S.C.C. Court File No. 38949

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

REPLY TO THE RESPONNSE TO THE APPLICATION FOR LEAVE TO APPEAL (JEFFREY BRADFIELD, APPLICANT)
(Pursuant to Rule 28 of the *Rules of the Supreme Court of Canada*)

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REPLY

Why Leave Should be Granted

1. The question before this Honourable Court, as the *Supreme Court Act* directs, is whether the issue raised by the decision of the Court of Appeal is, by reason of its public importance, one which *ought* to be decided.

2. The Respondent cites *Dorzek v. McColl Frontenac Oil Co., Ltd.*,[1] a decision which was released before the modern drafting of s. 40 (or the modern *Supreme Court Act* came into force),[2] as authority for the proposition that the Supreme Court of Canada should not hear this case. With respect, the *Dorzek* decision is of little relevance here. Section 41 of the *Act*, as it then was, set out a number of categories for "a special leave to appeal" which are scarcely applicable to the present case.

3. The Applicant submits the test at s. 40 of the modern *Supreme Court Act* is satisfied. 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[3] and which *directly* affects every motorist in Ontario and, *indirectly* every motorist in Canada.

4. The question raised by the decision of the Court of Appeal is: 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'?[4] The question *ought* to be decided because the Trial Judge and the Court of Appeal decision below fundamentally disagree on the answer to this question. Furthermore, the Court of Appeal decision below is at odds with recent parallel authority from the same Court of Appeal.[5]

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[1] *Dorzek v. McColl Frontenac Oil Co., Ltd.*, 1933 CanLII 4 (SCC), [1933] SCR 197.
[2] Response at para. 63.
[3] *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 1994 CanLII 100 (SCC), [1994] 2 SCR 490.
[4] *Bradfield v. Royal Sun Alliance Insurance*, 2019 ONCA 800 (CanLII) at para. 33.
[5] *The Commonwell Mutual Insurance Group v. Campbell*, 2019 ONCA 668 (CanLII).

5. But beyond the clear legal question and question of mixed fact and law, there is the matter of sound juridical policy. This case matters to real people, to any Canadian facing the daunting prospect of insurance litigation. How should Canadian insurers be incentivized to behave? The decision of the Court of Appeal signals that insurers are no longer required to diligently investigate to determine coverage before trial. Notwithstanding clear contradictory authorities, the Court below found that no prejudice results where an insurer fails to do so.

6. Without this Honourable Court's intervention, the same reasoning adopted by the Court of Appeal below may be applied to 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.

Law & Practical Reality: Why This Case Matters

7. The decision below raises an issue of public importance because the Court of Appeal's view – that the Respondent insurer's conduct herein 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.

8. There was no regard, in the decision of the Court of Appeal below, to fairness for ordinary insurance consumers or the resulting inefficiency in the administration of justice, contrary to this Honourable Court's pronouncement in *Hryniak v. Mauldin*.[6] Is that *really* the way forward for Canadians?

9. 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 assertions of non-coverage – this despite the Respondent insurer's initial decision to defend, and a notable absence of <u>any</u> steps taken to reserve that right before, during, or after litigation commenced.[7]

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[6] *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 SCR 87.
[7] In stark contrast to the behaviour of other insurers: *The Commonwell Mutual Insurance Group v. Campbell*, 2019 ONCA 668 (CanLII) at para. 11.

Should Insurers Do This?

10. 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 to obtain what he was directed to obtain and was available).

11. The practical concern before the Court of Appeal below was, as a matter of sound policy, when *should* an insurer be taken to know, and *should* there be an obligation on the insurer to investigate in some way? Should an insurer be rewarded for willful blindness? Here the Respondent insurer *knew* Mr. Deveceri was an M2 licence-holder, and they requested information required to determine the extent of coverage – including a coroner's report to determine blood alcohol levels. The Respondent insurer simply didn't follow up. In the meantime, they did nothing to preserve their rights and now blame the Applicant for their own flawed tactical choices. The Trial Judge recognized this, but the Court of Appeal below did not.

12. As a matter of accuracy, the Respondent is incorrect in stating that "actual knowledge" of all the material facts and evidence is required to engage waiver and estoppel principles. That is not the law as it is stated in *Saskatchewan River Bungalows*,[8] *Logel*,[9] *Rosenblood*,[10] or the August 2019 decision in *Commonwell*.[11] In this case the 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,[12] 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. In stark contrast to the decision below, the

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[8] *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, 1994 CanLII 100 (SCC), [1994] 2 SCR 490.
[9] *Logel Estate v. Wawanesa Mutual Insurance Company*, 2009 ONCA 252 (CanLII).
[10] *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.).
[11] *The Commonwell Mutual Insurance Group v. Campbell*, 2019 ONCA 668 (CanLII).
[12] *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.

Court of Appeal in *The Commonwell Mutual Insurance Group v. Campbell*[13] concurs with this approach and outcome.

Adverse Effects of the Decision Below

13. Prior to the decision of the Court of Appeal below, Canadian jurisprudence on this subject has maintained it is knowledge of one's rights that counts having regard to a potential basis for coverage denial or reservation of rights if there is a question of coverage. In this case, two Statements of Claim (issued in 2007 and 2008 and received by the Respondent insurer) alleged, *inter alia*, that the late Mr. Devesceri was impaired by alcohol. Because of the deceased's M2 status listed on the Respondent insurer's "Policy Declaration Page", a fact *actually* known to the Respondent on, before, and after May 29 2006, these allegations alone warranted, at least, a reservation of rights.

14. Alternatively, the Respondent insurer could have brought a "Stat TP Motion" 3 years before the 2010 "Stat TP Motion / Order" denying a defence to the Estate and adding the Respondent insurer as a "Stat TP".

15. 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*.[14] 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 very practical question for this Honourable Court is how long should an insured have to wait before an insurer finally decides whether to adopt/not adopt an "off-coverage" position?

16. The decision of the Court of Appeal below misstates the law, improperly overturns the Trial Judge's decision which correctly applies the law and creates massive confusion on the law of waiver/estoppel. The resulting uncertainty leaves insured Canadians vulnerable to arbitrary and delayed coverage denials that adversely affect them. The Court of Appeal decision below will also adversely affect the administration of justice. In particular, the civil justice system will

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[13] *The Commonwell Mutual Insurance Group v. Campbell*, 2019 ONCA 668 (CanLII).

[14] *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 SCR 87.

be saddled with unnecessary delays, needless trials, and endless coverage disputes. Leave is required to properly state the law on waiver and estoppel in the motor vehicle insurance context.

Conclusion

17. Despite its fundamental practical importance for Canadians, 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.[15] 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.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS, 3rd day of February, 2020.

Todd J. McCarthy
Counsel for the Applicant

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

TABLE OF AUTHORITIES

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

STATUTORY PROVISIONS