S.C.C. Court File No.

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

B E T W E E N:

JEFFREY BRADFIELD

APPLICANT
Respondent

A N D:

ROYAL AND SUN ALLIANCE INSURANCE COMPANY OF CANADA

RESPONDENT
Appellant

APPLICATION FOR LEAVE TO APPEAL
(JEFFREY BRADFIELD, APPLICANT)
(Pursuant to s.40 of the *Supreme Court Act,* R.S.C. 1985, c.S-26)

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PART I – OVERVIEW & STATEMENT OF FACTS

Overview

A clear issue of public importance

1. In *Hryniak v. Mauldin*[1] this Honourable Court declared a "culture shift" was required to create an environment promoting timely and affordable access to the civil justice system. In the context of insurance claims, these objectives are accomplished by promptness and due diligence in determining or resolving fundamental issues of coverage prior to or without the need for trial.

2. This case is about an insurance company's ability to deny coverage for breach of an insurance policy *after* it has already elected to defend a claim, an issue this Honourable Court has not addressed since 1994.[2] At a practical level, this case asks: what is the level of knowledge required on the part of an insurer before it can be taken to have expressed an 'unequivocal intention to abandon rights'?[3] The Trial Judge and the Court of Appeal decision below fundamentally disagree on the answer to this question. Indeed, the Court of Appeal decision below is at odds with recent parallel authority from the same Court of Appeal.[4]

3. The answer to these questions will fundamentally affect the success or failure of the contemporary civil litigation culture shift called for by this Honourable Court in *Hryniak*. By granting Leave in this case, however, this Honourable Court could provide clear guidance on what should be, for Canada, the point beyond which an insurer can be taken to have made up its mind on issues of coverage, a matter of central importance to the administration of justice, the efficiency of our courts and, indeed, for insured persons and consumers. This application for leave to appeal asks this Honourable Court to resolve the debate and send a message to insurers: that the diligent resolution of pre-trial issues of coverage is both an expectation and an obligation on their part.

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[1] *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 SCR 87.
[2] *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 1994 CanLII 100 (SCC), [1994] 2 SCR 490.
[3] *Bradfield v. Royal Sun Alliance Insurance*, 2019 ONCA 800 (CanLII) at para. 33.
[4] *The Commonwell Mutual Insurance Group v. Campbell*, 2019 ONCA 668 (CanLII).

Contextualizing the issue

4. The issues now before this Honourable Court arise in the context of a fatal motorcycle accident. On May 29, 2006, the Applicant (Mr. Jeffrey Bradfield) and the late Mr. Devecseri were out riding their motorcycles in Durham region, along with Mr. Paul Latanski. Mr. Devecseri was in front. Unfortunately, he drove onto the wrong side of the road and collided with Mr. Jeremy Caton's automobile. Although the Applicant did not hit Mr. Caton's automobile, Mr. Devecseri was killed and Mr. Caton was injured in the accident.[5]

5. Mr. Caton brought an action in which the Devecseri estate and the Applicant were found liable for damages resulting from the accident. Mr. Devecseri was insured by the Royal and Sun Alliance Insurance Company of Canada (the "Respondent insurer"). The judgment awarded $1.8 Million in total damages, apportioned 10/90 between the Applicant and Devecseri, and it also indemnified the Applicant against Mr. Devecseri's estate.[6] Despite the Respondent insurer's participation in this matter, as noted, the issue as to whether the Respondent insurer should be required to provide insurance coverage to Mr. Devecseri's estate remained undetermined at the first trial.[7]

6. In this case, that most basic preliminary decision – an insurer's choice to provide coverage or not – was altered late into the litigation process, in fact three years into that process. For the Trial Judge, echoing the established jurisprudence on the subject,[8] three years was "…much too late", resulting in prejudice to the parties and necessitating a second trial. For the Trial Judge, waiver and estoppel clearly applied in these circumstances.

7. For over three years, the Respondent insurer's conduct reasonably caused the Applicant (and other parties to this litigation) to believe that its policy would be in effect.[9] Controversially,[10]

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[5] *Bradfield v. Royal Sun Alliance Insurance*, 2019 ONCA 800 (CanLII) at para. 2.
[6] *Bradfield v. Royal and Sun Alliance Insurance Company of Canada*, 2018 ONSC 4477 (CanLII) at para. 3.
[7] *Bradfield v. Royal Sun Alliance Insurance*, 2019 ONCA 800 (CanLII) at para. 4.
[8] *Rosenblood Estate v. Law Society of Upper Canada* (1989), 37 C.C.L.I. 142 (Ont. H.C.J.), aff'd. 16 C.C.L.I. (2d) 226 (Ont. C.A.); *The Commonwell Mutual Assurance Group v. Campbell*, 2018 ONSC 5899 (CanLII) at para. 42.
[9] *Insurance Act*, RSO 1990, c I.8, s. 131(1).
[10] *The Commonwell Mutual Insurance Group v. Campbell*, 2019 ONCA 668 (CanLII).

the Court of Appeal below rejected that view. For the Court of Appeal, the Respondent insurer did not waive its right and should not be estopped from taking an "off-coverage" position despite:

- retaining an insurance adjuster to investigate policy breaches and coverage being fully aware of its insured's M2 license status;
- requesting all information required to determine the extent of coverage, including a coroner's report to determine the insured's blood alcohol level;
- retaining and instructing counsel;
- serving and filing a notice of intent to defend and statement of defence;
- engaging in pre-trial, strategic planning, documentary discovery; and
- attending discoveries.

8. The reason: the Court of Appeal found that to apply waiver and estoppel in these circumstances requires "actual knowledge" (on the Respondent insurer's part) of the policy breach. It is not enough that the relevant information existed, and was specifically requested by the Respondent insurer, or that the Respondent was clearly alive to the possibility that the insured person was in violation of the policy. Moreover, it did not seem to matter that the Respondent insurer's business is to determine the extent of coverage on the part of its customers – particularly in the context of litigation. For the Court of Appeal, the Respondent insurer's conduct did not result in any prejudice to the insured despite undisputed evidence of prejudice at trial.[11]

9. To put it bluntly, the Respondent was here rewarded for its lack of diligence in determining coverage as a pre-trial issue, the very antithesis of this Honourable Court's directive in *Hryniak*. That not only prejudiced the insured in this case, it has the potential to negatively affect the legitimate expectations of millions of Canadian insured persons. The question for this Honourable Court: how late into the game before an insurer decides whether it *really* wants to play? More specifically, how long should an insured have to wait before an insurer finally decides whether to adopt/not adopt an "off-coverage" position?

[11] *Bradfield v. Royal Sun Alliance Insurance*, 2019 ONCA 800 (CanLII) at para. 55.

Statement of Facts:

Timeline of key events

- **May 29, 2006:** Mr. Devecseri and the Applicant are involved in an accident with a car operated by Mr. Jeremy Caton. Mr. Devecseri is killed.[12]

- **June 6, 2006:** The Respondent appoints Mr. Tom Eddy as adjuster to investigate the accident and coverage/potential policy breaches;[13]

- **August 29, 2006:** Coroner's report indicates Mr. Devecseri had alcohol in his system.[14]

- **September 25, 2006:** "The Eddy Report" confirms the Respondent insurer asked "to obtain a copy of the Coroner's report" and indicates Mr. Eddy could "easily do so".[15]

- **February 28, 2007:** Mr. Eddy concludes the investigation.[16]

- **October 7, 2007:** The Applicant commences an action against Mr. Devecseri's estate for uninsured/underinsured coverage that includes an allegation of alcohol consumption by Devecseri in the Statement of Claim.[17]

- **May 27, 2008:** Mr. Caton commences an action against, *inter alia*, Mr. Devecseri's estate and the Applicant.[18]

- **August 3, 2008:** The Respondent insurer retains Mr. Stuart Forbes to defend Mr. Devecseri's estate in both actions.[19]

- **August 13, 2008:** Mr. Forbes delivers notice of intent to defend on behalf of the Respondent insurer.[20]

- **March 5, 2009:** Mr. Forbes files a statement of defence in both actions, formally unreservedly stating "we elect to defend", again on behalf of the Respondent insurer.[21]

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[12] *Bradfield v. Royal and Sun Alliance Insurance Company of Canada*, 2018 ONSC 4477 (CanLII) at para. 9.
[13] *Bradfield v. Royal and Sun Alliance Insurance Company of Canada*, 2018 ONSC 4477 (CanLII) at para. 14.
[14] *Ibid,* at para. 19.
[15] *Ibid,* at para. 53.
[16] *Ibid,* at para. 61.
[17] *Ibid,* at para. 12.
[18] *Ibid,* at para. 13.
[19] *Ibid,* at para. 15.
[20] *Ibid,* at para. 65.
[21] *Ibid,* at paras. 15 and 65.

- **June 25, 2009:** All counsel attend discoveries at which Mr. Latanski discloses that Mr. Devecseri and the Applicant consumed a beer shortly before the accident.[22]

- **July 6, 2009:** The Respondent insurer instructs Mr. Forbes to remove his firm as solicitor of record for Mr. Devecseri's estate; the Respondent also instructs Mr. Forbes to add it as a "statutory third-party" in the Applicant's action.[23]

- **July 8, 2009:** The Respondent advises parties in both actions that it is taking an "off-coverage" position as a result of Mr. Latanski's disclosure.[24]

- **October 28, 2009:** Counsel for Mr. Caton obtains the Coroner's report; forwards same to all parties.[25]

The Respondent insurer's "off-coverage" position

10. As an M2 licensee, alcohol consumption was not permitted under the terms of the Respondent insurer's policy.[26] After July 6, 2009, the Respondent insurer instructed counsel to remove his firm as solicitor of record for the Devecseri estate. The Respondent insurer then advised the parties that it was taking an "off-coverage" position as a result of the disclosure at discovery which revealed Mr. Devecseri was in breach of the policy. This was three years after coverage was initially investigated by the Respondent insurer and unreservedly confirmed.

11. In other words, the Respondent changed its position on coverage approximately three years after the accident and over one year after Mr. Caton's claim was first brought against Mr. Devecseri's estate and the Applicant. As such, the question as to whether the Respondent insurer was required to provide insurance coverage was deferred to a second trial.

Decision of Sosna J.

12. The second trial took place before Sosna J. The key issue was whether the Respondent insurer should be permitted to take an off-coverage position and reduce Mr. Devecseri's policy limit from $1,000,000 to $200,000, after the appointed counsel for Devecseri learned that he had

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[22] *Ibid,* at para. 17.
[23] *Ibid,* at para. 20.
[24] *Ibid,* at para. 21.
[25] *Ibid,* at para. 19.
[26] *Bradfield v. Royal Sun Alliance Insurance*, 2019 ONCA 800 (CanLII) at para. 3.

been drinking before the accident contrary to the terms of his insurance policy (nearly three years after Mr. Eddy's investigation).[27]

13. The position of the parties was clear. On the one hand, the Applicant contended that, since the Respondent defended Mr. Devecseri's estate (for over three years with no reservation of rights), and did not raise any coverage issues between June 2006 and July 2009, it could not raise a policy violation as a basis for denying coverage. The Applicant submitted the Respondent's conduct amounted to waiver or estoppel; that the Respondent's off-coverage position came far too late, and that there was evidence of both prejudice and detrimental reliance.

14. On the other hand, the Respondent insurer contended that "actual knowledge" is required for waiver and estoppel. As it never received information from Mr. Devecseri's estate, or from anyone else, that there was an actual policy violation, the Respondent sought for the action to be dismissed.

15. Sosna J. identified two seminal cases addressing waiver and estoppel as they apply to the issue of knowledge of a breach of an insurance policy: *Logel (Litigation Administrator of) v. Wawanesa Mutual Insurance Co.* and *Rosenblood Estate v. Law Society of Upper Canada*.[28] Ultimately, Sosna J. adopted the reasoning of these decisions in determining that the Respondent insurer abandoned the right to rely on Mr. Devecseri's policy breach. In doing so, the Trial Judge made a number of key findings, including:

- that both Mr. Eddy and the Respondent insurer knew of Mr. Devecseri's M2 licence status;[29]

- that they knew this status prohibited the operation of a vehicle with alcohol in his bloodstream and that such was a policy breach;[30]

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[27] *Ibid,* at para. 5.
[28] *Logel (Litigation Administrator of) v. Wawanesa Mutual Insurance Co*., [2008] O.J. No. 3717 (Ont. S.C.); and *Rosenblood Estate v. Law Society of Upper Canada*, [1989] O.J. No. 240 (Ont. H.C.) (appeal dismissed, [1992] O.J. No. 3030 (Ont. C.A.).
[29] *Bradfield v. Royal and Sun Alliance Insurance Company of Canada*, 2018 ONSC 4477 (CanLII), at para. 55.
[30] *Ibid,* at para. 55.

- that the Respondent insurer specifically instructed Mr. Eddy to obtain a copy of the Coroner's report because they were "alive to the importance of such a report";[31]

- that, as a matter of "common sense", in the context of an insurer's investigation of an accident involving a fatality, evidence of alcohol in the deceased's bloodstream is "clearly relevant" in determining whether there has been a policy breach;[32] and

- that Mr. Forbes' notice of intent to defend and statement of defence and crossclaim formally indicated "we elect to defend" without the Respondent ever having set out any reservation or proposal of non-waiver agreement.[33]

16. The Trial Judge held the Respondent insurer waived its right to rely on Mr. Devecseri's policy breach because it took its off-coverage position "too late", as in *Logel*.[34] As such, the Trial Judge determined the Respondent was responsible to provide insurance coverage to Mr. Devecseri's estate.

Decision of the Court of Appeal

17. The Respondent appealed the finding that it waived its right to deny coverage or was estopped from doing so. The Court of Appeal allowed the appeal.[35]

18. The central issue was what constituted "knowledge" under these circumstances. The trial judge imputed knowledge to the Respondent insurer on the basis that the evidence was available. Although the Court of Appeal agreed that knowledge can be "inferred from conduct", citing *Canadian Federation of Students/Fédération canadienne des étudiant(e)s v. Cape Breton University Students' Union,*[36] the Court determined there must be an "unequivocal intention to abandon rights known to the party waiving the right".[37]

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[31] *Ibid*., at para. 68.
[32] *Ibid,* at para. 58.
[33] *Ibid,* at para. 65.
[34] *Bradfield v. Royal Sun Alliance Insurance*, 2019 ONCA 800 (CanLII) at para. 6.
[35] *Ibid,* at para. 51-58.
[36] *Canadian Federation of Students/Fédération canadienne des étudiant(e)s v. Cape Breton University Students' Union*, 2015 ONSC 4093 (CanLII), at para. 129.
[37] *Bradfield v. Royal Sun Alliance Insurance*, 2019 ONCA 800 (CanLII) at para. 33.

19. The Court of Appeal considered, but ultimately distinguished, the decision in *Logel*.[38] In *Logel*, the insurer was prevented from taking an off-coverage position after it had initially agreed to defend. In this case, the Court of Appeal noted the Respondent insurer had no "actual knowledge" that Mr. Devecseri breached the policy by consuming alcohol until 2009.

20. For the Court of Appeal, such knowledge is not to be imputed except in cases where the insurer has, but simply failed to appreciate the significance of, information as to the existence of a policy breach.[39] Simply put, for the Court of Appeal, the Respondent insurer was not aware of the information contained in the Coroner's report and so had no actual knowledge until 2009.[40] Further, the Court of Appeal took the position that there was no legal authority to support the argument that an insurer has an obligation to obtain a Coroner's report.[41]

21. For the Court of Appeal, the Respondent insurer would have acted differently had it obtained the report (a finding which suggests that not even Mr. Latanski's 2009 disclosure was enough to constitute actual knowledge), specifically "it would not have expended monies conducting further investigation and defending the claim."[42] Despite the Court's finding, it is clear from the timeline of events in this case that the Coroner's report was not determinative of the Respondent insurer's position – it took the off-coverage position in July of 2009, months *before* receiving the report in October of that year.

22. Notwithstanding the Respondent insurer's specific decision to defend the claim and issue both a notice of intent to defend and statement of defence, the Court of Appeal also found no written waiver of Mr. Devecseri's breach of the policy, as required by s. 131(1) of the *Insurance Act*.[43] The Court of Appeal also found that Respondent was not estopped from asserting a breach of policy as, again, it did not have actual knowledge of Mr. Devecseri's breach and there was "no prejudice to the insured".[44]

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[38] *Logel Estate v Wawanesa Mutual Insurance Company*, 2009 ONCA 252.
[39] *Bradfield v. Royal Sun Alliance Insurance*, 2019 ONCA 800 (CanLII) at para. 35.
[40] *Ibid,* at para. 37.
[41] *Ibid,* at para. 39.
[42] *Ibid,* at para. 39.
[43] *Ibid,* at para. 40.
[44] *Ibid,* at para. 42-50; 55.

PART II – STATEMENT OF ISSUES

23. This leave application raises the following issue of national and public importance:

Issue 1: Should an insurer be permitted to deny coverage for breach of an insurance policy three years after electing to defend a claim?

What is the proper test to be used uniformly across Canada for determining the application of waiver and estoppel principles in insurance litigation? When is an insurer no longer entitled to adopt an "off-coverage" position in the litigation process? In the context of waiver and estoppel, what degree of "knowledge" is required on the part of an insurer?

PART III – STATEMENT OF ARGUMENT

Issue 1: Should an insurer be permitted to deny coverage for breach of an insurance policy three years after electing to defend an accident claim?

The novelty of appellate authority & public importance

24. This Honourable Court has not considered the application of waiver and estoppel principles in the context of an insurer taking an "off-coverage" position since 1994, in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*[45] In the Court of Appeal below, the relevant jurisprudence and applicable principles of law have similarly not been addressed before this Honourable Court, or any Court of Appeal, for at least 10 years.

25. The issue of knowledge of a breach of an insurance policy, and related issues of waiver and estoppel by an insurer are matters of public importance, peripherally affecting both access to justice, and the Canadian public's reasonable understanding of the insurer/insured relationship. Notwithstanding its importance, there is currently a dearth of appellate authority on this subject – the most recent directly applicable case cited by the courts below was from 2009.

26. Although the Court of Appeal cites *Canadian Federation of Students/Fédération canadienne des étudiant(e)s v Cape Breton University Students' Union*,[46] a 2015 decision of the Superior Court of Justice addressing waiver in the context of a student referendum and outstanding

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[45] *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 1994 CanLII 100 (SCC), [1994] 2 SCR 490.

[46] *Canadian Federation of Students/Fédération canadienne des étudiant(e)s v Cape Breton University Students' Union*, 2015 ONSC 4093 (CanLII) at para. 129.

membership fees, the principles discussed therein are simply lifted from *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*[47]

27. Since that time, the juridical landscape has changed.[48] In the absence of clear authority from this Honourable Court on the subject of waiver and estoppel principles in the insurance litigation context, there is a significant schism in recent jurisprudence on the subject. For example, the decision of the Court of Appeal below in this case stands in stark contrast to very recent authority from the same Court and is at odds with results in other provinces and jurisdictions across Canada.[49]

28. Whereas prior judicial authorities impose a more stringent standard of diligence upon insurers, the decision of the Court of Appeal below is recklessly permissive of late assertion of non-coverage – this despite the Respondent insurer's initial decision to defend, and a notable absence of any steps taken to reserve that right before, during, or after litigation commenced. The Respondent insurer's conduct is not consistent with the practice of other insurers – for example, as recently recognized by the Court of Appeal in *Commonwell*: "Guarantee promptly issued a non-waiver agreement and a reservation of rights letter, and ultimately denied coverage".[50]

29. The decision below raises an issue of public importance because the Court of Appeal's view – that the Respondent insurer's conduct does not give rise to waiver or estoppel, and results in no prejudice – opens the floodgates to late assertions and changes of position during ongoing litigation. In light of the "culture shift" advocated by this Honourable Court in *Hryniak*, should coverage issues like this be delayed? Indeed, should an insurance company be rewarded for doing so? Is it fair to the system, to all those currently awaiting civil trials and to insured consumers?

Fundamental policy choice

30. The Respondent insurer's position was that it had no knowledge of the breach until 2009, three years after having engaged and directed an adjuster to investigate coverage (and who failed

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[47] *Ibid,* at para. 129; citing *Gu v. Tai Foong International Ltd.*, 2003 CanLII 20380 (ON CA) at paras. 40-41.
[48] *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 SCR 87.
[49] See, for example, in *Alpine Forest & Food Market v. Axa Pacific Insurance*, 2004 BCSC 1731 (CanLII) and *Personal Insurance Company v. Richinger*, 2012 NWTSC 19 (CanLII).
[50] *The Commonwell Mutual Insurance Group v. Campbell*, 2019 ONCA 668 (CanLII) at para. 11.

to obtain what he was directed to obtain and was available). A similar position, that the insurer had no knowledge of a policy breach, is taken in many cases, including *Logel* (i.e. a decision relied on by Sosna J., and more recently, by the Court of Appeal in *Commonwell*).[51] The question is, as a matter of sound policy, when an insurer does not know, should there not be an obligation on their part to investigate that in some way? Should an insurer be rewarded for being willfully blind? To allow this leads all parties to the litigation to believe that the coverage will be there. Should Canadian insured persons not be able to count on that?

31. In *Logel Estate v. Wawanesa Mutual Insurance Company*,[52] the Court of Appeal regarded it as being "obvious" that taking an off-coverage position three years into an action was too late:

> The appellant filed its Statement of Defence in July 2002. In the following three years, the action proceeded through discoveries, production and settlement discussions, including the dismissal of the action against two parties. Not until August 2005 did the appellant raise the potential coverage issue. In these circumstances, the motion judge was entitled to apply what Holland J. said in the factually similar case *Rosenblood Estate v. Law Society of Upper Canada*, 1989 CanLII 4221 (ON SC), [1989] O.J. No. 420 (S.C.), aff'd. [1992] O.J. No. 3030 (C.A.), namely, that "[i]n the present case the insurer finally took an off coverage position but … much too late." Moreover, in the context of the appellant electing to defend the action and taking many steps with respect to its defence over a three year period, it seems obvious, as it was to Holland J. and this court in *Rosenblood* Estate, that the respondent would be prejudiced if the appellant were allowed to raise a coverage issue three years into the action.[53]

32. This approach is consistent in other Canadian jurisdictions. For example, in *Personal Insurance Company v. Richinger*,[54] a decision of the Supreme Court of the Northwest Territories, the Court reviewed the same argument advanced by the Respondent insurer below – that it did not have full knowledge of its rights when it filed the statement of defence. In *Personal*, the insurer said that, until it received the coroner's report, it did not have full knowledge of the facts.[55]

33. The Court responded as follows:

> Had the Personal wanted to reserve to itself the right to deny indemnity and defence, it should have taken the steps normally taken in its industry as set out in *Rosenblood Estate*

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[51] *Ibid*.
[52] *Logel Estate v. Wawanesa Mutual Insurance Company*, 2009 ONCA 252 (CanLII) at para. 7.
[53] *Ibid,* at para. 7.
[54] *Personal Insurance Company v. Richinger*, 2012 NWTSC 19 (CanLII).
[55] *Ibid,* at para. 34. Emphasis added.

v. Law Society of Upper Canada, (1989) 37 C.C.L.I. 142 at paragraph [64], appeal dismissed (1992), 16 C.C.L.I. (2d) 226:

> 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.[56]

34. This result was consistent with jurisprudence from British Columbia, including *Alpine Forest & Food Market v. Axa Pacific Insurance*.[57] Significantly, the Court pointed out that the insurer did not attempt to obtain a non-waiver agreement or provide a reservation of rights letter. Just as in the case before this Honourable Court, the insurer defended the estate through to the point of examinations for discovery.[58] The message these decisions send is that it is the business of the insurance company, when it takes a position in litigation, to secure its rights and interests.

What is the level of knowledge required on the part of an insurer before it can be taken to have expressed an 'unequivocal intention to abandon rights'?

35. The central issue before the Court of Appeal below was what constitutes "actual knowledge". At a practical level, this case asks this Honourable Court to finally determine what is the level of knowledge required on the part of an insurer before it can be taken to have expressed an 'unequivocal intention to abandon rights'?[59] Whereas the Trial Judge imputed knowledge of the breach to the insurer on the basis the evidence was available, and the Respondent insurer was aware of its right to obtain it, the Court of Appeal disagreed.

36. The decision of the Court of Appeal below established that knowledge of rights is only established when an insurer has "actual knowledge" of material facts constituting a breach of policy. For the Court of Appeal, the requirement is not whether the insurer *could* obtain the

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[56] *Ibid,* at para. 35.
[57] *Alpine Forest & Food Market v. Axa Pacific Insurance*, 2004 BCSC 1731 (CanLII).
[58] *Personal Insurance Company v. Richinger*, 2012 NWTSC 19 (CanLII) at para. 37.
[59] *Bradfield v. Royal Sun Alliance Insurance*, 2019 ONCA 800 (CanLII) at para. 33.

material facts, but whether they *did* have the facts necessary to enable them to know of the policy breach.[60]

37. As such, in a case where information confirming a policy breach *could* have been obtained through further investigation, there is no right or obligation on the insurer to investigate every reasonable possibility that the policy was breached.[61]

38. The question for this Honourable Court is whether that should be the law. This issue raises a legal question of public importance for Canadians. The decision of the Court of Appeal below has the effect of decreasing an insurer's obligation to investigate and determine the extent of coverage in a timely fashion. The negative fallout for insured consumers and civil justice is apparent if that is the law.

Waiver and estoppel

39. As noted by the Court of Appeal, waiver and estoppel are closely related. The basic idea is that a party should not be allowed to resile from a choice when it would be unfair to the other party to do so.[62] The Court of Appeal also noted that both of these doctrines require "knowledge" – that, in order to find the Respondent insurer waived its right to rely on Mr. Devecseri's breach of the policy, there must be some evidence the Respondent insurer knows about it.[63] In law, it is knowledge of rights that matters.

40. The Court of Appeal below takes this idea from *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.* There, writing for a unanimous court, Major J. said:

> Waiver occurs where one party to a contract or to proceedings takes steps which amount to foregoing reliance on some known right or defect in the performance of the other party….
>
> Waiver will be found only where the evidence demonstrates that the party waiving had (1) a full knowledge of rights; and (2) an unequivocal and conscious intention to abandon them. The creation of such a stringent test is justified since no consideration moves from

[60] *Ibid,* at paras. 51-57.
[61] *Ibid,* at paras. 51-57.
[62] *Ibid,* at paras. 30-31.
[63] *Ibid,* at paras. 30-31.

> the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.[64]

41. With respect, should the Court of Appeal's application of *Saskatchewan Bungalows* not be informed by the contemporary insurance litigation landscape? Section 131(1) of the *Insurance Act* provides as follows:

> **Waiver and estoppel**
> 131(1) The obligation of an insured to comply with a requirement under a contract is excused to the extent that,
>
> (a) the insurer has given notice in writing that the insured's compliance with the requirement is excused in whole or in part, subject to the terms specified in the notice, if any; or
>
> (b) the insurer's conduct reasonably causes the insured to believe that the insured's compliance with the requirement is excused in whole or in part, and the insured acts on that belief to the insured's detriment.[65]

42. Section 131(1) is disjunctive. That means that, under s. 131(1)(b), where the insurer's conduct *reasonably causes* the insured Mr. Devecseri's estate and the Applicant to believe compliance with the policy is excused, the obligation to comply really is, for the purpose of the statute, excused. In that circumstance, the evidence is in the insurer's conduct and how it is reasonably interpreted by the insured.

43. That being said, under s. 131(1)(a), the Trial Judge had clear evidence that the insurer *did* provide notice of the insured's compliance – the Respondent insurer retained and instructed counsel to issue a notice of intent to defend and statement of defence in this case. For the Trial Judge, these documents formally state "we elect to defend".[66] Neither of these documents reserved rights for the Respondent insurer to deny coverage on the basis of Mr. Devecseri's violation of the policy. In contemporary insurance litigation, shouldn't that mean something? In light of the decision below, should there not be a recognized duty on insurers to be clear about their position, and not to leave an insured (and other litigants) with a false belief that its interests are protected?

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[64] *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 1994 CanLII 100 (SCC), [1994] 2 S.C.R. 490 at p. 500. [Emphasis added].
[65] *Insurance Act*, RSO 1990, c I.8, s. 131(1).
[66] *Bradfield v. Royal and Sun Alliance Insurance Company of Canada*, 2018 ONSC 4477 (CanLII) at para. 65.

44. Should an insurer not take steps to bring the possibility that the claim will be denied to the attention of the insured? "Non-waiver agreements" or "reservation of rights" letters are simple to produce and ensure that an insured clearly understands she or he may not be covered – providing an opportunity for the insured to take reasonable steps to prepare for that possibility.

45. In *The Commonwell Mutual Assurance Group v. Campbell*, the Court of Appeal pointed out "the general practice is to obtain a non-waiver agreement or to reserve rights" and noted that other insurance companies (The Guarantee Company of North America in that case) did this before denying coverage.[67]

46. Sosna J. adopted the reasons of a similar case, *Logel (Litigation Administrator of) v. Wawanesa Mutual Insurance Co.*,[68] which had been upheld by the Court of Appeal. As in *Logel*, Sosna J. found:

- the Respondent's failure to take an off-coverage position for three years during which the coroner's report existed and was available to it,
- its defence of the claim and its continued defence of the claim through discovery

amounted to a waiver by conduct of Mr. Devecseri's breach and/or that the Respondent should be estopped from taking that position.

47. With respect to estoppel, the Trial Judge applied what the Court said in *Logel*: that prejudice is *presumed* where the insurer persisted for almost three years in its defence through production and discovery.

Clashing Court of Appeal decisions

48. The Trial Judge determined that the doctrine of waiver and estoppel should apply in these circumstances. The Court of Appeal, in this case, disagreed. A few months earlier, in *Commonwell*

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[67] *The Commonwell Mutual Assurance Group v. Campbell*, 2018 ONSC 5899 (CanLII) at para. 32.
[68] *Logel (Litigation Administrator of) v. Wawanesa Mutual Insurance Co.*, [2008] O.J. No. 3717.

Mutual Insurance Group v. Campbell,[69] the Court of Appeal found, in similar circumstances, that the insurer had waived its right to deny coverage or was estopped from doing so.

49. These are two starkly conflicting messages from the Court of Appeal. In this case, the Court has said insurance companies need not be diligent in determining issues such as whether to cover a claim prior to the commencement of civil litigation. In *Commonwell*, the Court of Appeal states the opposite.

50. On August 16 2019, in *Commonwell Mutual Insurance Group v. Campbell*, the Court of Appeal was confronted with the same problem later addressed in this case, only in circumstances where the insured was involved in a dirt bike accident. In June 2015, without securing a non-waiver agreement or issuing a reservation letter (just as in this case), Commonwell took the following steps:

- appointed a lawyer to defend the claim,
- exchanged pleadings with opposing counsel,
- made tactical decisions with respect to who would be joined in the action; and
- issued a crossclaim.[70]

51. In January of 2016, only after opposing counsel asked whether there was any issue about coverage did Commonwell inquire further and determine they would be denying coverage. The reason: the policy did not cover liability arising from the use of an unregistered dirt bike.[71] With respect, this is the exact same type of 'knowledge' problem confronted by the Court of Appeal below – Commonwell knew the accident involved a dirt bike, and so knew or ought to have known whether the accident would be covered.

52. Just as in this case, the Application Judge determined that the litigation was sufficiently "well advanced" to result in detrimental reliance and the insurer was prevented from denying coverage on both a waiver and estoppel theory. Whereas the Court of Appeal below found there

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[69] *The Commonwell Mutual Insurance Group v. Campbell*, 2019 ONCA 668 (CanLII).
[70] *Ibid,* at paras. 3, 11.
[71] *Ibid,* at para. 4.

was no prejudice caused by the Respondent insurer's conduct, the Court of Appeal in *Commonwell* affirmed the Application Judge's decision:

> In these circumstances, the application judge was entitled to conclude that the litigation was well-advanced, and to infer that allowing Commonwell to now assert that there is no coverage and therefore no duty to defend Mr. Campbell would be detrimental to him.[72]

53. In light of the stark difference between the Court in *Commonwell* and the Court below, the Court of Appeal is clearly divided on the degree to which an insurer is obliged to carry out diligent investigation and determine the extent to which it will cover a claim. The Court below considered the same issue twice, weeks apart, and produced completely different answers. As such, this Honourable Court has a clear choice before it: which Court of Appeal got it right?

When does "actual knowledge" happen?

54. The Court of Appeal decision fails to recognize that an insurer's duty to defend is based on the *possibility* rather than the fact of coverage, a point clearly set out by the Court in *Commonwell*. This is so because, as a practical matter, the decision whether to defend has to be made before the duty to indemnify can be finally determined.[73]

55. Here, the Coroner's report came into existence 92 days from the date of accident and 84 days after the Respondent insurer retained the insurance adjuster. The adjuster's report specifically acknowledged the Respondent's direction to obtain a copy of the Coroner's report, but for reasons unexplained, no steps were taken to do so.[74]

56. At the end of the day, it seems the Coroner's report was irrelevant to the key decision the Respondent needed to make: to cover or not to cover. Although the Applicant doesn't have exact knowledge, that decision was likely reached sometime between June 25 and July 8 of 2009, months before the Respondent had "actual knowledge" of Mr. Devecseri's blood alcohol levels, aside from Mr. Latanski's statements. In any event the Statements of Claim issued in October 2007 and May 2008 both contained allegations of alcohol consumption by Devesceri - known by his Insurer to have a restricted M2 licence requiring a zero alcohol level while driving - such that the unqualified

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[72] *Ibid,* at para. 13. Emphasis added.
[73] *Ibid*., at para. 20.
[74] *Bradfield v. Royal and Sun Alliance Insurance Company of Canada*, 2018 ONSC 4477 (CanLII) at para. 64.

defences provided by the Respondent Insurer without any reservation of rights amounted to waiver even assuming the Respondent Insurer did not have the actual evidence or knowledge of such evidence.

The decision below sends the wrong message

57. Consider the application of the Court of Appeal's reasoning in other legal contexts, for example in the context of the *Limitations Act*[75] – can we not assume that the Respondent insurer knew or *ought to have known* that Mr. Devecseri's blood alcohol levels exceeded the legal limit for an M2 licence-holder, thereby violating their policy?

58. For example, in Ontario, s. 5(1) of the *Limitations Act* provides that a claim is discovered on the earlier of,

> (a) the day on which the person with the claim first knew,
>
> > (i) that the injury, loss or damage had occurred,
> > (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
> > (iii) that the act or omission was that of the person against whom the claim is made, and
> > (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

59. Similar to the language contained at s. 161(1) of the *Insurance Act*, the factors listed in s. 5(1) of the *Limitations Act* are conjunctive. This means that a claim is discovered on the day a plaintiff is actually aware of the factors listed in (a) *or* until a reasonable person, with the abilities and in the circumstances of the plaintiff, first ought to know of all of those matters.[76]

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[75] *Limitations Act, 2002*, SO 2002, c 24, Sch B.
[76] *Longo v. MacLaren Art Centre Inc*., 323 O.A.C. 246, at para. 41 and *Crombie Property Holdings Ltd. v. McColl-Frontenac Inc.*, 2017 ONCA 16 (CanLII), 406 D.L.R. (4th) 252, at para. 35, leave to appeal refused, [2017] S.C.C.A. No. 85.

60. Here, we're dealing with an insurer – as noted by Lack J. in *Logel*, it is an insurer's business to assess claims and determine whether they are covered by the policies of insurance that it issues.[77] Canadians rely on their insurers to know if they are covered.

Why this matters in real terms

61. The decision of the Court of Appeal signals that insurers are not required to diligently investigate to determine coverage before trial, finding that no prejudice results where an insurer fails to do so. In *Commonwell*, the Court of Appeal said the exact opposite; rejecting the insurer's assertion that an insured person must identify some specific misstep on the part of the insurer before it can be determined that prejudice results:

> 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.[78]

62. Moreover, the Court of Appeal compared Commonwell's conduct to that of other insurers to demonstrate the need for diligence in these circumstances:

> Commonwell has not persuaded us that the application judge made a palpable and overriding error in finding detrimental reliance. Immediately upon being served with a statement of claim in April 2015, Mr. Campbell contacted his insurance broker and was put in touch with adjustors for Guarantee and Commonwell. Guarantee promptly issued a non-waiver agreement and a reservation of rights letter, and ultimately denied coverage. To the contrary, instead of taking similar prudent steps Commonwell appointed counsel for Mr. Campbell. An investigation of Mr. Campbell's potential liability was then undertaken. A detailed statement of defence was prepared. Tactical decisions were made relating to who would be joined in the action, and crossclaims were issued. The tactical decision not to have a jury trial was made.[79]

63. The question is: which of these two visions for Canadian insurance litigation should be preferred? How should Canadian insurers be incentivized to behave? Without this Honourable Court's intervention, the same reasoning adopted by the Court of Appeal below may be applied to

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[77] *Bradfield v. Royal and Sun Alliance Insurance Company of Canada*, 2018 ONSC 4477 (CanLII) at 43; citing *Logel (Litigation Administrator of) v. Wawanesa Mutual Insurance Co*., [2008] O.J. No. 3717 (Ont. S.C.).
[78] *The Commonwell Mutual Insurance Group v. Campbell*, 2019 ONCA 668 (CanLII) at para. 15.
[79] *Ibid,* at para. 11.

insurance claims *beyond* the motor vehicle accident context. Leave to appeal should be granted because the Court of Appeal decision below opens the floodgates to late coverage denials in the litigation of all insurance claims.

Conclusion: The Public Importance of the Issues Raised

64. The issues in this case raise a number of fundamental, practical questions that, by reason of their significance for timely determinations of coverage for consumers in all future cases, are matters of public importance which ought to be decided by this Court.[80] This is an appropriate case for leave to appeal to the Supreme Court of Canada. The issues were placed squarely before the Court of Appeal below, on an extensive factual record developed for the express purpose of answering them and the Court below has provided direction which is out of step with its own pronouncements and those of this Honourable Court.

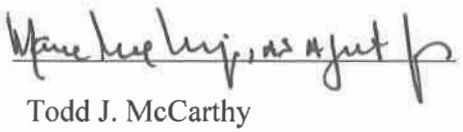
PART IV – SUBMISSIONS ON COSTS

65. The Applicant respectfully requests costs of this application to be granted in the cause.

PART V – ORDER SOUGHT

66. The Applicant requests that leave to appeal be granted, with costs in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS, 6th day of December, 2019.



Todd J. McCarthy

Counsel for the Applicant

[80] *Supreme Court Act*, s. 40.

PART VI – TABLE OF AUTHORITIES

Cases ***at Paragraph(s)***

STATUTORY PROVISIONS

Insurance Act, RSO 1990, c I.8, ss. 131(1), 161 (1)
Loi sur les assurances, LRO 1990, c I.8, ss. 131(1), 161(1)

Limitations Act, 2002, SO 2002, c 24, Sch B, s. 5 (1)
Loi de 2002 sur la prescription des actions, LO 2002, c 24, Ann B, s. 5(1)

Supreme Court Act, RSC 1985, c S-26, s. 40
Loi sur la Cour suprême, LRC 1985, c S-26, s. 40