SCC File No.: 38949

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

BETWEEN:

JEFFREY BRADFIELD

APPLICANT
(Respondent)

-and-

ROYAL AND SUN ALLIANCE INSURANCE COMPANY OF CANADA

RESPONDENT
(Appellant)

RESPONSE TO APPLICATION FOR LEAVE TO APPEAL
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. The Applicant seeks leave to appeal to this Court from a unanimous decision of the Court of Appeal for Ontario.

2. This Court has granted leave only sparingly and this is not one of those extraordinary cases where this Court should exercise its discretion to grant leave. This Application does not raise an issue of national importance or public interest, or an important issue of law that should be dealt with by the Supreme Court of Canada.

3. The Application for leave to appeal should be dismissed.

B. THE FACTS

4. On May 29, 2006, the Applicant, Paul Latanski, and the late Steven Devecseri, were riding their motorcycles. Mr. Devecseri was in front. Unfortunately, Mr. Devecseri drove onto the wrong side of the road and collided with Jeremy Caton's automobile. The Applicant did not hit Mr. Caton's automobile. Mr. Devecseri was killed and Mr. Caton was injured.[1]

5. Mr. Devecseri was insured by the Respondent under a standard motor vehicle policy with a $1,000,000 limit. He had an M2 driver's license, which prohibited him from operating a motorcycle with any alcohol in his bloodstream. To do so, constituted a policy violation.[2]

6. On June 6, 2006, the Respondent engaged an adjuster to investigate the circumstances of the accident. The Respondent instructed the adjuster to obtain any and all information with regard to the accident and provided a list on non-mandatory, suggested areas to investigate.

[1] *Bradfield v. Royal Sun Alliance Insurance*, 2019 ONCA 800 at para 2.
[2] *Ibid*, at para 3.

The list included investigation materials from the police service and the coroner (death certificate).[3]

7. During the investigation, the adjuster obtained the police report which concluded that "excessive speed was a major contributing factor in the collision." The police report made no mention of alcohol. The adjuster testified that he did not believe alcohol was involved in the collision because it was not disclosed in the police report.[4]

8. As part of his investigation, the Respondent's adjuster also interviewed the Applicant and Mr. Latanski. Neither informed the adjuster that Mr. Devecseri had been drinking before the accident.[5]

9. Before 2009, the Applicant's insurer received hearsay information that drinking was involved in the accident but did not disclose this information to the Respondent or its adjuster.[6]

10. None of the parties obtained a copy of the coroner's report.[7]

11. On May 27, 2008, Mr. Caton brought an action for personal injuries as against the Devecseri estate and the Applicant. Examinations for Discovery proceeded in June 2009 and Mr. Latanski advised for the first time that Mr. Devecseri and the Applicant were drinking beer shortly before the accident. As a result, two weeks after Mr. Latanski's examination, the Respondent advised the parties that it was taking an "off-coverage position", given that having a blood alcohol level above zero was contrary to Mr. Devecseri's M2 licence and a breach of his insurance policy. By taking an off-coverage position, Mr. Devecseri's policy limit was reduced from $1,000,000 to $200,000.[8]

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[3] *Bradfield v. Royal Sun Alliance*, 2019 ONCA 800 at para 12.
[4] *Ibid*, at para 13.
[5] *Ibid*, at para 16.
[6] *Ibid*, at para 15.
[7] *Ibid*, at para 14.
[8] *Ibid*, at paras 5 and 17-19.

12. At no time did the Respondent provide Mr. Devecseri's estate notice in writing that it was waiving the policy violation, as described in section 131(1) of the *Insurance Act*, R.S.O. 1990, c I.8.[9]

13. In 2012, the Caton action proceeded to trial and the Applicant and Mr. Devecseri were found liable for damages resulting from the motor vehicle accident. The jury awarded $1,800,000 in total damages, apportioning 90% liability against the Devecseri estate, and 10% against the Applicant. The Applicant was indemnified against Mr. Devecseri's estate and obtained judgment on his crossclaim against the estate.[10]

14. The Applicant subsequently brought a direct action against the Respondent pursuant to section 258 of the *Insurance Act*, R.S.O. 1990, c I.8 seeking entitlement to recover judgment against the Respondent for the remaining $800,000 available under Mr. Devecseri's policy ($200,000 had already been paid out).[11]

15. In the second action, the Trial Judge was asked to determine whether the Respondent was entitled to take an off-coverage position and reduce the policy limits after it had learned that Mr. Devecseri had been drinking before the accident, contrary to the terms of his insurance policy.[12]

16. In the second action, the Trial Judge incorrectly held that the Respondent had waived its right to rely on Mr. Devecseri's policy breach. According to the Trial Judge, knowledge of the policy breach could be *imputed* on the basis that the evidence of the policy breach was available to the Respondent, had it obtained the coroner's report in 2006. Having found waiver, the Trial Judge held that the issue of estoppel was moot.[13]

17. The Respondent appealed the Trial Judge's finding that it had waived its right to deny coverage on three grounds:

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[9] *Bradfield v. Royal Sun Alliance*, 2019 ONCA 800 at para 20.
[10] *Ibid*, at para 21.
[11] *Ibid*, at para 23.
[12] *Ibid*, at para 5.
[13] *Ibid*, at para 6 and 27.

(a) The Respondent submitted that it did not have actual knowledge of the policy breach until 2009 when Mr. Latanski advised for the first time that Mr. Devecseri had been drinking before the accident.[14]

(b) The Respondent submitted that there was no clear waiver of the breach in writing as provided in section 131(1) of the *Insurance Act*, R.S.O. 1990, c I.8; and

(c) The Respondent submitted that there could be no estoppel as there was no knowledge of the breach until 2009 and no detrimental reliance.[15]

18. In a unanimous decision, the Court of Appeal for Ontario held that the Respondent did not waive its right to rely on the policy breach nor was it estopped from relying on the breach.[16]

19. The Court of Appeal reached the following conclusions in its 16-page, well-reasoned decision:

(a) the Respondent did not have actual knowledge of the policy breach that entitled it to deny coverage until June 2009;[17]

(b) knowledge of the policy breach could not be imputed as the Respondent did not have all the material facts from which to determine there was a policy breach until it received Mr. Latanski's evidence in 2009;[18]

(c) the knowledge requirement is not whether the insurer *could* obtain the material facts but whether they *did* have the material facts necessary to enable them to know of the policy breach;[19]

[14] *Bradfield v. Royal Sun Alliance*, 2019 ONCA 800, at para 7 and 37.
[15] *Ibid*, at para 9, Appellant's Materials.
[16] *Ibid*, at para 57.
[17] *Ibid*, at paras 37 and 52.
[18] *Ibid*, at para 38 and 53.
[19] *Ibid*, at para 53.

(d) the Respondent expressed no clear intention to forego the exercise of the right to deny coverage in writing as required under section 131(1) of the *Insurance Act*, R.S.O. 1990, c I.8;[20]

(e) the Respondent was not estopped from asserting a breach of the policy, as it had no knowledge of the breach until 2009 and there was no evidence of detrimental reliance;[21] and

(f) there was no legal authority to support the proposition that an insurer is required to investigate every reasonable possibility that a policy was breached.[22]

20. The Court of Appeal for Ontario therefore granted the appeal and set aside the decision of the Trial Judge.[23]

PART II – STATEMENT OF QUESTIONS IN ISSUE

21. The Applicant submits that the proposed appeal raises the following issue of national or public importance:

a. 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 the insurer?

22. As set out below, this issue has arisen in prior cases, and has been properly disposed of by the Ontario Superior Court of Justice, the Court of Appeal for Ontario, and this Court. This appeal raises no novel issues of law, and is not of national or public importance.

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[20] *Bradfield v. Royal Sun Alliance*, 2019 ONCA 800, at paras 40 and 54.
[21] *Ibid*, at paras 47- 49 and 55.
[22] *Ibid*, at paras 39 and 56.
[23] *Ibid*, at para 57.

23. The Applicant's request for leave to appeal should be dismissed.

PART III – STATEMENT OF ARGUMENT

24. The Ontario Superior Court of Justice, the Court of Appeal for Ontario, and this Court have all considered the circumstances when an insurance company can deny coverage for a breach of an insurance policy after it has already elected to defend a claim.[24]

25. The Respondent respectfully submits that the Court of Appeal for Ontario accurately followed the jurisprudence in reaching its conclusions and that its decision offers no valid grounds for leave to appeal to the Supreme Court of Canada.

26. The legal principles of waiver and estoppel, which form the basis of this appeal, are well-settled and are applied in fact specific circumstances. As discussed below, the underlying facts of this case do not support the Trial Judge's finding that the Respondent waived its right or was estopped from taking an off-coverage position. The facts show that the Respondent did not have any knowledge of the policy breach until three years after the motor vehicle accident when Mr. Latanski advised for the first time at his Examination for Discovery that Mr. Devecseri and the Applicant were drinking before the accident.

27. The Respondent submits that its adjuster acted reasonably in his investigation. The adjuster obtained a copy of the police report and interviewed the Applicant and Mr. Latanski. The police report did not mention alcohol was a factor in the collision, and the Applicant and Mr. Latanski did not advise the adjuster that Mr. Devecseri had been drinking before the accident. Based on this, there was no reason to suspect that alcohol was a factor in the collision and, therefore, no reason to investigate further.

28. There is no jurisprudence supporting the Applicant's proposition that an insurer is required to investigate every reasonable possibility that its policy may have been breached. Rather,

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[24] *Logel (Litigation Administrator of) v. Wawanesa Mutual Insurance Co.*, [2008] O.J. No. 3717 (Ont. S.C.), affirmed 2009 ONCA 252; *Rosenblood Estate v. Law Society of Upper Canada*, [1989] O.J. No. 2470 (Ont. H.C.), appeal dismissed, [1992] O.J. No. 3030 (Ont. C.A.); *The Commonwell Mutual Insurance Group v Campbell*, 2019 ONCA 668; and *Saskatchewan River Bungalows Ltd. v Maritime Life Assurance Co.*, [1994] 2 S.C.R. 490.

the Respondent respectfully submits that seeking out a policy breach where there is no knowledge, evidence or information that suggests same, would be contrary to the duty of good faith it owed to Mr. Devecseri's estate.[25]

29. Moreover, an insurer has every right to investigate and assess claims in the manner it so chooses. There is no jurisprudence directing insurers on how to investigate claims, and no evidence cited by the Applicant regarding the standard of care to which the Respondent should be held. The court is only interested in whether an insurer's investigation breaches the duty of good faith. The only duty imposed on adjusters is simply to carry out a reasonable investigation.[26]

30. The Respondent respectfully submits that its adjuster's investigation was reasonable. He obtained the police report and interviewed the witnesses. The investigation revealed no indication of alcohol consumption before the accident.

A. *Waiver by Conduct*

31. This Court dealt with the issue of wavier by conduct in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co*.[27] The test for waiver as set out by this Court is fact specific and driven by the evidence. Writing for a unanimous Court, Major J. set out the following test for wavier:

> 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 the party in whose favour a waiver operates. An overly broad interpretation of waiver would undermine the requirement of contractual consideration.[28] [Emphasis added]

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[25] *Whiten v Pilot Insurance Co*., [2002] 1 S.C.R. 595.
[26] *Kingscourt Auto Enterprises Inc. v. General Accident Assurance Co. of Canada*, 1992 CarswellOnt 677 at para 39 and *Khazzaka v. CGU Insurance Company of Canada*, 2002 CanLII 45018 (ON CA) at para 72.
[27] *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co*., [1994] 2 S.C.R. 490.
[28] *Ibid.*, at p. 500.

32. In *Logel (Litigation Administrator of) v. Wawanesa Mutual Insurance Co.,*[29] the Superior Court of Justice for Ontario applied the test for waiver as set out in *Saskatchewan River Bungalows Ltd*.

33. In *Logel,* the plaintiff was involved in a fatal motor vehicle accident in June of 2000. She was a G2 driver and was insured under an automobile policy with Wawanesa. As a G2 driver, the plaintiff was prohibited from operating a motor vehicle with a blood alcohol concentration greater than zero. In 2002, Wawanesa's solicitor obtained a copy of the coroner's report that showed the plaintiff had alcohol in her system at the time of the accident. Despite the actual knowledge of this fact, Wawanesa did not take an off-coverage position as a result of the policy breach until 2005.

34. Based on the evidence, the court found that Wawanesa and its representative had full knowledge of its rights under the Wawanesa policy and that upon receipt of the coroner's report, it must have had knowledge of the facts giving rise to the exclusion of coverage. Wawanesa should have appreciated the significance of these facts before it elected to defend.[30]

35. Unlike the insurer in *Logel,* the Respondent did not have any knowledge of the policy breach and did not sit idly on information for three years before taking an off-coverage position.

36. Given the Respondent's lack of knowledge, it was improper for the Trial Judge to conclude that knowledge of the breach could be *imputed* on the part of the Respondent. As stated by the Court of Appeal for Ontario:

> This is not a case where RSA failed to appreciate the significance of information; it did not have information that Devecseri had been drinking and thereby had breached the terms of the policy.[31]

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[29] *Logel (Litigation Administrator of) v. Wawanesa Mutual Insurance Co.*, [2008] O.J. No. 3717 (Ont. S.C.)
[30] *Ibid,* at para 22.
[31] *Bradfield v. Royal Sun Alliance,* 2019 ONCA 800 at para 38.

37. The Respondent's adjuster investigated the circumstances of the accident and found no evidence that alcohol was a factor in the collision. The police report made no mention of alcohol, and the Applicant and Mr. Latanski did not advise the Respondent's adjuster that Mr. Devecseri had been drinking before the accident when they were interviewed. How could the Respondent be expected to appreciate facts it did not have following a reasonable investigation?

38. Notably, the Applicant's insurer had hearsay evidence prior to 2009 that drinking was involved in the accident, but chose not to disclose this information to the Respondent or its adjuster.

39. Without any information or evidence of drinking, it was incorrect for the Trial Judge to impute knowledge of the policy breach to the Respondent.

40. This is not a case like *Logel* where the insurer had information and failed to appreciate it. This is a case where the insurer had no information and the Trial Judge expected the insurer to appreciate information it did not have. "The knowledge requirement is not whether the insurer *could* obtain the material facts but whether they *did* have the material facts necessary to enable them to know of the policy breach."[32]

41. With respect to part 2 of the test for waiver, there is no evidence that the Respondent abandoned its right to take an off-coverage position. In addition, the Respondent never provided Mr. Devecseri's estate with a written waiver, which was required under the section 131(1) of the *Insurance Act*, R.S.O. 1990, c I.8:

> **Waiver of term or condition**
>
> **131.** (1) No term or condition of a contract shall be deemed to be waived by the insurer in whole or in part unless the waiver is stated in writing and signed by a person authorized for that purpose by the insurer. [33]

[32] *Bradfield v. Royal Sun Alliance*, 2019 ONCA 800 at para 53, Appellant's Materials.
[33] *Insurance Act*, R.S.O. 1990, c I.8, s 131(1) and (2).

42. The wording of section 131(1) of the *Insurance Act*, R.S.O. 1990, c I.8, as it then was, clearly states that no term or condition of a contract shall be deemed to be waived by the insurer unless the waiver is stated in writing and signed by a person authorized for that purpose by the insurer. At no point did the Respondent provide such written notice to Mr. Devecseri's estate.

43. The Applicant reproduced the current version of section 131(1) of the *Insurance Act*, R.S.O. 1990, c I.8 at page 14 of his Memorandum of Law:

> **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 of the specified 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.[34]

44. This version of section 131(1) came into force on July 1, 2016, well after the subject accident and the trial of Mr. Caton's action. Given that this section was not in force at the relevant time, it does not apply to the Respondent's conduct. Moreover, the current version of section 131(1) does not specifically state that it is to be interpreted retroactively. Any argument that the Respondent has waived or is estopped under this version of section 131(1) is without merit.

45. Without full knowledge of its rights and without an unequivocal intention to abandon its rights under the policy in accordance with section 131(1) of the *Insurance Act*, R.S.O. 1990, c I.8, the Respondent cannot be said to have waived its right to take an off coverage position. Accordingly, the Court of Appeal for Ontario was correct in holding that the

[34] *Insurance Act*, R.S.O. 1990, c I.8, s 131(1).

Respondent did not waive its right to refuse coverage for breach of the terms of the insurance policy.

B. *Estoppel*

46. As stated by this Court in *Maracle v Travelers Indemnity Co. of Canada*[35] the principle of promissory estoppel is well settled.

47. The principle underlying the doctrine of promissory estoppel 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. Like waiver, estoppel requires "knowledge" of the policy breach. Determining whether a party is estopped is fact specific.[36]

48. The essential elements of estoppel in the insurance context are:

(a) the insurer must have knowledge of the facts that support a lack of coverage; and

(b) there must be a course of conduct by the insurer upon which the insured relied to its detriment.[37]

49. The test for estoppel is conjunctive. Both elements must be met for estoppel to be found.

50. Although the Trial Judge did not address the issue of estoppel, the Court of Appeal for Ontario explored the issue in its well-reasoned decision.

51. In reaching its decision that the Respondent was not estopped from asserting a breach of the policy, the Court of Appeal for Ontario relied upon *Rosenblood Estate v. Law Society of Upper Canada.*[38]

52. In *Rosenblood Estate*, the estate of a deceased solicitor sued on a policy of professional liability insurance. The solicitor practiced real estate law and was involved in a scam

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[35] *Maracle v. Travelers Indemnity Co. of Canada*, [1991] 2 SCR 50 at para 2.
[36] *Bradfield v. Royal Sun Alliance*, 2019 ONCA 800 at para 31.
[37] *Rosenblood Estate v. Law Society of Upper Canada*, [1989] O.J. No. 2470 (Ont. H.C.), appeal dismissed, [1992] O.J. No. 3030 (Ont. C.A.) at para 18.
[38] *Ibid.*

against a credit union. The solicitor died one year after the scam and six months after his estate notified the Law Society of the credit union's claim. The insurer, through the Law Society and its lawyer, had actual knowledge of facts giving rise to a policy exclusion and chose to defend the action. Two years later, the Law Society advised the Estate that it was denying coverage. The court found that the Law Society appreciated or should have appreciated the significance of these facts.

53. The court in *Rosenblood* held:

> …the insurer through the Law Society and its solicitor had knowledge of facts giving rise to exclusions of coverage and appreciated or should have appreciated the significance of these facts.[39]

54. The insurer in *Rosenblood* should have appreciated the significance of the information in its possession that constituted a policy exclusion. Despite this information, it elected to defend the claim. The court also found that the insured relied to its detriment on the insurer's agreement to defend the claim.

55. Unlike the insurer in *Rosenblood*, the Respondent did not have any knowledge to support a lack of coverage. The police report made no mention of drinking and the Applicant and Mr. Latanski did not mention anything about drinking when interviewed by the Respondent's adjuster after the accident.

56. Without any information about drinking before the accident, the Respondent did not have any knowledge about a possible policy breach and was not in a position to take an off-coverage position until the Examination for Discovery of Mr. Latanski in 2009.

57. This case can also be distinguished from *Rosenblood* because there is no evidence of detrimental reliance, the second element in the test for estoppel.

58. There was no evidence that any of the steps taken by the Respondent to defend the case operated to prejudice the estate. Rather, both the litigation administrator for Mr. Devecseri's estate and Mr. Caton's counsel testified at trial that there would have been no

[39] *Rosenblood Estate v. Law Society of Upper Canada*, [1989] O.J. No. 2470 (Ont. H.C.), appeal dismissed, [1992] O.J. No. 3030 (Ont. C.A.) at para 61.

difference in the defence of the action whether the Respondent added itself as a statutory third party or was a defendant in the action.[40]

59. Given that the defence of the case would not have changed, then even if the Applicant's submission that prejudice is presumed is correct, the Court of Appeal concluded that such presumption would have been rebutted – no detrimental reliance was found.

60. When the facts of this case are applied to the test for estoppel, it is evident that estoppel cannot be made out: (1) there is no evidence that the Respondent had any knowledge to support a lack of coverage; and (2) there is no evidence that any of the steps taken by the Respondent to defend the case operated to prejudice Mr. Devecseri's estate, nor that the estate detrimentally relied on the Respondent.

61. Accordingly, the Court of Appeal for Ontario was correct in determining that the Respondent was not estopped from asserting a policy breach.

C. ***The Applicant Has Not Met the Test for Leave***

62. The Supreme Court of Canada is concerned only with matters of national importance or public interest.[41]

63. As stated in the case of *Dorzek v. McColl Frontenac Oil Co.,* [1933] S.C.R. 197, the Court should not grant leave for the mere purpose of reasserting the law it has already expounded. The mere fact that a point of law – important though it may be – is involved in the appeal is not in itself sufficient reason why leave should be granted, if the point has already been the subject of a decision of the Supreme Court of Canada.[42]

64. The principles of waiver and estoppel have already been the subject of decisions from this Court. Moreover, these principles do not need to be revisited as they are well settled.[43]

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[40] *Bradfield v. Royal Sun Alliance,* 2019 ONCA 800 at para 49.
[41] *Supreme Court Act*, R.S.C. 1985, c. S-26, s 40.
[42] *Dorzek v. McColl Frontenac Oil Co*., [1933] S.C.R. 197 at paras 14 and 16.
[43] *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co*., [1994] 2 S.C.R. 490 and *Maracle v. Travelers Indemnity Co. of Canada*, [1991] 2 SCR 50.

65. The Respondent submits that there are no conflicting decisions from the Court of Appeal for Ontario. The decision in this case is not at odds with the decision in *The Commonwell Mutual Insurance Group v Campbell*.[44]

66. In *Commmonwell*, the insured was injured in a dirt bike accident in April 2013 when he collided with an ATV. The ATV driver was injured and commenced an action in negligence. At all material times, the insurer knew the insured was operating a dirt bike and that the policy did not cover liability arising from the use of the dirt bike, as it was not registered. In August 2016, the insurer brought an application seeking a declaration that the insured was not covered under the policy. The application judge denied the application holding that the insurer had waived its right to deny coverage. On appeal, the Court of Appeal for Ontario upheld the decision of the application judge and found that the insurer had the knowledge it was relying on to deny coverage at the material time.[45]

67. The *Commonwell* case is distinguishable. Unlike the insurer in *Commonwell*, the Respondent did not have any knowledge of a possible policy violation when it elected to defend Mr. Devecseri's estate. Knowledge of a possible policy violation was not disclosed to the Respondent until the Examination for Discovery of Mr. Latanski in 2009.

68. The Applicant also submits that the decision of the Court of Appeal for Ontario is at odds with the results in other provinces and jurisdictions across Canada. The Applicant cites the decisions of *Apline Florist & Food Market v. Axa Pacific Insurance* and *Personal Insurance Company v. Richiger* in support of this position.

69. In *Alpine Florist & Food Market v. Axa Pacific Insurance,*[46] the plaintiff sought judgment against the defendant's insurer in a direct action. One of the issues in the direct action was whether the insurer was estopped from denying coverage as a result of the actions it took in defending the claim advanced by the plaintiff against the insurer's insured. The Supreme Court of British Columbia applied the facts of that case to the law of estoppel and found that, under the circumstances, the insurer was not estopped from denying coverage despite

[44] *The Commonwell Mutual Insurance Group v. Campbell*, 2019 ONCA 668
[45] *Ibid. at* para 9.
[46] *Apline Florist & Food Market v. Axa Pacific Insurance*, 2004 BCSC 1731 (CanLii).

not entering into a non-waiver agreement with the insured as there was no detrimental reliance. The Court of Appeal for Ontario made a similar finding in the within case – no detrimental reliance.

70. In *Personal Insurance Company v. Richinger*, the insured was involved in a fatal motor vehicle collision with his daughters. The accident occurred on June 21, 2004 and on July 22, 2004 the insurer's adjuster was informed that the insured had telephoned his wife shortly before the accident saying he was going to kill himself and his daughters. In 2009, the insurer sought a declaration that it had no obligation to defend and indemnify the insured's estate given the criminal conduct. The Supreme Court of the Northwest Territories held that the insurer had knowledge of the facts giving rise to the policy violation and should have appreciated same. The court held that the insurer had waived its right to deny coverage.[47]

71. The *Richinger* case it not at odds with the Court of Appeal for Ontario's decision. In *Richinger*, the insurer had knowledge of the facts to deny coverage shortly after the accident. The day after the accident the adjuster was informed that the insured intended to kill himself and his daughters. The Supreme Court of the Northwest Territories took the position that the insured should have appreciated the facts in its possession before waiting five years to deny coverage.[48] Unlike *Richinger*, the Respondent did not have any knowledge of a policy breach when it elected to defend Mr. Devecseri's estate. Moreover, the Respondent was never made aware of the policy breach despite interviewing the Applicant and Mr. Latanski after the accident.

72. Given the foregoing, the Applicant's request for leave to appeal should be dismissed.

PART IV – SUBMISSION ON COSTS

73. The Respondent respectfully requests its costs on this leave Application.

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[47] *Personal Insurance Company v. Richinger*, 2012 NWTSC 19, Appellant's Materials.
[48] *Ibid*, at para 33.

PART V – ORDER SOUGHT

74. The Respondent respectfully requests that this Application for leave to appeal be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28th day of January, 2020.

Derek V. Abreu

Mark A. Borgo

PART VI – TABLE OF AUTHORITIES & STATUTORY PROVISIONS

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Statutes, Regulations, Legislation:	
Insurance Act, R.S.O. 1990, c. I.8, s. 131(1). (current version) *Loi sur les assurances*, LRO 1990, c I.8, s. 131(1).	43, 44
Insurance Act, R.S.O. 1990, c. I.8, s. 131(1). (previous version) *Loi sur les assurances*, LRO 1990, c I.8, s. 131(1).	41, 42, 45
Supreme Court Act, R.S.C. 1985, c. S-26, s. 40. *Loi sur la Cour suprême*, LRC 1985, c S-26. S. 40.	61