

HARPER GREY LLP
3200 – 650 West Georgia Street
Vancouver, British Columbia, V6B
4P7
Canada

Tel: 604 687 0411
Fax: 604 669 9385

CASE SUMMARY: INSURED PREJUDICED BY THE INSURER'S DENIAL OF COVERAGE DURING LITIGATION

The Court of Appeal affirmed that the insurer was estopped from denying coverage during litigation due to prejudice.

Insurance law – Homeowner's insurance – Duty to defend – Estoppel – Practice – Appeals

Commonwell Mutual Insurance Group v. Campbell, [2019] O.J. No. 4357, 2019 ONCA 668, Ontario Court of Appeal, August 26, 2019, D. Paciocco, A.L. Harvison Young and B. Zarnett JJ.A.

The insured was involved in a dirt bike accident, injuring the driver of an ATV. The ATV driver sued the insured in negligence. The automobile insurer promptly issued a non-waiver agreement and a reservation of rights before denying coverage. The homeowner insurer appointed counsel and defended the claim without issuing a non-waiver or a reservation of rights. At the discovery stage of litigation, counsel for the ATV driver inquired if there was a coverage issue. This provoked the homeowner insurer to consider and ultimately deny coverage on the basis of the unowned registrable vehicles exemption before bringing an application for a declaration that it did not have a duty to defend or indemnify the insured. The homeowner insurer also relied on the consent exemption on the application.

The application was dismissed on the basis that the homeowner insurer was estopped or had waived its right to deny coverage due to inferred prejudice to the insured. The homeowner insurer appealed, arguing, among other things, that the application judge had made an error of law in determining that the litigation was well advanced, triggering presumed prejudice. In dismissing the appeal, the Court rejected the argument that "well advanced" was a formal legal status that could be identified by the stage of litigation. Instead, the question of whether to infer or find prejudice was a question of fact to be determined based on the circumstances.

The Court agreed that the circumstances of this case justified a finding of presumed prejudice as the homeowner insurer had defended the insured for 10 months before the insured had any reason to believe he would not be defended or indemnified. Moreover, the Court held that there was supplementary evidence of direct prejudice because, as a result of the homeowner insurer's conduct, the insured had no reason to take charge of his own defence or take other potential steps.

This case was digested by [Michael J. Robinson](#), and first published in the LexisNexis® Harper Grey Insurance Law Netletter and the Harper Grey Insurance Law Newsletter. If you would like to discuss this case further, please contact Michael J. Robinson at mrobinson@harpergrey.com.