S.C.C. File No. 38949

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

TRIAL LAWYERS ASSOCIATION OF BRITISH COLUMBIA

Appellant

- AND -

ROYAL SUN ALLIANCE INSURANCE COMPANY OF CANADA

Respondent
(Appellant)

- AND -

ONTARIO TRIAL LAWYERS ASSOCIATION

Intervener

FACTUM OF THE INTERVENER, ONTARIO TRIAL LAWYERS ASSOCIATION

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada,* S.O.R./2002-156)

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PART I. OVERVIEW

1. This case is about whether an insurer can be estopped from denying coverage under an insurance policy long after it knew or ought to have known that it had the right to deny such coverage, and where parties to the litigation have reasonably relied on the insurer's assumption and continuation of the defence as an assurance of coverage.

2. The Ontario Trial Lawyers' Association ("**OTLA**") submits that the strict approach to estoppel taken by the Ontario Court of Appeal—that it will not apply unless the insurer had *actual knowledge* of a policy breach—represents a departure from the consumer protection orientation of insurance law, creates inequity between plaintiffs and defendants, and would have a chilling effect and hinder access to civil justice for injured plaintiffs.

3. When an insurance company elects to defend a claim, this represents to the claimant that the insured defendant is covered by an insurance policy and any settlement or judgment for her claim will in fact ultimately be paid. Injured claimants commence and continue litigation based on their understanding of coverage. Litigation is expensive and time-consuming—no one would invest the substantial resources required to advance an injury claim if they knew that even if successful there would be limited or no recovery because the defendant lacked insurance coverage.

4. Claimants' reliance on insurers' representations of coverage is reasonable. As was held in *Logel v. Wawanesa Mutual Insurance Company*, an insurance company's "business is assessing claims and determining whether they are covered by the policies of insurance it has issued".[1] Insurers have a duty to act in good faith diligently to investigate claims, and are in a special position to determine coverage issues.

5. The law is clear that an insurer may be estopped from taking a non-coverage position if it elects to defend or continues to defend an insured despite knowing of a policy breach.[2] OTLA asks this Court to confirm that an insurer may be estopped from taking a non-coverage position if the insurer defends an insured after having *constructive knowledge* of the policy breach, that is, if the

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[1] *Logel (Litigation Administrator of) v Wawanesa Mutual Insurance Company*, [2008] OJ No. 3717 (SCJ) at para 20, aff'd 2009 ONCA 252.

[2] See, *e.g.*, *Western Can. Accident & Guaranty Insurance Co. v. Parrot* (1921), 61 S.C.R. 595; *Rosenblood Estate v. Law Society of Upper Canada* (1989), 37 C.C.L.I. 142 (Ont. H.C.), aff'd, [1992] O.J. No. 3030 (Ont. C.A.); *Commonwell Mutual Insurance Group v Campbell*, 2019 ONCA 668 [*Commonwell*].

insurer ought to have known it had the right to take a non-coverage position, if only the insurer had exercised reasonable diligence in its investigation.

6. In OTLA's respectful submission, where an insurer has elected and continued to defend a claim beyond the point where it knew or ought to have known about its right to deny coverage, it should be estopped from changing its coverage position well into the litigation—after the parties have spent considerable resources advancing the claim on the understanding that the insurer has been defending the insured without raising any coverage concerns. A rule that would permit an insurer to belatedly change its coverage position in these circumstances is incongruous with the consumer protection objectives of insurance law and raises serious access to justice concerns.

PART II. STATEMENT OF POSITION ON QUESTIONS IN ISSUE

7. OTLA takes no position on the outcome of this case. The question in issue on appeal on which OTLA wishes to make submissions is as follows:

> Where an insurer assumes and continues the defence of an action on behalf of its insured, can the insurer be estopped from denying coverage based on a policy breach long after it knew or ought to have known that it had the right to do so?

8. For the reasons below, OTLA respectfully submits that the answer to this question is "yes".

PART III. STATEMENT OF ARGUMENT

A. Consumer protection must govern the development and application of the equitable doctrine of estoppel in the insurance law context

9. OTLA respectfully submits that two overriding principles should inform this Court's analysis of the issue at bar: consumer protection and fairness.

10. This Honourable Court has previously held that "There is no dispute that one of the main objectives of insurance law is consumer protection, particularly in the field of automobile and home insurance".[3] Automobile insurance policies are not merely commercial contracts; they form part of the social contract amongst Canadians. As the Ontario Court of Appeal has held:

> The entire regulatory structure of automobile insurance has become part of the social contract, and forms "part of an integral social safety net that attempts to

[3] *Smith v Co-operators General Insurance Co*, 2002 SCC 30 at para 11.

> balance economic feasibility with sound risk management principles for not just drivers and partner insurers, but anyone injured by an automobile accident."[4]

11. The objective of ensuring consumer protection in the context of a greater social contract serves as an interpretive tool when applying relevant provisions under the *Insurance Act*, and a useful guide when addressing novel problems not directly addressed by the statutory scheme. OTLA submits that the consumer protection lens is not limited to the interpretation of the *Act*, but ought to be employed similarly when applying the doctrine of promissory estoppel in the insurance law context, so that the *Insurance Act* will remain true to its purpose.

12. A further principle is relevant in this insurance case, as the Appellant seeks to apply an equitable doctrine. Promissory estoppel is based in equity and rooted in considerations of fairness. Historically, courts of equity functioned as courts of conscience, seeking to achieve justice through flexible and case-specific analysis rather than through rigidly applied positive laws whose general application did not suit a new or unique situation. While there are no longer separate courts of law and equity, equity's distinct purpose—to avoid unfairness and injustice—remains.[5]

13. Today, equity's traditional doctrines have been assimilated into the common law. This Court has adopted the following "general principle" of estoppel:

> When the parties to a transaction proceed on the basis of an underlying assumption — either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — ***neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so***. If one of them does seek to go back on it, the courts will give the other such remedy ***as the equity of the case demands***.[6]

14. The issue at the heart of this case is fairness to injured Canadians: should an insurer be permitted to go back on the underlying assumption of coverage on which the commencement and

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[4] *Abarca v. Vargas*, 2015 ONCA 4 at para 37, citing Erik Knutsen, "Auto Insurance as Social Contract" (2010-2011) 48 Alta. L.R. 715 at 716-17, 739.

[5] Rotman, "Fusion of Law and Equity" (2016) 2(2) CJCCL 497, p. 503 ("Equity works alongside the law, supporting it where it is deficient and enabling the law to adequately respond to the individual requirements of particular circumstances"); see also p. 506-507 ("the jurisdictional merger of law and equity did not change the various reasons for creating equity in the first place"). See also *Cowper-Smith v. Morgan*, 2017 SCC 61 at paras 15-20.

[6] *Ryan v. Moore*, 2005 SCC 38 at para 51, citing Lord Denning in *Amalgamated Investment & Property Co. (In Liquidation) v. Texas Commerce International Bank Ltd.*, [1982] 1 Q.B. 84 (C.A.), at p. 122 [emphasis added]; see also *Cowper-Smith v. Morgan*, 2017 SCC 61 at para 16.

continuation of litigation was premised? OTLA respectfully submits that the answers to the legal questions at issue ought to be guided by the foundational principles of insurance law and of equity: Can the resulting rule be said to promote consumer protection? And, in all the circumstances, would permitting the insurer to belatedly change its coverage position be unfair or unjust?

B. If claimants cannot rely on insurers' representations of coverage, unfairness arises and access to justice is at risk

15. An oft-expressed concern about the application of equitable principles is uncertainty; this Court has noted that equity's "flexibility must not come at the expense of clarity and predictability".[7] In this case, however, the Appellant seeks to apply promissory estoppel to *promote* clarity and predictability; it seeks to eliminate the uncertainty that would be brought about if an insurer is permitted to change its coverage position and deny coverage well into litigation, after the plaintiff has devoted resources to the proceeding (including not only their time and energy but the significant legal expenses required to advance the case, including to obtain expert reports).

16. RSA submits that nothing less than "full and actual knowledge" of a policy breach can be relied upon for a finding that an insurer is estopped from belatedly taking a non-coverage position in reliance on such breach.[8]

17. Such a "full and actual knowledge" standard would permit an insurer to neglect to investigate coverage in a reasonably diligent and timely manner. An insurer could proceed with its eyes closed, presuming that there are no coverage issues, then deny coverage years later based on a right that it easily could have (and ought to have) appreciated and exercised earlier—well before the claimant spent substantial time and resources advancing the case.

18. If an insurer will not be estopped from changing its coverage position unless it *actually* discovers and appreciates all facts underlying a policy breach, insurers could neglect to conduct a diligent investigation, and the spectre of a possible loss of coverage would loom over insurance proceedings.

19. While there would be little cost to the insurer for changing its coverage position at a later date, the cost to the plaintiff would be significant. Requiring nothing less than "full and actual

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[7] *Cowper-Smith v. Morgan*, 2017 SCC 61 at para 19.
[8] RSA Factum at para 103.

knowledge" of the breach before an insurer can be estopped from taking a non-coverage position would have a significant chilling effect on lawyers and injured parties.

20. Typically, where a plaintiff knows the defendant does not have insurance coverage before an action commences, no action is commenced. The pursuit of an injury claim costs tens of thousands, if not hundreds of thousands of dollars; no one would take the chance to commence and advance such an expensive claim knowing that recovery will be, at best, very limited because the defendant does not have insurance.

21. If a plaintiff learns there is no coverage shortly after a claim is issued (for example, if the claim is not defended by an insurance company), the harm is minimal; the plaintiff can make an informed decision about whether to proceed, having not yet committed significant resources.

22. Unfairness arises, however, if an insurer can represent that there is coverage beyond the point at which the insurer knew or ought to have known that its insured breached the policy and, as such, that the insurer had a right to deny coverage. In these circumstances, as the litigation progresses, every dollar that is spent and every hour that is invested by the plaintiff in the advancement of the claim in such a case would have been saved, if only the insurer had done its job and diligently investigated the claim at an early stage.

23. If the Court of Appeal's decision is upheld, insurers would be free to neglect to adequately investigate, then deny coverage well into the litigation—and claimants would be left holding the bag. This creates significant risk to plaintiffs and their counsel. To the extent plaintiffs' counsel take cases on contingency, the risk calculus applied to determine whether to accept a case changes dramatically if insurers can change their coverage position late in the game, after significant time and money has been invested in the litigation. The risk of belatedly learning that there is in fact no insurance coverage—despite an insurer's active defence of the case on behalf of the insured—may become too risky a proposition in all but the clearest of cases, and may seriously jeopardize injured plaintiffs' access to the courts.

24. Finally, estopping an insurer from belatedly changing to a non-coverage position is consistent with the culture shift in favour of promoting timely resolution of claims before trial, and will promote judicial economy.[9] Insurers (and parties to litigation generally) ought to be incentivized to take diligent steps early on in litigation to narrow the issues and permit their positions to crystallize, promoting certainty and informed decision-making in litigation. A rule that

[9] See *Hryniak v. Mauldin*, 2014 SCC 7.

permits an insurer to close its eyes to highly relevant facts (such as whether the insured had consumed alcohol before the accident) and to change its position to the detriment of the other parties at a late stage, without consequence, promotes uncertainty and will only serve to prolong litigation and hinder the timely resolution of civil claims.

25. Affordable access to the civil justice system is enhanced when parties can rely on an insurer's representation regarding coverage and make informed decisions to advance the litigation accordingly.

C. Where an insurer ought to have known coverage was in issue, electing and continuing to defend a claim constitutes a representation of coverage that can give rise to estoppel

i. Estoppel does not require "full and actual knowledge"

26. RSA submits that nothing less than "full and actual knowledge" of the facts indicating a lack of coverage can be relied upon for a finding that an insurer is estopped from relying on a policy breach to take a non-coverage position.[10] But, as the Appellant has noted, unlike in the law of waiver, promissory estoppel does not require "full knowledge" or an "unequivocal intention"—it merely requires an assurance intended to affect the parties' legal relationship and to be acted upon.[11] There is no basis in law for RSA's suggestion that "full and actual knowledge" of the breach is a prerequisite for a representation to be made and for estoppel to apply.

27. Indeed, *Logel v. Wawanesa Mutual Insurance Company*[12] suggests that an insurer may be precluded from taking an off-coverage position where it *should have* known it had a right to deny coverage based on the insured's breach of the policy before electing to defend the claim. In *Logel*, following a motor vehicle accident in the summer of 2000, the insurer promptly obtained a police report that indicated that the driver had a G2 licence.[13] This information was also in the insurer's underwriting department records.[14] A G2 license requires a driver's blood alcohol concentration to be zero at all times while operating a motor vehicle.[15] By January 2002, the insurer obtained the coroner's report, which showed that alcohol was present in the driver's body at the time of the

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[10] RSA Factum at para 100.
[11] See TLABC Factum at paras 84-85; *Maracle v. Travelers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50.
[12] *Logel (Litigation Administrator of) v Wawanesa Mutual Insurance Company*, 2008 OJ No. 3717 (SCJ) [*Logel*], aff'd 2009 ONCA 252.
[13] *Logel* at paras 12-13.
[14] *Logel* at para 18.
[15] *Logel* at para 4.

accident.[16] The insurer defended the claim several months later in July 2002, and the case proceeded through discoveries.

28. It was only in August 2005 that the insurer first raised a coverage issue, when it finally put the driver's alcohol level and G2 licence together and realized it had a right to deny coverage based on a policy breach. The insurer and its legal counsel submitted that they should have been able to deny coverage at that time because they "never directed their minds to the issue of a possible policy breach" until then.[17]

29. The Court rejected this submission, holding:

> There can be no doubt that Wawanesa and its representatives had full knowledge of its rights under Ms. Logel's policy. It is, after all, an insurer and its business is assessing claims and determining whether they are covered by the policies of insurance it has issued.[18]

30. Notably, the Court found that the insurer "had full knowledge of its rights" despite the insurer's express submission to the contrary, *i.e.* that it had not directed its mind to the right to deny coverage based on a policy breach. In effect, the Court held the insurer had *constructive* knowledge of its rights, or ought to have known of its rights, because of its expertise and special position in determining coverage.

31. The Court concluded that the insurer "must have had knowledge of the facts including Ms. Logel's licence and her physical condition, which gave rise to the exclusion of coverage. If they did not appreciate the significance of these facts they should have before they elected to defend".[19]

32. The Court of Appeal upheld the trial judge's determination that the insurer "should have" appreciated its right to deny coverage, stating that "she properly inferred an intention to abandon the right to rely on the policy breach from its conduct over a 3 ½ year period".[20]

33. The decisions in *Logel* are consistent with and reinforce the decision and reasoning in *Rosenblood Estate v. Law Society of Upper Canada*, in which an insurer was estopped from taking a belated off-coverage position. In *Rosenblood*, the Court held:

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[16] *Logel* at para 13.
[17] *Logel* at para 17.
[18] *Logel* at para 20.
[19] *Logel* at para 22.
[20] *Logel (Litigation Administrator of) v Wawanesa Mutual Insurance Co.*, 2009 ONCA 252 at paras 5-6.

> When a claim is presented to an insurer the facts giving rise to the claim should be investigated. If there is no coverage then the insured should be told at once and the insurer should have nothing further to do with the claim if it wishes to maintain its off coverage position. If coverage is questionable the insurer should advise the insured at once and in the absence of a non-waiver agreement or of an adequate reservation of rights letter defends the claim at its risk. In the present case the insurer finally took an off coverage position but… much too late. [21]

34. Unlike in *Logel* and *Rosenblood*, in the present case the insurer had not obtained the underlying information about the driver's blood alcohol content (*i.e.* the facts giving rise to the policy breach) at the time it elected to defend. But the applicable principle is the same.

35. In both *Logel* and the present case, the insurer had the responsibility, and was in a special position, to investigate coverage issues. In both cases, the insurer failed to appreciate, despite information readily available to it, that the driver had breached the terms of its policy until the litigation had proceeded through to discoveries—and took an off-coverage position "much too late". In both cases, the insurer ought to have appreciated that it had the right to deny coverage, given its special position and duty to investigate coverage issues—and the only reason the insurer failed to appreciate its right to deny coverage was because it failed to exercise reasonable diligence in its investigation. Finally, in both cases, it was reasonable for other parties to the litigation to rely on the insurer's assumption and continuation of the defence as a representation of coverage; as the Court held in *Logel*, "It is, after all, an insurer, and its business is assessing claims and determining whether they are covered by the policies of insurance it has issued".[22]

36. OTLA respectfully submits that where an insurer elects and continues to defend an action beyond the point where it ought to have known—through the exercise of reasonable diligence—that it had the right to deny coverage, this constitutes a representation of coverage that may be reasonably relied upon and gives rise to estoppel. Such a rule is, at most, a modest and logical evolution in the law as stated in the *Logel* and *Rosenblood* cases.

ii. It is equitable to require insurers to be held to a standard of reasonable diligence

37. The law has long applied an objective "ought to have known" standard to *plaintiffs* who fail to exercise reasonable diligence in discovering and asserting their legal rights. Applying the same standard to insurers, who are sophisticated litigants, is neither onerous nor unfair.

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[21] *Rosenblood Estate v. Law Society of Upper Canada*, [1989] O.J. No. 240 (Sup. Ct. Ont. – HCJ) [*Rosenblood*], aff'd [1992] O.J. No. 3030 (CA).
[22] *Logel* at para 20.

38. Limitation periods operate to foreclose (often unsophisticated) plaintiffs from asserting their legal rights. According to the principle of discoverability, "a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered *or ought to have been discovered by the plaintiff by the exercise of reasonable diligence*".[23]

39. The discoverability rule does not refer exclusively to when a plaintiff gained "actual knowledge" of the facts underlying a cause of action. Rather, a limitation period will begin to run when the plaintiff either knew the material facts on which the cause of action is based, or ought to have known those facts, if they had simply exercised reasonable diligence to discover them.

40. This is a sensible standard. A plaintiff cannot close her eyes to material facts or fail to make reasonable efforts to uncover the facts, then rely on her failure to do so to the defendant's detriment. But that is what the Court of Appeal's strict approach to estoppel would permit insurance companies to do. With the "full and actual knowledge" standard RSA proposes be applied, an insurance company could fail to exercise reasonable diligence then later plead ignorance when it discovers years later that it had the right to deny coverage to the insured—and on that basis changes its coverage position to the plaintiff's detriment.

41. There is no reasonable justification to apply a higher standard of diligence in discovering relevant facts to take a position on whether to pursue or defend litigation to injured plaintiffs than to insurance companies. Holding sophisticated insurers to the same standard as unsophisticated plaintiffs is the only equitable thing to do.

iii. Late assertions of non-coverage are inherently prejudicial to plaintiffs

42. On the question of reliance, OTLA urges this Honourable Court to affirm the reasons the Ontario Court of Appeal in *Commonwell Mutual Insurance Group v Campbell*, which was decided just six weeks before the decision under appeal.

43. The Court in *Commonwell* estopped an insurer from taking a non-coverage position just ten months after appointing counsel to defend the insured. While, in so doing, the Court of Appeal

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[23] *Central Trust Co. v. Rafuse*, 1986 CanLII 29 (SCC), [1986] 2 S.C.R. 147 at para 77 [emphasis added]. See also, *e.g.*, s. 5(1)(b) of Ontario's *Limitations Act, 2002*, SO 2002, c 24, Sch B, which provides that a claim is discovered on "the day on which a reasonable person with the abilities of and in the circumstances of the person with the claim first *ought to have known* of the matters referred to…".

noted that "Whether to infer or find prejudice or detriment from the circumstances of a case is a factual determination",[24] it identified an important overarching principle about what must be proven to demonstrate reliance:

> We do not accept that to prove prejudice Mr. Campbell is obliged to identify missteps that have occurred; this is an unrealistic and unnecessary burden to impose at this stage in the litigation. The immediate point is that as a result of Commonwell's conduct, Mr. Campbell allowed Commonwell to prosecute the defence of his case for close to a year without taking charge of his own defence.[25]

44. Given insurers' duties, role, and special position—it is, after all, an insurer's business to identify and determine coverage issues—it is reasonable for other parties to the litigation, including a claimant with a right to claim through to the insurer, to rely on the insurer's representations of coverage to their own detriment. Consistent with *Logel* and *Rosenblood*,[26] the decision in *Commonwell* recognizes this, and permits courts to presume prejudice where an insurer has continued a defence on behalf of the insured well beyond the point at which it could have asserted its right to deny coverage, and parties have advanced litigation on this basis.

PART IV. SUBMISSIONS CONCERNING COSTS

45. OTLA seeks no costs on this appeal and asks that costs not be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of March, 2021.

Gavin MacKenzie

Gavin MacKenzie, Brooke MacKenzie,
James Vigmond, and Brian Cameron

Counsel for the Intervener, OTLA

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[24] *Commonwell* at para 10
[25] *Commonwell* at para 15.
[26] See *Logel* at para 24 and *Rosenblood* at p. 10, in which the Court held that even if it was not possible to point to actual prejudice, "in the circumstances of this case where the insurer persisted in the defence through production and discovery into settlement negotiations prejudice must be presumed".

PART VI. TABLE OF AUTHORITIES

Case Law	**Paragraph(s) Referenced in Memorandum of Argument**
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