exercise its discretion to order a stay:

1. Is there a serious issue on appeal?
2. Will irreparable harm result if the stay is not granted?
3. Does the balance of convenience favour granting a stay?

[6] Before the trial judge and before this Court, all parties agreed that there is a serious issue on appeal and the first element of the test is satisfied.

[7] Irreparable harm, the second element, considers the nature of the harm where a refusal of a stay could so adversely affect the applicant's interest that the harm could not be remedied: *RJR-*

*MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at para. 341. The third element, balance of convenience, considers the potential harm to the respondent as well as the applicant: *RJR-MacDonald* at paras. 340-341. The second and third elements are inexorably linked and should be considered together: *Alberta (Treasury Branches) v. Pocklington Financial Corporation* (1998), 228 A.R. 115 at para. 8 (C.A.).

[8] In the application before Wittman, A.C.J. the Crown claimed the irreparable harm would be to the public interest. The evidence in support filed before the trial judge included the existence of hundreds of actions and claims for non-pecuniary damages affected by the judgment under appeal, the possibility of more awards in excess of the cap, the difficulty or impossibility of recovery of monies paid out should the appeal be successful, the potential increase in automobile insurance rates prior to the disposition of the appeal possibly resulting in overcharging policy holders, the uncertainty for accounting and actuarial standards, and the confusion which may result in failure to treat motor vehicle accident injuries expeditiously.

[9] The trial judge found that the evidence did not demonstrate irreparable harm. He held that irreparable harm is not always presumed where impugned legislation has been struck and the applicant is a public authority. He observed that an increase to insurance premiums was speculative. The concern that settlements and damage awards will occur prior to the disposition of the appeal was not a practical concern as these matters could be dealt with, for example, by payments into trust pending the appeal and in any event, a stay would not prevent actions from proceeding. Evidence showed that many claims have been held in abeyance pending final determination of the constitutionality of the cap. He also held that the nature of the harm is financial and therefore, irreparable harm to the public interest was not established.

[10] The trial judge further held that if he erred in failing to find irreparable harm, when weighing the harm from increased insurance premiums and the effect on the ability to drive a car, when weighed against the harm from the perpetuation of the stereotype related to soft tissue injury victims, the balance of convenience favoured injury victims.

[11] With respect to the stay of the payment to Morrow, he found that as Morrow may be unable to repay the award should the judgment be overturned, the balance of convenience favoured the stay. On the concession by State Farm that it would pay the amount of the judgment including interest, costs and disbursements into court or an interest bearing trust account, the trial judge stayed payment of the judgment to Morrow excepting out the sum of \$4000 in non-pecuniary damages and \$1000 special damages.

### **Applicant's submissions for a stay**

[12] State Farm, almost four months later, seeks a broader stay from this Court. It seeks a stay similar to that sought by the Province before Wittman, A.C.J., in other words a stay of all claims. In the alternative, it seeks an order staying enforcement of judgment pending conclusion of the

appeal for all State Farm's bodily injury claims.

[13] As noted above, the test requires demonstration by the applicant that it will suffer irreparable harm and the balance of convenience, when compared to the harm of not granting a stay, weighs in favour of a stay. The serious issue is conceded by the respondents.

[14] State Farm was granted a stay of the judgment awarded to Morrow but applies for a broader stay because of the risk that any settlements or judgments paid out in excess of \$4000 will not be recoverable if the cap is found to be constitutional. The affidavit of Rod Lunau, State Farm's Claim Team Manager in Alberta, deposed that State Farm has approximately 1000 claims affected by this action. In 111 of those claims, the limitation period for commencing an action will expire before the September 2008 hearing of the appeals. State Farm proposes that it is under pressure to settle those claims before the limitation period expires. Lunau further deposed that in his lengthy experience, once funds are paid out to claimants, it is nearly impossible to recoup payments made in error. Additionally, the affidavit of Ray Kearns deposed that premiums for State Farm insurance have been based on the existence of the cap but if State Farm has to pay out settlements or judgments in excess of the cap, State Farm will be providing coverage for which it was never paid based on the rates and premiums previously calculated. Alternatively, if State Farm increased its premiums before the conclusion of this appeal, customers could be overcharged should the appeal be allowed. State Farm for the time being proposes not to increase its premiums. Mr Kearns described the Auto Insurance Rate Board (AIRB) process for reviewing premiums. Exhibit A to his affidavit is a notice of hearing advising that AIRB public meetings, which commence today, will be considering the issues of rates and premiums. State Farm submits that as a stay would preserve the status quo, there would be increased certainty regarding the rate setting procedure.

[15] The intervener, Insurance Bureau of Canada, supports State Farm's application but submits that the first alternative should be granted, i.e. the broader stay that would include all actions pending before the courts in which the non-pecuniary damages cap is or was an issue. In support, the affidavit of Ronald Miller deposed that in his professional actuarial opinion, the harm described by Kearns will be suffered by the Alberta automobile insurance industry as a whole.

[16] The Crown took no position in this particular application today.

### **Irreparable harm**

[17] State Farm submits that the situation has changed since the February 2008 appearance before Wittman, A.C.J., and that the evidence of irreparable harm is greater. For the following reasons, I am not persuaded that this is so:

1. With respect to the impact of the trial judgment on the AIRB hearings, this uncertainty has existed since October 2004 when the litigation commenced. Accordingly, the AIRB has been alive to this issue since its first deliberation in June

2005. As Wittmann, A.C.J. found, this is a red herring.

2. With respect to the impact of the stay on settlement, I agree with the respondents and with Wittmann, A.C.J. that there is no impact. State Farm cannot be compelled to settle at an amount higher than the cap. This was acknowledged by Mr. Lunau, on behalf of State Farm in the cross-examination on the affidavit sworn in support of this application.
3. State Farm says that it will suffer irreparable harm because of claims that have been, or are about to be, tried. It fears that it may be directed to pay amounts in excess of the cap. However, State Farm was unable to point to any claim which is in trial or about to go to trial between now and September. There is no evidence showing that claimants are being paid in excess of the cap or that insurers are being forced to pay such amounts. The evidence of harm, should money be paid to a claimant in excess of the \$4000, is speculative. As the trial judge noted, the risks can be dealt with by making a payment into court or into a trust account, or by making an application for a stay on an individual basis as was done in the case of the judgment awarded to Morrow. In this aspect, this case is no different than many cases where the law is uncertain due to potential appeals to this Court or to the Supreme Court of Canada. The parties and their lawyers in each individual case are in a far better position to address the terms of a stay on a case by case basis.
4. State Farm is concerned about the expiry of limitation periods and proposes that this Court suspend the operation of the limitation periods as a term of such a stay. Indeed as I understood its submission, it was to suspend the operation the *Limitations Act*, R.S.A. 2000, c. L-12. I have no power to grant such a term and, in any event, such a provision would have no legal effect on how other actions proceed.

### **Balance of convenience**

[18] Although the failure to show irreparable harm is sufficient to dismiss this application, I note additionally, that the balance of convenience, does not favour a stay. A stay would perpetuate the stereotypes described in A.C.J. Wittmann's decision. It would harm the public interest in failing to uphold *Charter* rights and would negatively affect claimants by interfering with their actions. There are potentially many Albertans affected by the trial judgment and who would be affected by the stay. The applicant purports to represent the insured driver whose premiums might be affected. The interests of the public, including claimants and prospective plaintiffs, is not represented, although Mr. Kozak made representations regarding their interests. It seems to me that the Court must consider their interests in this situation.

[19] The nature of the harm alleged by State Farm and the Insurance Bureau of Canada is financial. Moreover, the administrative proposal advanced by State Farm for addressing claims in

the interim during a stay period is no less cumbersome, perhaps more so, than by simply addressing each case on an individual basis. Weighed against the harm of granting a stay, the balance of convenience does not favour granting a stay.

**Conclusion**

[20] Accordingly, the application is dismissed.

Application heard on June 17, 2008

Reasons filed at Calgary, Alberta  
this 27th day of June, 2008

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Rowbotham J.A.

**Appearances:**

Mr. A. D'Silva

For the Applicants, Jian Yue Zhang and Xiao Fei Wei

Mr. F.S. Kozak, Q.C.

For the Respondents/Appellants by Cross Appeal

Mr. R. Davison, Q.C.

For the Appellant/Respondent by Cross Appeal, Insurance Bureau of Canada