

A Comprehensive Update on the *Minor Injury Regulation*

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Personal Injury and Insurance Update

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**SPARROWHAWK AND BEYOND: A COMPREHENSIVE UPDATE
ON THE *MINOR INJURY REGULATION***

INTRODUCTION

Despite the fact that it came into force as long ago as October 1, 2004, few Judges have been called upon to interpret the meaning of Alberta's *Minor Injury Regulation* ("MIR"). Some recent decisions, however, most notable among which is *Sparrowhawk v. Zapolinsky*, 2012 ABQB 34 ("*Sparrowhawk*"), have provided some commentary regarding the MIR. Nevertheless, Plaintiff and Defence Counsel disagree as to whether such commentary will assist in the interpretation of what is colloquially known as "the Cap." From the Plaintiff's point of view, *Sparrowhawk* has been heralded as a victory in expanding the definition of "serious impairment" and thus in minimizing the situations to which the Cap applies. From the Defendant's standpoint, *Sparrowhawk's* *obiter* comments on "serious impairment" appear to change or narrow the scope of the "serious impairment" definition to the extent that its subjective test has, arguably, rendered the MIR virtually inoperable.

DEFINING "SERIOUS IMPAIRMENT"

Plaintiff's View

The Cap applies to "minor injuries" as defined by the MIR. More specifically, section 1(h) of the MIR provides that:

"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.

Section 1(j) of the MIR provides that:

"serious impairment", in respect of a claimant, means an impairment of a physical or cognitive function

- (i) That results in a substantial inability to perform the

- (A) Essential tasks of the claimant's regular employment, occupation or profession, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's employment, occupation or profession,
- (B) Essential tasks of the claimant's training or education in a program or course that the claimant was enrolled in or had been accepted for enrolment in at the time of the accident, despite reasonable efforts to accommodate the claimant's impairment and the claimant's reasonable efforts to use the accommodation to allow the claimant to continue the claimant's training or education, or
- (C) Normal activities of the claimant's daily living,
 - (i) That has been ongoing since the accident, and
 - (ii) That is expected not to improve substantially.

Prior to *Sparrowhawk*, personal injury litigators in Alberta were forced to look to Ontario for guidance as to how the courts have interpreted "serious impairment," for the purpose of avoiding the Cap's application. In *Valdez v. Clark*, 2010 ONSC 174, for example, the Plaintiff was found to have sustained a serious impairment for the following reasons:

1. While he was able to resume his primary job, he was unable to return to his "secondary employment", which was a cleaning business that he and his wife had begun a year and a half prior to the accident;
2. He had given up two of his former "passions", those being cooking and photography;
3. While he had previously been socially active, following the accident he did "virtually nothing anymore aside from his job;"
4. He was no longer active in sports with his son and no longer played with his children;
5. He no longer shopped for the family and required help dressing;
6. He was irritable, impatient, and short-tempered in a way that he had not been prior to the accident; and
7. His emotional relationship with his son had suffered such that his son stopped visiting him every other weekend as he had done previously.