Date: 20131107
Docket: 11/95
Citation: *Guardian Insurance Company of Canada v. Roman Catholic Episcopal Corp. of St. John's*, 2013 NLCA 62

This matter is subject to an order that any information that could disclose the identity of the Second Respondent shall not be published in any document or broadcast in any way, manner or form whatsoever

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR COURT OF APPEAL

BETWEEN:

GUARDIAN INSURANCE COMPANY OF CANADA — APPELLANT

AND:

ROMAN CATHOLIC EPISCOPAL CORPORATION OF ST. JOHN'S — FIRST RESPONDENT

AND:

JOHN DOE – HGM#1
(a pseudonym) — SECOND RESPONDENT

Coram: Green C.J.N.L., Welsh and Harrington JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador Trial Division (G) 200901T4501

Appeal Heard: September 13, 2012
Judgment Rendered: November 7, 2013

Reasons for Judgment by Green C.J.N.L.
Concurred in by Harrington J.A.
Dissenting Reasons by Welsh J.A.

Counsel for the Appellant: Philip Buckingham and Jennifer Lundrigan
Counsel for the First Respondent: Thomas J. O'Reilly, Q.C.
and Denis Fleming
Counsel for the Second Respondent: No Appearance

Green C.J.N.L.:

[1] This appeal engages questions relating to the scope and application of the judicial discretion not to apply the doctrine of *res judicata* when new evidence has been subsequently discovered that entirely changes an aspect of the original case.

[2] I have concluded that the trial judge erred in principle when he decided that the judicial discretion that is designed to allow a court to decide *not* to apply the *res judicata* doctrine in special circumstances could, instead, be used to *apply* the doctrine notwithstanding the fact that new evidence existed that would have changed the result of the original decision and could not, with reasonable diligence, have been discovered before that decision was made.

[3] The result of this determination is that the appeal should be allowed and a declaration made that the appellant insurance company is not barred by either *res judicata* or abuse of process from defending the respondent's third party claim for indemnity on the ground that the respondent knew that one of its priests was sexually abusing boys and failed to disclose this fact to its insurer, thereby materially affecting the risk being insured.

[4] What follows are my reasons for this conclusion.

Background

(a) The 1989 Proceeding

[5] In 1989, John Doe, a minor suing under a pseudonym, filed a claim in the Supreme Court, Trial Division (the "1989 Proceeding") against Alphonsus Penney, the Roman Catholic Archbishop of the Archdiocese of St. John's in the Province of Newfoundland and Labrador ("Archbishop Penney") and the Roman Catholic Episcopal Corporation of St. John's ("RCEC"), amongst others, claiming damages for sexual abuse by James Hickey, a Roman Catholic priest during the period from 1982 to 1988. The statement of claim alleged, amongst other things, that Archbishop Penney

and RCEC knew or ought to have known of Father Hickey's activities and propensities. Father Hickey subsequently passed away before the matter was ready for trial.

(b) The Original Third Party Claim

[6] Archbishop Penney and RCEC made a third party claim against Guardian Insurance Company of Canada ("Guardian") claiming (i) indemnification under a policy of insurance covering the period from 1982 to October 1, 1985 in respect of any liability which they might incur in favour of John Doe, and (ii) a declaration that Guardian was obligated to defend them with respect to the 1989 Proceeding.

[7] Guardian, while admitting the existence of the insurance policy and that it contained an obligation to indemnify and defend, denied liability on the grounds, amongst other things, that Archbishop Penney or RCEC either knew or ought to have known of the actions and propensities of Father Hickey with respect to sexual misconduct and that they failed to communicate this knowledge to Guardian, thereby constituting a "fundamental breach" of their obligations under the policy, relieving Guardian of its obligations to indemnify or defend.

[8] Prior to the filing of the third party claim, a report had been prepared and published, following an inquiry commissioned by the RCEC (the "Winter Commission") relating to sexual abuse of children by members of the clergy. As described by the trial judge in the current proceeding (2011 NLTD(G) 150, 315 Nfld. & P.E.I.R. 179):

> [8] … One of the conclusions of that Commission was that RCEC and those in authority in the Archdiocese were indeed aware of allegations of sexual abuse by James Hickey prior to this having become public knowledge and that such knowledge was had as far back as 1975. Furthermore, a conclusion reached was that RCEC had failed to respond appropriately at the time.

[9] The Winter Commission report did not identify the names of the persons who it concluded had notified the Church hierarchy of the alleged abuse. Guardian instructed its counsel to investigate the extent of the knowledge, if any, that Archbishop Penney and RCEC may have had with respect to the activities of Father Hickey with a view of obtaining the evidence necessary to defend the third party claim.

[10] Following an extensive investigation and inquiries, including examination for discovery of Archbishop Penney and Bishop Lahey, Vicar-General at the time, both of whom denied any knowledge of any improper sexual activity by Father Hickey, Guardian's counsel came to the conclusion that there was no "credible, probative or admissible evidence that would allow with any certainty the maintenance of the defence" that Guardian had filed to the Third Party claim.

(c) The 1992 Consent Order

[11] As a result of this conclusion, on September 21, 1992, the day scheduled for the trial of the third party issues, Guardian consented to judgment (the "1992 Consent Order") being entered against it in respect of the Third Party Claim in the following terms:

> IT IS ORDERED THAT:
>
> 1. … Guardian … indemnify … Alphonsus Penney and [RCEC] in accordance with the terms and conditions of the policies of insurance issued by it to [RCEC] in respect of assaults allegedly committed against [John Doe] by … James J. Hickey during the period 1982 to October 1, 1985;
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> 2. ….
>
> AND IT IS ALSO ORDERED THAT:
>
> 3. … Guardian … defend in the name of and on behalf of … Alphonsus Penney and … [RCEC] the within action brought by [John Doe] … against [Archbishop Penney] and [RCEC]
>
> 4. …

[12] Of note is that the order to indemnify and defend did not contain a general declaration interpreting the language of the applicable policy or defining the scope and application of the policy generally; rather it was limited to indemnification and defence of one claim of one specific individual covering a specific time period.

[13] In accordance with the 1992 Consent Order, Guardian proceeded to represent Archbishop Penney and RCEC with respect to John Doe's claims and eventually settled them in 1997 at or around the same time as a number of other similar claims were resolved.

(d) Subsequently Resolved Cases

[14] During the time between the entry of the 1992 Consent Order and the settlement of the 1989 Proceeding in 1997, other persons claiming they were abused by Father Hickey commenced actions against Archbishop Penney and RCEC.[1] In all of these, RCEC and Archbishop Penney issued third party notices to Guardian, in essentially the same terms as they did in the 1989 Proceeding, seeking an order that Guardian indemnify and defend them.

[15] Notably, they did not plead in any of those third party claims that, by virtue of the 1992 Consent Order, Guardian had admitted liability generally to defend or indemnify with respect to any other similar claims that may be subsequently be made. Nor did they plead that the issue of the obligation of Guardian to indemnify and defend now rested, not on a cause of action in contract, but on the 1992 Consent Order itself, i.e. the issue of the obligation to defend and indemnify for all similar actions had been decided for all time; in other words it was *res judicata*. If, indeed, the 1992 Consent Order had settled the issue in respect of all subsequent similar proceedings, RCEC's cause of action for indemnity and defence would have been based on the order itself (the cause of action having been merged in the judgment), not an individual claim under the insurance contract.

[16] In all of these cases, Guardian filed a defence to the third party claims in essentially the form that it filed in the 1989 Proceeding. Subsequent to denying the third party claims Guardian filed a Notice of Change of Solicitors taking over the defence of Archbishop Penney and RCEC in respect of those cases. Unlike the 1989 Proceeding, however, no consent order was entered in which Guardian was ordered to indemnify Archbishop Penney and RCEC or to defend them in those proceedings.

[17] Guardian proceeded to represent RCEC and Archbishop Penney in the proceedings and ultimately resolved those claims at or around the time it resolved the 1989 Proceeding (the "Subsequently Resolved cases"). The resolutions were formally effected by the plaintiffs filing notices of discontinuance, in 1997, against the defendants. The discontinuances were expressed to be filed and effective "without Minutes of Settlement".

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[1] The Trial Division cause numbers are as follows: 90/3901; 90/3902; 90/3903; 90/3898; 90/3899; 93/2243; 93/4643; 93/4645; 93/4727.

(e) New Information

[18] Subsequent to the making of the 1992 Consent Order, and in some cases before taking over the defence of some of the Subsequently Resolved Cases (the ones commenced in 1993), Guardian became aware of additional information that on its face raised questions relating to the nature and extent of knowledge that Archbishop Penney and other officials in the Church and RCEC had had about possible improper sexual activity of Father Hickey. It came from three sources:

(i) T.C. provided an affidavit that he had been sexually assaulted by Father Hickey in 1973 and 1974 and as a result spoke to three priests about it and ultimately told Monsignor Morrissey, the Vicar-General, about it, but nothing was done about the allegation (the "T.C Allegations");

(ii) Father R. McIntyre provided an affidavit that he had been told about an incident of sexual abuse by Father Hickey and that father McIntyre reported it to Monsignor Morrissey (the "McIntyre Allegations");

(iii) At an examination for discovery, one R.J.B., a seminarian posted in Rushoon where Father Hickey had been posted as parish priest, stated that he was aware that sexual activity was ongoing between Father Hickey and boys in the parish. He said he met Archbishop Penney and told him that Hickey was sexually abusing boys (the "R.J.B. Allegations"). As found by the trial judge "such evidence obviously contradicts the evidence given by Archbishop Penney in his own discovery prior to [the 1992 Consent Order]".

[19] Following becoming aware of this information, Guardian continued to represent Penney and RCEC in the 1989 Proceeding and in the Subsequently Resolved Cases up to and including their resolution by the plaintiff filing discontinuances of each of the proceedings.

(f) The 2009 Proceeding

[20] In 2009, another plaintiff, also using a pseudonym, sued RCEC alleging sexual abuse by Father Hickey and that Archbishop Penney and

RCEC knew or ought to have known of Father Hickey's propensities and activities. RCEC filed a defence in which, amongst other things, it denied that it or Archbishop Penney knew or ought to have known of these things.

[21] RCEC third-partied Guardian claiming that it had a duty to defend RCEC with respect to the claim. As in the Subsequently Resolved Cases, RCEC did not plead the 1992 Consent Order as constituting the cause of action for indemnity or defence, but asserted a contractual cause of action based on the terms of the relevant insurance policy.

[22] Guardian responded, claiming that the actions were not covered by the policy and that Father Hickey's improper sexual activities and propensities were known to RCEC. Pleading the doctrine of utmost good faith on the part of insureds in their dealings with insurers with respect to matters pertaining to the risk to be insured, Guardian claimed that the policy was void as a result of material non-disclosure of the knowledge it had regarding Father Hickey "as well as other clergy" at the time of entering into the policy or at the time of subsequent renewals.

[23] RCEC filed a Reply to Guardian's defence in which it specifically raised the issue of *res judicata* as a result of the 1992 Consent Order. It also alleged that subsequent to the making of the 1992 Consent Order Guardian "assumed the RCEC's defence and indemnified the RCEC in [the Subsequently Resolved Cases] in which damages were similarly claimed against [RCEC] in respect of sexual assaults by James Hickey occurring during the policy period."

The Current Application Under Appeal

[24] RCEC then applied under rule 17 of the *Rules of the Supreme Court, 1986* (the summary judgment rule), for orders that (i) pursuant to rule 17.02(k), the defence of Guardian be "struck out on the grounds that the defences therein pleaded are *res judicata"*; (ii) pursuant to rule 17.02(b) "judgment be entered in favour of [RCEC] against [Guardian] in respect of the declaratory relief therein sought"; and (iii) costs on a solicitor-and-own-client basis.

[25] In support of the application, RCEC relied on the existence of the 1992 Consent Order and asserted that Guardian's defence was essentially the same as that pleaded in the 1989 Proceeding and that Guardian was now estopped from relying on that defence. With respect to Guardian's additional

plea, which had not been raised in the defence in the 1989 Proceeding, that certain exclusions under the policy applied, RCEC asserted that Guardian had the opportunity to plead these matters and was now estopped from pleading them in the current action.

[26] RCEC also referred to the Subsequently Resolved Cases and asserted that those claims involved similar claims for sexual assaults by Father Hickey. It did not assert, however, any prejudice suffered by it by reason of the fact that Guardian had undertaken the defence of those claims, nor did it assert that it had relied on Guardian's actions in respect of the Subsequently Resolved Cases relating to any belief it may have had that Guardian was thereby giving up any possible similar defences in respect of any other claims that might subsequently be made.

[27] The only affidavit evidence presented dealing with this point came from the former counsel for Guardian, who deposed that following the filing of the 1992 Consent Order, he was instructed by Guardian to defend RCEC and Archbishop Penney specifically with respect to the Subsequently Resolved Cases as well as some others. Pursuant to those instructions, he took steps to become counsel of record.

[28] No evidence was presented as to any discussions or communications between Guardian or its counsel, and RCEC or its counsel, respecting the new information or any undertakings or representations made by Guardian as to whether its agreement with the 1992 Consent Order or its taking over the defences of the other claims constituted an undertaking to defend *only* those specific claims or to defend any and all similarly-based claims that would thereafter be made.

[29] In response to RCEC's application, Guardian relied on the new information asserting that, if *res judicata* applied, the discovery of that new information constituted a special circumstance entitling the Court to exercise its discretion to allow Guardian's defence to proceed.

[30] With the consent of the parties, the applications judge converted the rule 17 application into a summary trial application under rule 17A because he felt that the extent of the relief claimed could not be granted under rule 17. By converting the matter to an application under rule 17A, he felt he could decide the merits of the case even though there was a genuine issue for trial, if on the record he could find the facts necessary to decide the appropriate questions of fact or law.

[31] The trial judge also allowed RCEC to raise abuse of process as an alternative to its argument based on *res judicata* even though it had not been pleaded in the written application.

The Trial Judge's Decision, 2011 NLTD(G) 150

[32] The trial judge accepted that there were two forms of *res judicata* and analyzed the case in terms of both cause of action estoppel and issue estoppel. He also acknowledged that even if either cause of action estoppel or issue estoppel applied, the court must consider, further, whether special circumstances existed that would nevertheless make it in the interests of justice not to apply the doctrine (paragraph 37).

[33] He concluded that:

1. Both cause of action estoppel and issue estoppel applied to the circumstances of the case (paragraphs 39-57 and 58-68);

2. "Special circumstances" that would justify not applying either cause of action estoppel or issue estoppel "include the discovery of new evidence subsequent to the earlier judgment or order" (paragraph 37);

3. The T.C. Allegations and McIntyre Allegations were reasonably discoverable by Guardian prior to entry of the 1992 Consent Order and therefore could not be considered new evidence that could constitute special circumstances (paragraphs 71 and 81);

4. The R.J.B. Allegations were not reasonably discoverable and that they "would amount to the type of new evidence that could qualify as supporting the existence of special circumstances" (paragraphs 72 and 82);

[34] Only the third of these findings has been appealed. It can be taken as a given for the purposes of this appeal, therefore, that:

a. *Res judicata* in at least one of its forms *prima facie* applies to the current proceeding;

b. There was new evidence (the R.J.B. Allegations) available since the entry of the 1992 Order that was capable of constituting "special

circumstances" that would ordinarily be sufficient to justify not applying the doctrine.

[35] Notwithstanding these conclusions, however, the trial judge purported to exercise the discretion he felt he had and barred Guardian from relying on the new evidence for the purposes of its defence. From that he concluded that Guardian's defence to the third party claim should be struck out and a declaration granted that Guardian is required to defend RCEC and indemnify it in accordance with the policy.

[36] He reasoned as follows:

> [79] … where the result in the prior proceeding was obtained by fraud or dishonesty, when new evidence comes to light that could not have reasonably have been discovered in the earlier proceeding and where fairness dictates that the original result should not be binding, it is open to the court to conclude that the application of *res judicata* in those circumstances would be contrary to the interests of justice.
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> …
>
> [82] … I am satisfied that the evidence of [R.J.B.], obtained on August 31, 1993 during the time Guardian was undertaking its defence of RCEC, can be considered as the type of new evidence that could ground a decision of this court not to apply *res judicata*. Such evidence in my view places Guardian in a position where it would now have an arguable case as regards the issue of good faith and the obligation on the part of RCEC and its officials.
>
> [83] That being said, I cannot ignore the circumstances subsequent to that evidence becoming known to Guardian in the exercise of my discretion here. While I find Guardian's actions in continuing to defend all of the claims against RCEC that had been commenced prior to the date of the consent judgment is not of any significant consequence in my assessment of fairness and justice, I find otherwise as regards the undertaking of the defence of RCEC to one or more claims commenced after the discovery of [R.J.B.] as did occur here.
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> [84] Guardian's counsel submits that the events occurring after the consent judgment are not material to my decision here. While I accept that this is true as regards the first step in the test for applying the doctrine of *res judicata*, in considering the second part of the test, as assessment of justice and fairness, I am of the view that what transpired after the consent judgment cannot be ignored. As stated earlier, my task here ultimately is balancing appropriately the objectives of finality and fairness. In doing so in these circumstances, it is impossible for me to disregard the continued willingness of Guardian to defend RCEC particularly as regards an action or actions commenced after [R.J.B.'s] evidence became known.

> [85] Balancing the interests involved, I find that it would not be unjust in these circumstances to apply the doctrine of *res judicata* as regards the present application. What is the difference between the new cause or causes of action that were commenced after Guardian had learned of [R.J.B.'s] evidence in the 1990's and the present cause of action? To me there can really be no distinction and it appears that, for whatever reason, Guardian has determined that, as regards this matter, it now wishes to relitigate the question of its obligation to RCEC pursuant to the insurance contract in place.
>
> [86] Taking all of what I have stated above, I have come to the conclusion that Guardian has not established special circumstances that would justify a finding that to apply *res judicata* here would be contrary to the interests of justice. While I must admit that this result does not rest fully satisfactorily with me, balancing the relevant factors as I have leads me to the conclusion that justice and fairness dictates that RCEC should succeed in its application to have the doctrine of *res judicata* applied.
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> (Emphasis added.)

[37] As a result of this conclusion, the trial judge did not consider it necessary to decide whether the doctrine of abuse of process by relitigation should be applied.

Issues on Appeal

[38] On this appeal, Guardian challenged:

(i) the judge's conclusion that the T.C. Allegations and McIntyre Allegations did not constitute new evidence;

(ii) the judge's failure, having found that the R.J.B. Allegations were capable of constituting new evidence, to conclude that the existence of that evidence in itself amounted to an exception to the application of *res judicata*;

(iii) the manner in which the judge's application of the "special circumstances" exception to the doctrine of *res judicata* was used to apply the doctrine rather than provide an exception to it and in so doing not concluding that the duty of material disclosure by RCEC to Guardian, stemming from the duty *uberrimae fide*, should have led to the conclusion that special circumstances existed justifying the non-application of the doctrine.

[39] Also engaged on this appeal is RCEC's alternative submission that even if special circumstances exist to justify not applying the doctrine of *res*

judicata, Guardian should nevertheless be barred from relying on the new evidence by virtue of the operation of the doctrine of abuse of process.

Analysis

(a) Principles

[40] The policies underlying the *res judicata* doctrine are the promotion of finality of litigation and the prevention of a multiplicity or fragmentation of proceedings so that "[a] person should only be vexed once in the same cause": *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 per Binnie J. at para. 18; *Quinlan v. Newfoundland (Minister of Natural Resources)* (2000), 192 Nfld. & P.E.I.R. 144 (NFCA), per Green J.A. at para. 6. In *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, Cromwell and Karakatsanis JJ., writing for the majority, elaborated on the rationale as follows:

> [28] Relitigation of an issue wastes resources, makes it risky for parties to rely on the results of prior litigation, unfairly exposes parties to additional costs, raises the spectre of inconsistent adjudicative determinations and, where the initial decision maker is in the administrative law field, may undermine the legislature's intent in setting up the administrative regime. For these reasons, the law has adopted a number of doctrines to limit relitigation.

[41] In deciding whether a discretion not to apply the *res judicata* doctrine should be exercised, the potential promotion or hindering of these policies of putting an end to litigation and prevention of unnecessary harassment of individuals through multiple litigation should be taken into account in deciding whether to exercise the discretion.

[42] It is generally recognized that there are two species of *res judicata*, or estoppel by record: cause of action estoppel and issue estoppel: *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, per Dickson J. at p. 254. For the former category, the cause of action in the prior proceeding must be the same (i.e. not "separate and distinct") from the cause of action in the current proceeding: *Grandview (Town) v. Doering* , [1976] 2 S.C.R. 621 per Ritchie J. at p. 65; *Furlong v. Avalon Bookkeeping Services Ltd.*, 2004 NLCA 46; 239 Nfld. & P.E.I.R. 197 per Roberts J.A. at para. 17. If the facts relied on to support the cause of action in the prior proceeding constitute substantially the same facts supporting the cause of action in the current proceeding, the causes of action will be regarded as the same (i.e. not separate and distinct) for the purposes of cause of action estoppel, even

though the actual relief sought in the two proceedings is not the same. See Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 3d ed. (Markham, ON: Lexis Nexis, 2010), pp. 147-151 and cases there cited.

[43] For issue estoppel, on the other hand, the causes of action need not be the same but an issue or question fundamental to the disposition of the previous litigation must be at issue again in the current litigation: *Angle*, per Dickson J. at p. 255; *Quinlan* at paragraph 7; *Furlong* at paragraph 16.

[44] Where cause of action estoppel is established, the party seeking to relitigate will, subject to limited exceptions, be barred from retrying the cause of action or any claim or argument which could have been made in the prior action had the party exercised reasonable diligence. Where issue estoppel is established, the party seeking to relitigate will, subject to limited exceptions, be barred from challenging the "material facts and the conclusions of law or of mixed fact and law … that were necessarily (even if not explicitly) determined in the earlier proceedings": see *Danyluk*, per Binnie J. at paragraph 24.

[45] With respect to issue estoppel, two sub-categories have been distinguished, at least with respect to the exercise of the discretion not to apply the doctrine of *res judicata*. The first relates to a situation where the original final decision and the current matter both involve court proceedings (to borrow Donald Lange's terminology, a "court-to-court proceeding"). The second is where the first proceeding is a tribunal proceeding and the second is a court proceeding (a "tribunal-to-court proceeding").

[46] Because the principles with respect to the operation of exceptions to the doctrine may operate differently depending on whether cause of action estoppel or issue estoppel applies, it is important to determine which category governs the current case. The trial judge held that both categories were applicable. However, as Roberts J.A. observed in *Furlong* at paragraph 50, "issue estoppel is only relevant where the cause of action in the second action is different from the one in the first".

[47] Accordingly, notwithstanding the fact that the trial judge's finding in this regard has not been appealed, it is necessary, for a proper analysis of the remaining issues, to determine whether this is a case of cause of action estoppel or issue estoppel. In my view, if the doctrine of *res judicata* has any application (and as I have said the parties concede its application and the

correctness of this has not been challenged on appeal) this is a case of issue estoppel.

[48] In both cases, RCEC has sought indemnity pursuant to the same policy of insurance and in both cases one of the defences raised by Guardian was that RCEC knew or ought to have known of Father Hickey's sexual propensities and should have informed Guardian of this fact as part of their duty of good faith to disclose information that was material to Guardian's risk. That said, a cause of action for indemnity does not arise in the abstract, but in a fact-specific context as a result of a specific claim by a specific claimant.

[49] The *cause of action* in the first case was a claim for indemnification and defence of a particular lawsuit by a particular plaintiff in relation to specific alleged sexual misconduct. The cause of action in the current proceeding, while based on the same policy and raising the almost *identical issues*, is not the *same cause of action*. It is a cause of action for indemnification and defence of a completely "separate and distinct" lawsuit by another plaintiff in relation to separate sexual misconduct occurring at different times and places. While certain *issues* (coverage under the policy and whether RCEC knew of Father Hickey's propensities) were the same, those issues were clearly being raised in relation to two separate and distinct causes of action (for indemnity and defence in respect of different claims).

[50] This argument was raised by counsel for Guardian on the application but was rejected by the trial judge (paragraphs 49-53). With respect, the judge is wrong on this point. What was effectively resolved by the 1992 Consent Order was (i) the policy by its terms applied to the claim against RCEC for which RCEC was claiming indemnification and defence; and (ii) there was insufficient evidence at that time to establish Guardian's defence that the policy was void because RCEC knew or ought to have known of Father Hickey's sexual propensities. Those *issues*, having been decided against Guardian by virtue of the 1992 Consent Order, in the context of one indemnity/defence cause of action, can be said to bind Guardian in the context of the *separate and distinct* indemnity/defence cause of action in the current proceeding, unless an applicable exception applies.

[51] Accordingly, I will approach the analysis of the issues in this case on the basis that what is at issue here is whether an exception to issue estoppel applies.

(b) New Evidence as a Specific Exception to *Res Judicata*

[52] It is generally recognized that there are limited exceptions to the application of *res judicata* once its constituent elements have been established. For example, where the first decision was obtained by fraud, this will not be a bar to relitigation. Similarly, the discovery of new evidence that, with reasonable diligence, could not have been discovered prior to the original decision and which, had it been considered, could have changed the outcome of the original decision, has always been a recognized category of exception to the application of the *res judicata* doctrine: *Doering*, per Ritchie J. at pp. 637-639; *Quinlan*, para. 6; *Janes v. Deer Lake (Town)* (1975), 130 Nfld. & P.E.I.R. 176 (NFCA), per Cameron J.A. at para. 3; *Furlong*, per Roberts J.A. at paras. 13, 15. This exception is directly in issue on this appeal.

[53] The rationale behind the new evidence exception is that the policies underlying the application of *res judicata* have much less strength where newly discovered evidence affecting the result exists. If subsequent to the original judgment, new evidence, not previously discoverable, is unearthed and that evidence calls into question the evidentiary basis of the earlier decision, the effectiveness and fairness of the system will be called into question because it appears that it operated on a false evidentiary premise. Finality as a policy behind not reopening a case loses its resonance when it results in compounding error. The earlier false evidentiary premise explains why, if the case is retried, there may be inconsistent results and, in a sense, justifies a second proceeding. Protestations by the other party about the unfairness of being dragged back into court lose strength when it is shown that the previous decision is not soundly grounded in truth.

[54] The formulation of the *res judicata* rule itself contemplates its non-application to situations where new evidence which could not with reasonable diligence have been discovered at or before the original decision would change the whole aspect of the case.

[55] Consider the seminal case of *Henderson v. Henderson* (1843), 3 Hare 100; 67 E.R. 313. Vice Chancellor Wigram stated the "rule" as follows at p. 115:

> … where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special

> circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.
>
> (Emphasis added.)

[56] In a sense, therefore, the new evidence concept is not an "exception" to the *res judicata* rule at all. It in fact defines the parameters for its operation. This approach is also recognized in the Supreme Court's decision in *Doering*, which involved an attempt to relitigate a claim for water damage involving a new theory as to how the water damage occurred based on the opinion of a soils expert that had been obtained subsequent to the first trial. There, Ritchie J., writing for the majority, referred without disapproval to the statement by Vice Chancellor Wigram in *Henderson*, quoted above, and noted that nothing had changed between the bringing of the first action and the second one except that the claimant had received advice from a soil expert who had expounded a new theory.

[57] Observing that "[s]uch an expert could probably have been consulted before the first action, and if he had been then the matter would no doubt have been put in issue at that time", Ritchie J. quoted from the opinion of Lord Cairns in *Phosphate Sewage Co. v. Molleson* (1879), 4 App. Cas. 801 at pp. 814-815:

> As I understand the law with regard to res judicata, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation, there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts that I mentioned, it ought now to be allowed to be the foundation of a new litigation and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were permitted to say, I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before.
>
> (Emphasis added.)

[58] The same approach is evident in the decision of this Court in *Quinlan*:

> [6] … Subject to the restrictive rules respecting reopening a case on the grounds of mistake or fraud or to allow the reception of new evidence, a litigant ought not to be able to retry a cause of action, or to claim any relief flowing therefrom, that has already been litigated …
>
> (Emphasis added.)

[59] In other words, the doctrine of *res judicata* does not apply where it is alleged and established that the new action is based on new information that could not with reasonable diligence have been discovered earlier and that the information is of such a nature that it would "entirely change the aspect of the case."

[60] The discovery of new information of the character described is therefore in a special category of reasons for not applying *res judicata*: its existence means that the policies underlying the doctrine are not offended. Indeed, there is an inherent fairness in allowing relitigation in such circumstances.

[61] This last point is reinforced when one considers that the discovery of game-changing new evidence figures prominently in a number of circumstances justifying reinstituting or continuing litigation. It also provided the basis for relitigation under the old procedure of an application to set aside a judgment and to order a new trial: *Varette v. Sainsbury*, [1928] S.C.R. 72; *Walsh, Admx. v. Hannon* (1927), 12 Nfld. L.R. 39; *Brophy v. Collins* (1954), 34 M.P.R. 280 (S.C.N.). It, further, allows an appellate court, upon reception of fresh evidence on appeal, to order a new trial or deciding the appeal on the basis of the augmented record: *Penford v. Taylor* (1964), 49 M.P.R. 325 (NFCA); *Sparkes-Morgan v. Webb*, 2001 NFCA 55, 205 Nfld. & P.E.I.R. 344; *Humby v. Newfoundland and Labrador Housing Corporation*, 2013 NLCA 4, 331 Nfld. & P.E.I.R. 190 ("*Humby 1"*).

[62] In other words, the discovery of new evidence is a recognized reason for allowing relitigation in a variety of circumstances notwithstanding the general policy of supporting the integrity of existing judgments. All of these circumstances address the same point underlying the rationale for the doctrine of *res judicata* and its scope.

[63] I conclude therefore, that the doctrine of *res judicata* is not intended to apply where it is alleged and established that the new matter is based on

new information that could not with reasonable diligence have been discovered earlier and that the information is of such a nature that it would entirely change the aspect of the case.

(c) The "Fairness" Exception

[64] Apart from the fraud and new evidence exceptions to the application of *res judicata* identified above, the cases also refer to another exception to the application of issue estoppel: a party will be allowed to relitigate an issue where "fairness dictates that the original result should not be binding in the new context" (*Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, per Arbour J. at para. 52, citing *Danyluk*). This exception was also considered in *Penner*. There, Cromwell and Karakatsanis JJ observed that issue estoppel:

> [29] … balances judicial finality and economy and other considerations of fairness to the parties. It holds that a party may not relitigate an issue that was finally decided in prior judicial proceedings between the same parties of those who stand in their place. *However, even if these elements are present, the court retains the discretion to not apply issue estoppel when its application would work an injustice.*
>
> (Emphasis added.)

[65] Two points should be made about this passage. First, the italicized statement was made in the context of a case involving tribunal-to-court issue estoppel. It has been suggested, however, that the discretion not to apply issue estoppel may be more attenuated in the case of court-to-court estoppel: *Danyluk*, per Binnie J. at paragraph 62; *Furlong*, per Roberts J.A. at paragraph 41.

[66] The trial judge did not differentiate between the circumstances where the discretion not to apply *res judicata* should be exercised in court-to-court, as opposed to tribunal-to-court, situations. In doing so, he referred to statements concerning the exercise of discretion in *Danyluk* as well as certain *obiter* comments in *Toronto*. *Danyluk* involved a tribunal-to-court situation, as did *Penner*. *Toronto* was concerned primarily with the doctrine of abuse of process. None of these cases explicitly dealt with how the discretion was to be exercised in court-to-court situations.

[67] Indeed, in *Danyluk*, Binnie J., for the majority, observed that "the discretion is necessarily broader in relation to the prior decisions of

administrative tribunals because of the enormous range and diversity of the structures, mandates and procedures of administrative decision-makers." (paragraph 62). Later, in listing the factors that the Court should take into account in deciding whether to exercise the discretion not to apply *res judicata* (the wording of the statute relating to the administrative decision-maker; the purpose of the legislation; the availability of an alternative administrative appeal or review; safeguards available to the parties in the administrative procedure; the expertise of the administrative decision-maker; and the circumstances giving rise to the prior administrative proceedings), his focus was clearly on matters that related to the prior administrative proceeding and whether, in light of those factors, application of *res judicata* would undermine its policy basis. Those factors have no relevance to a discretion not to apply *res judicata* in a court-to-court situation.

[68] The same approach appears to be reflected in the manner in which the Court analyzed the scope of the discretion in *Penner*. Cromwell and Karakatsanis JJ. described the "residual discretion" applicable to issue estoppel in the context of tribunal-to-court proceedings:

> [31] Issue estoppel with its residual discretion, applies to administrative tribunal decisions. The legal framework governing the exercise of this discretion is set out in *Danyluk*. In our view, this framework has not been overtaken by this Court's subsequent jurisprudence. The discretion requires the courts to take into account the range and diversity of structures, mandates and procedures of administrative decision makers however, the discretion must not be exercised so as to, in effect, sanction collateral attack, or to undermine the integrity of the administrative scheme. As highlighted in this Court's jurisprudence, particularly since *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, legislation establishing administrative tribunals reflects the policy choices of the legislators and administrative decision making must be treated with respect by the courts …

[69] It cannot be said, therefore, that *Danyluk* or *Penner* speak in any meaningful way to the nature of the discretion to be exercised in the court-to-court circumstance.

[70] Nevertheless, the trial judge purported to apply the *Danyluk* discussion of discretion to the court-to-court situation he was facing.

[71] The second point arising from the passage in *Penner* quoted above is that the residual discretion is one "to *not apply* issue estoppel". The trial judge, however, appears to have asserted a discretion to *apply* issue estoppel even where one of the other categories of exception is satisfied. He asserted

a broad discretion to apply or not apply the doctrine based on an overriding notion of fairness:

> [76] As held in *Danyluk* at paragraph 81, balancing these two policy concerns [previously identified as finality and fairness] requires the Court to stand back and to take into account the entirety of the circumstances whether the application of *res judicata* would work an injustice.

[72] The judge also referred to the observation by Arbour J in *Toronto*, in the context of a discussion of abuse of process, that certain circumstances would justify allowing relitigation of an issue where to do so would enhance the adjudicative process as a whole:

> [52] … from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation may enhance, rather than impeach, the integrity of the judicial system, for example: (1) where the first proceeding is tainted by fraud or dishonesty, (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original result should not be binding in the new context.
>
> (Emphasis added.)

[73] Two points are to be noted about this passage. First, as in *Toronto*, the discussion is in relation to circumstances that would *allow* relitigation. Secondly, the three categories were expressed disjunctively – any one of them could be considered as a justification for allowing relitigation. It was not being suggested that one category could be set off against another in some overall balancing exercise. Rather, the third (fairness) category seems particularly relevant to resolving the additional conundrum of whether to apply *res judicata* where the first decision-maker is not a court and cannot, by its nature, be said to have decided the issue in a way that a court would have done – the very issue that was engaged in *Danyluk*.

[74] The trial judge, however, appears to have interpreted the passage from *Toronto* as recognizing a discretion to *deny* relitigation, even though one of the other categories were satisfied, where, in the opinion of the court, the third (overall fairness) category overbalanced the other applicable categories, instead of operating as an additional circumstance to *allow* relitigation where the other two categories justifying the non-application of *res judicata* (fraud and new evidence) were not engaged.

[75] This is apparent from his summary at paragraph 79 of his judgment:

> [79] … [i] where the result in the earlier proceeding was obtained by fraud or dishonesty, [ii] when new evidence comes to light that could not reasonably have been discovered in the earlier proceeding and [iii] where fairness dictates that the original result should not be binding, it is open for a court to conclude that the application of *res judicata* in those circumstances would be contrary to the interests of justice.
>
> (Emphasis added.)

[76] This formulation generally tracks the exposition in *Toronto* with one important exception: the judge expressed the three categories *conjunctively* rather than disjunctively. Read literally, it meant that the discretion not to apply *res judicata* when it would otherwise be applicable could only be exercised when all three factors were satisfied. Thus, even if fraud or new evidence were subsequently discovered, but the court was not satisfied that overall fairness also dictated not applying *res judicata*, it should nevertheless be applied. The trial judge was therefore in error when he suggested that one category could be set off against another in some overall balancing exercise.

[77] The judge went on to take this erroneous approach, as evidenced from the quotations from paragraphs 82-86 of his judgment reproduced earlier. He considered subsequent events, in particular the fact that Guardian had agreed to defend and settle other specific claims after knowing about the R.J.B. Allegations and concluded that "[b]alancing the interests involved, … it would not be unjust in these full circumstances to apply the doctrine of *res judicata*" (paragraph 85). He cited no authority that asserted a jurisdiction to exercise a discretion to *apply* the doctrine of *res judicata* notwithstanding the fact that new evidence existed. That is understandable. Counsel on this appeal were unable to show that any such authority exists. Certainly, there is no basis for applying the discretion discussed in *Danyluk* to a court-to-court situation and the judge's analysis of *Toronto* is based on a misapprehension as to what it says.

[78] The closest counsel for RCEC can come to suggest authority to support application of a discretion to apply *res judicata* in a court-to-court situation is the decision of the Ontario Court of Appeal in *Smith Estate v. National Money Mart Co.*, 2008 ONCA 746, 303 D.L.R. (4th) 175. This case dealt with whether a party could rely on *res judicata* where between the time of the first decision and the second case the law had changed. The

Court described its previous decision in *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (C.A.), as well as the British Columbia Court of Appeal in *Hockin v. Bank of British Columbia* (1995), 123 D.L.R. (4th) 538 (B.C.C.A.) as not establishing "an iron-clad guarantee that a litigant who has fought an issue and lost will always be accorded the benefit of a change in the law" (paragraph 42). (*Minott* and *Hockin* were also distinguished on the basis that the loss of the right to relitigate because of a change of the law in *Smith* was "considerably less serious" than in *Hockin)*.

[79] The Court concluded that the loss of the benefit to the appellants of the change in the law as a result of subsequent Supreme Court of Canada decisions was outweighed by the adverse consequences to the respondents of revisiting the issue "at this late stage of the proceedings" (after having had fought a challenge to the court's jurisdiction on other points all the way to the Supreme Court of Canada, fought and won a contested motion for certification of the class action, incurred substantial disbursements and set the matter down for trial, all in reliance on the ruling in the original proceeding). In those circumstances, the Court allowed *res judicata* to continue to apply.

[80] *Smith* does not explicitly address the question as to whether a court may exercise a discretion nevertheless to apply *res judicata* even if new evidence has been discovered. At most, it could be said that by referring to the discretion discussed in *Danyluk* without drawing a distinction between tribunal-to-court and court-to-court situations, and by not automatically accepting a change in the law as a separate category justifying the non-application of *res judicata,* the Court was inferentially affirming the use of a general fairness discretion in a court-to-court situation that *could* result in another category of special case (discovery of new evidence) also being dealt with in the same way.

[81] I do not accept that *Smith* can be carried so far. It was dealing with a different situation (subsequent change in the law) that was not traditionally regarded as an established exception to the application of *res judicata*. In fact, there is some dispute on the authorities as to the extent to which a change in the law is a factor that would even, in principle, warrant a court not to apply *res judicata*. (See Lange, *The Doctrine of Res Judicata in Canada*, pp. 257- 265 and cases there cited.) The policy issues underlining whether this should be recognized as a potential exception are different.

[82] Mention should also be made of the earlier decision of the Ontario Court of Appeal in *Tsaoussis (Litigation Guardian of) v. Baetz* (1998), 112 O.A.C. 78 (C.A.); leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 518. That case dealt with an application under the Ontario rules of court to set aside a court order approving an infant settlement on the ground of facts arising or discovered after it had been made. The Court of Appeal held that the application could not succeed because the evidence eventually generated by further medical assessments could have been available by the exercise of reasonable diligence prior to the order approving the settlement (paragraph 46). However, Doherty J.A., writing for the Court, observed in *obiter* that if the hurdle of showing that the new evidence could not have been earlier discoverable by the exercise of due diligence is cleared (which it was not in that case):

> [44] … the court will go on to evaluate other factors such as the cogency of the new evidence, any delay in moving to set aside the previous judgment, any difficulty in re-litigating the new issues and any prejudice to other parties or persons who may have acted in reliance on the judgment.

[83] The first factor articulated by Doherty J.A. (the cogency of the new evidence) relates to the recognized requirement that the nature of the new evidence must be such that it "entirely changes the aspect of the case". However, it could be argued that the fact that he mentions other factors, essentially relating to prejudice to the other party if the matter were to be relitigated on the new evidence, recognizes, like an expansive reading of *Smith Estate,* a limited discretion to allow *res judicata* to apply even in the face of new evidence that could not have been discovered by the exercise of reasonable diligence and that entirely changes the aspect of the case.

[84] Even if one could reason by analogy from *Smith Estate* and were prepared to accept the *obiter* statements in *Tsaoussis,* however, any discretion to apply *res judicata* would be limited to circumstances where significant prejudice to the party facing relitigation has been established. It would take something of an extraordinary nature pointing in the other direction to trump the already-existing basis to exercise a discretion not to apply the doctrine. That situation does not in any event apply here because I have concluded that, for the reasons given later, no prejudice has been established in this case.

[85] In light of the foregoing analysis, I conclude that while there is a general discretion *not to apply res judicata* after considering general notions

of fairness, it does not empower the court to *apply res judicata* where the existence of new evidence that was not discoverable by reasonable diligence before the first decision and which would entirely change the aspect of the case is discovered. The reason is that the new evidence circumstance in itself is designed to achieve fairness in the application or non-application of the doctrine.

[86] In the end, whether one describes the new evidence category as defining the parameters of the *res judicata* doctrine, or as an exception to it, or even as a factor that in itself provides the justification for the exercise of discretion not to apply the doctrine, the result is essentially the same: the existence of the new evidence should disable the application of *res judicata* because the existence of new evidence that undermines the integrity of the original judgment is *in itself* a compelling reason for not applying the *res judicata* doctrine.

(d) The Nature of the New Evidence

[87] The further question that must be answered whenever new evidence is proffered as a response to a submission that *res judicata* applies is: what type of evidence will satisfy the Court that *res judicata* should not be applied in a given case? From the jurisprudence, it appears it must possess two essential characteristics. First, it must not have been discoverable with reasonable diligence prior to the first decision being rendered. Secondly, the evidence must be of such significance that it would have the effect of changing the result in the first decision.

[88] With respect to the second criterion, there is some disagreement in the case law as to how the significance of the evidence is described. In *Doering*, the phrase "entirely changes the aspect of the case" was used. In *Varette v. Sainsbury,* a case involving new evidence as a justification for ordering a new trial, the test was expressed as being "practically conclusive" (p. 76) or such as would "conclusively establish" the case (p. 77). *Penford v. Taylor* and *Brophy v. Collins* have also enunciated a "practically conclusive" standard. In *Toronto,* Arbour J. described the standard as "conclusively impeaches the original results." The predominant descriptor of the test appears to be "practically conclusive." See, Lange, *The Doctrine of Res Judicata in Canada,* p. 287.

[89] But what does "practically conclusive" mean in a concrete case? It certainly would mean more than merely allowing the new evidence to be

weighed in the balance with contrary evidence submitted at the first trial. In *Walsh, Admx. v. Hannon,* Warren J. described the situation thus at p. 43:

> It must further be shown that the evidence available might prove the decision given erroneous and that its absence might cause a miscarriage of justice. … [T]here must be more than oath against oath in the event of a new trial …
>
> (Emphasis added.)

[90] That said, if the test is limited to a situation where there can be *no* evidence submitted at the first trial that is contradictory of the new evidence, there would be virtually no situation where the exception would ever apply. The emphasis on "practically" in the standard means, in my view, that the new evidence must be of such significance that it calls into serious doubt the integrity of the original evidence, if any, such that to overlook the new evidence would undermine confidence in the adjudicative process. In other words, in the language chosen by Lord Cairns in the *Phosphate Sewage* case, the new evidence "entirely changes the aspect of the case". I note that my colleague Welsh J.A. also interprets "practically conclusive" in line with Lord Cairns' formulation (paragraph 180).

(e) Conclusions Regarding the Applicable Principles

[91] It follows from the foregoing that in my view: (i) the existence of new evidence that entirely changes the aspect of the earlier case and was not discoverable with reasonable diligence before the earlier decision is a recognized stand-alone category of justification for not applying the doctrine of *res judicata* in court-to-court situations involving issue estoppel; and (ii) except perhaps in the most extraordinary of circumstances involving significant prejudice, there does not exist a discretion in the court, once it finds that appropriately qualified new evidence exists, nevertheless to apply *res judicata*.

[92] No case was cited to support the exercise of a discretion to *apply* the doctrine in the face of the existence of new evidence that would normally justify not applying it. Even if the decision in *Smith Estate v. National Money Mart Co.*, discussed earlier, can be interpreted to recognize inferentially a residual discretion to apply *res judicata* in the face of new evidence, the discretion would only exist – extrapolating from the circumstances of that case – where there has been long delay between the

first case and the bringing of the second action and there has been significant prejudice to the other party that has occurred in the meantime.

[93] If a court were to allow the doctrine of *res judicata* to bar relitigating an issue in a subsequent case even though new evidence existed, anomalous situations could result. Take this case. The existence of knowledge on the part of RCEC and Archbishop Penney of Father Hickey's propensities is relevant to the main action as well as the third party issue between RCEC and Guardian. The claimant has asserted that RCEC and Archbishop Penney knew of Father Hickey's propensities and did nothing about that knowledge. RCEC has denied this. In the third party proceeding Guardian has also asserted that RCEC had the same knowledge and RCEC has denied it.

[94] The R.J.B. Allegations now throw into question whether RCEC can maintain its denial. If Guardian is barred from litigating in the third party claim whether RCEC had the requisite knowledge and it proceeds to defend the main action on the merits, it will nevertheless be able – indeed it will have the duty – to defend RCEC's denial of knowledge against the R.P. Allegations and any other evidence on the point the claimant presents even though it believes, based on the R.J.B. Allegations, that such knowledge existed. If the claimant is successful against RCEC on this point, Guardian will have to indemnify RCEC (subject to other possible defences) against the claim in a situation where the establishment of that very fact of knowledge would under normal circumstances enable Guardian to avoid an obligation to indemnify. In one circumstance (the main action), the existence of knowledge is at play and in the other (the third party proceeding) it is not. This does nothing to enhance the image of the administration of justice.

Considerations Applicable to this Case

(a) Did the Trial Judge err in concluding that the evidence of T.C. and Father McIntyre did not constitute new evidence (The First Issue on Appeal)?

[95] The trial judge held that the T.C. and McIntyre Allegations were reasonably discoverable by Guardian prior to entry of the 1992 Consent Order and therefore could not be considered new evidence that would justify not applying *res judicata*.

[96] This conclusion is a conclusion of mixed fact and law because it involves the application of the legal test for reasonably diligent

discoverability to the facts. The standard of review in such a circumstance is one of palpable and overriding error. There is no extricable question of law involved here that would call for application of a correctness standard of appellate review.

[97] Counsel for Guardian submits that the trial judge in effect applied too rigid a standard of reasonably diligent discoverability when assessing the efforts undertaken by Guardian's counsel to determine whether there was any credible evidence existing prior to the 1992 Consent Order demonstrating that RCEC or Archbishop Penney knew of Father Hickey's proclivities. Counsel says that in concluding that "more could reasonably have been done" the judge assessed the reasonableness of the investigation of Guardian and its counsel with the benefit of hindsight and not with the level of knowledge and circumstances as they existed prior to entry of the 1992 Consent Order.

[98] It is true that the judge, in dealing with this issue, made reference to the affidavit evidence of T.C. and Father McIntyre as filed in the current matter but he did so to determine whether this level of information could have been reasonably discoverable at an earlier date. He concluded:

> [81] … I also accept that with some further investigation, reasonably undertaken, more evidence of knowledge on the part of RCEC could well have surfaced at that time. I accept the submission of RCEC that the identity of T.C. was discoverable and, had he been questioned at that time, the involvement of Father McIntyre would likely have been learned. While I am satisfied that generally what Guardian did at the time prior to the consent judgment amounted to a diligent investigation, I am not fully able to conclude in these circumstances that the evidence of T.C. and Father McIntyre was not discoverable. In other words, more could reasonably have been done to obtain the information Guardian presently has in this regard.
>
> (Underlining added.)

[99] Counsel also submits, relying on *Sun Alliance Insurance Co. v. Thompson*, (1981), 56 N.S.R. (2d) 619 and *420746 B.C. Ltd. v. Misley*, (1998), 157 D.L.R. (4th) 273 (B.C.C.A.), that given the importance of sworn evidence in the proper operation of our justice system, "in accepting and relying on the sworn evidence of RCEC and its officials, which at the time of the entry of the [1992] Consent Order was uncontradicted, Guardian acted reasonably." In other words, faced with this uncontradicted evidence, it was not reasonable to expect Guardian to take the extraordinary steps of further

investigation that the judge seemed to postulate as being necessary to satisfy the reasonable diligence standard.

[100] In *Sun Alliance*, the information subsequently discovered demonstrated potential fraud in the utterance of the previously sworn statement denying involvement in arson. Fraud was regarded as a justification in itself for not applying *res judicata*. The court did not address at all whether there was anything else the insurance company could have done to discover the fraud before judgment in the first proceeding.

[101] In *Misley*, evidence was obtained subsequent to entry of judgment that ureaformadahyde foam insulation was present in the subject residence and the vendor had been told of it by a plumber, contrary to the warranty given by the vendor and the vendor's denial of any knowledge of its presence. The Court of Appeal held that, even though the purchaser knew on the eve of the trial that the plumber had worked on the building (and presumably could have inquired of him as to his knowledge of the presence of UFFI if he could have been located), reliance on the vendor's assertion that she did not know of the presence of UFFI, coupled with the fact that the purchaser was not able to locate the plumber until seven of eight months after the trial, amounted to reasonable diligence, justifying reception of the evidence at the second trial.

[102] Neither of these cases helps Guardian here. At most, they stand for the proposition that reliance at the time of the original trial on assertions subsequently proven to be false can be considered, in the context of all other relevant circumstances, in determining whether the party seeking to rely on the new evidence acted with reasonable diligence when it did not discover the new evidence earlier.

[103] Here it is clear that the judge was alive to the fact that RCEC officials and Archbishop Penney had stated under oath in examination for discovery prior to entry of the 1992 Consent Order that they did not know of Father Hickey's activities. It is apparent that the judge considered the degree of limited information Guardian had at the critical time and concluded that that was enough, notwithstanding RCEC's and Archbishop Penney's denials, to have enabled Guardian, with reasonable diligence, to have discovered the additional evidence by further inquiries. While I might not, sitting as the trial judge, have assessed the evidence with such strictness, I cannot conclude that there was not a sufficient basis for the judge to reach the conclusions and draw the inferences that he did.

[104] Accordingly, the judge did not commit a palpable and overriding error in reaching his conclusion that the evidence of T.C. and Father McIntyre was potentially discoverable with reasonable diligence on the part of Guardian.

(b) Did the Trial Judge err in not concluding that the existence of new evidence in itself was sufficient to amount to an exception to the application of the doctrine of *res judicata*? (The Second Issue on Appeal)

[105] Counsel for Guardian submits that, having concluded that new evidence meeting the qualifying criteria existed, the trial judge erred in not concluding that that, in itself, justified the non-application of *res judicata*. For the reasons outlined above, I agree with that submission.

[106] One of the responses of RCEC to Guardian's argument on this ground of appeal was to submit that the R.J.B.'s Allegations did not in fact constitute new evidence at all. It advances this argument on two fronts. It submits that: (i) on the record, R.J.B.'s evidence was in fact discoverable with reasonable diligence prior to the entry of the 1992 Consent Order; and (ii) the judge did not apply the proper test for determining what constitutes new evidence, by concluding that the evidence provided Guardian with "an arguable case" for establishing RCEC's knowledge rather than a "conclusive" one.

[107] These assertions involve the arguments that the judge committed errors of fact in his treatment of the evidence of R.J.B. and of law in his application of the test for determining whether information qualifies as new evidence. It is not open to RCEC to do so because they have not cross-appealed these findings. This is not a situation, like RCEC's argument based on abuse of process by relitigation (discussed below), where RCEC is attempting to support a trial decision for reasons other than those given by the judge while at the same time not alleging any errors by the trial judge. In the current situation, to achieve its ends, RCEC must effectively mount an attack on the correctness of legal and, factual findings of the trial judge. To do that, it should appeal them: *Humby1* at paragraphs 42-44; *Humby v. Newfoundland and Labrador Housing Corporation*, 2013 NLCA 7 (*"Humby 2"*) at paras. 36-37; and rule 57.09(1)(b) of the *Rules of the Supreme Court, 1986*. It has not done so. Accordingly, to the extent that the trial judge's conclusions amount to findings that the R.J.B. Allegations constitute new evidence, they are determinative for the purpose of this appeal.

[108] In any event, I would observe that even if RCEC's challenge to the judge's finding that the R.J.B. Allegations were not discoverable were cognizable on this appeal, the judge made a clear finding of fact that R.J.B.'s evidence was "unknown for certain" by Guardian prior to the entry of the 1992 Consent Order (paragraph 72). There was evidence from which he could have drawn that conclusion. There was accordingly no palpable and overriding error in his treatment of the evidence on this point.

[109] That said, the question whether the judge actually decided that the R.J.B. Allegations constitute new evidence and applied the correct test in so doing still remains. This question arises because of the language chosen by the judge to describe his conclusion on this issue is imprecise. He stated:

> [72] What I do find was unknown by Guardian for certain at the time of the consent judgment was the information provided by [R.J.B.] in August 1993 concerning his disclosure to Archbishop Penney. That evidence is significant as, unlike Monsignor Morrissey who is not able to be questioned by Mr. Adams due to his being deceased, Archbishop Penney had been discovered and had denied any knowledge or recollection of disclosures about sexual misconduct of James Hickey. That evidence of Archbishop Penney, along with what other information Guardian was aware of at the time of the consent judgment, obviously played a significant role in Guardian's actions in September 1992. As such, I am satisfied that this would amount to the type of new evidence that could qualify as supporting the existence of special circumstances.
>
> ...
>
> [82] … I am satisfied that the evidence of [R.J.B], obtained on August 31, 1993 during the time that Guardian was undertaking its defence of RCEC, can be considered as the type of new evidence that could ground a decision by this Court not to apply *res judicata*. Such evidence in my view places Guardian in a position where it would now have an arguable case as regards the issue of good faith and the obligation on the part of RCEC and its officials.
>
> (Emphasis added.)

[110] Can it be said that the trial judge, in using language like "could qualify", "can be considered" and "arguable case", was actually deciding that the test for new evidence had been met, or was he merely making a tentative diagnosis and discussing the matter only from a theoretical perspective?

[111] When his language is considered in the context of the structure and content of his reasons as a whole, I am satisfied that he was purporting to

decide that as a matter of law the R.J.B. Allegations constituted new evidence as discussed in the applicable case law. Firstly, he cited cases that asserted that, to justify not applying *res judicata*, the new evidence must be "decisive" (paragraph 70) or "entirely [change] the aspect of the case" (paragraph 78). In my view he was purporting to apply the correct test. Secondly, it is clear from the fact that he went on to consider whether other discretionary factors nevertheless justified applying *res judicata* that he must have concluded that new evidence meeting what he believed to be the applicable test existed; otherwise, he would not have needed to consider such other factors. If the information did not constitute new evidence, that would have been the end of the matter.

[112] In any event, I am satisfied that the nature of the R.J.B. Allegations meets the standard, as enunciated in the *Phosphate Sewage* case and adopted in *Doering*, of entirely changing the aspect of the case. It is true that they exist in contradiction of discovery evidence of Archbishop Penney, who denied being told about Father Hickey's activities ("I have no recollection of somebody coming to me and specifically raising that type of an issue and, if they did, again, you know, there was certainly no mention of sexual abuse") – and in that sense there is a potential for "oath against oath" (*Walsh, Admx. v. Hannon*) if the matter were to be retried. Nevertheless, it cannot be said that the existence of the R.J.B. evidence did not change that aspect of the case in a fundamental way, given the centrality of the evidence to the issues at stake and given the fact that it was the very absence of that type of evidence that caused Guardian to consent to judgment in the 1989 Proceeding on the basis that "no credible, probative or admissible evidence" existed.

[113] Although the doctrine of *res judicata* can apply to consent judgments as well as to judgments following a full trial, the fact that the order in issue in this case was entered by consent without adjudication on the issue of knowledge is nevertheless relevant in the current context. The rationale for recognizing the new evidence exception as a justification for not applying *res judicata*, is that it "impeaches the original results" (*Toronto*, per Arbour J. at paragraph 52). The "result" is the decision that has been reached. In the case of judgment following trial, the new evidence must impeach the trial result, i.e. the adjudication on the evidence that is arrived at. In the case of a consent order, however, the result is the consent underlying the judgment. That is what the evidence relates to – the decision not to contest liability on the insurance policy. Thus, the new evidence must be directed at impeaching

the consent that resulted in the order. The consent is analogous to the adjudication on the evidence that results in a judgment following trial. Thus, this is in reality not a situation of "oath against oath"; all that was necessary here to entirely change the aspect of the case was the existence of some credible evidence (and it has not been suggested that R.J.B.'s evidence was not credible) that could form the basis of a defence to the third party proceeding and thus not result in Guardian consenting to judgment.

[114] Viewed from this perspective, there can be little doubt that in view of the defence that it had raised to the third party proceeding, if Guardian had had access to the new evidence prior to agreeing to abandon its defence in that proceeding, it would not have agreed to the entry of the 1992 Consent Order and instead would likely have litigated the issue of insurance coverage rather than to concede that there was "no credible evidence" to support the allegation of prior Church knowledge.

[115] Having concluded therefore that the judge decided that the R.J.B. Allegations met the test for the existence of new evidence and that there is no basis for overturning that finding, it is now necessary to consider whether the judge was correct as a matter of law in applying other considerations as a means of justifying disregarding the existence of that new evidence and nevertheless applying *res judicata*.

[116] Given my previous analysis of the applicable principles, I must conclude that the trial judge erred in law in deciding that he had a discretion to continue to apply *res judicata* even though new evidence existed. His conclusion is not supported by *Danyluk* or *Penner*, which dealt with a tribunal-to-court situation, nor by *Toronto*, which he misinterpreted. Nor is it supported by any other authority.

(c) Did the Trial Judge err in purporting to exercise his discretion in a manner so as to apply the doctrine of *res judicata* rather than to create an exception to it (The Third Issue on Appeal)?

[117] Even if there is a residual discretion to apply *res judicata* in the face of the new evidence, I am nevertheless satisfied that the judge erred in principle in the manner in which he exercised his discretion in this case.

[118] What appears to have influenced the trial judge to conclude that *res judicata* should nevertheless apply is the fact that Guardian defended and

ultimately settled the Subsequently Resolved Cases after it had become aware of the R.J.B. Allegations. In conducting what he called "an assessment of justice and fairness", he stated that "it is impossible for me to disregard the continued willingness of Guardian to defend …, particularly as regards an action or actions commenced after [R.J.B.'s] evidence became known" (paragraph 84). He then stated that it would not be "unjust" to apply *res judicata*. The only reason he gave is as follows:

> [85] … What is the difference between the new cause or causes of action that were commenced after Guardian had learned of [R.P.'s] evidence in the 1990's and the present cause of action? To me there can really be no distinction and it appears that, for whatever reason, Guardian had determined that, as regards this matter, it now wishes to relitigate the question of its obligation …

[119] A number of observations can be made about this. First, with respect to the comment that the settled cases contained "no distinction" from the current case, there is, in fact one very important distinction: none of the other cases involved a consent order in which Guardian was ordered to defend and indemnify. The judge's failure to acknowledge this indicates he was effectively undertaking a *res judicata* analysis involving the Subsequently Resolved Cases and the current one, in addition to the analysis between the case involving the 1992 Consent Order and the current case, which was the issue in question.

[120] Secondly, although he does not say explicitly why it was "impossible … to disregard" the continued willingness of Guardian to defend the other cases, it seems a fair inference that the judge considered the actions of Guardian in this regard as an undertaking or representation that Guardian was prepared not to raise the issue of RECEC's knowledge again as a defence to any third party claim.

[121] Finally, the judge appears to rely on the fact that Guardian wanted to "relitigate" its obligation to defend as being an inappropriate position for Guardian to take.

[122] In my view, none of these reasons justifies the exercise of discretion (assuming a residual discretion exists) in the way it was exercised. In so doing the judge considered irrelevant factors and disregarded relevant ones.

[123] In relying on the fact that there was "no distinction" between the settled cases and the current case, the judge seems to be effectively applying a kind of first level *res judicata* analysis to the Subsequently Resolved

Cases. A comparison in this regard is in fact not warranted. The true comparison is between the original case and the current case. The fact that Guardian acted and settled the other cases does not involve, unlike the original case, the submission by Guardian to an order that it is bound to defend and indemnify. By approaching it as he did, the trial judge elevated the participation of Guardian in the settlements to the status of a previous judgment that in itself can result in the application of the *res judicata* doctrine. This is clearly an error in the way the discretionary exception is to be applied.

[124] The fact of undertaking the defence and settling of the Subsequently Resolved case is in itself a neutral circumstance. It is not possible to draw from that simple fact alone the inference that Guardian was acknowledging an obligation *in all other cases* that they had a duty to defend and indemnify. An insurance company, or any litigant for that matter, may settle a particular case and pay something towards a claim for any number of reasons other than acknowledgement of liability. For example, it may be considered the commercially prudent thing to settle on a cost-benefit analysis regardless of merits. It must be remembered that there is no evidence on the record of any overall settlement agreement between RCEC and Guardian whereby Guardian agreed to or conceded an obligation to indemnify RCEC with respect to all present and future claims.

[125] While the fact of settling the other cases was neutral, it is the impact of that event on RCEC that is key. It must be remembered that in none of the other cases was there an order that Guardian defend and indemnify RCEC. Unlike the original case where a consent order was entered, therefore, Guardian's involvement in these cases does not in itself engage the doctrine of *res judicata* anew. At most, the actions of Guardian in settling these other cases might be relevant insofar as those actions had a negative impact on the legal position of RCEC through such doctrines as estoppel, waiver or laches.

[126] In this case, however, there is nothing on the record that would support an inference that Guardian's conduct reasonably led RCEC to proceed on the assumption that Guardian would not, in the future, resile from the position it took in the 1992 Consent Order with respect to that one claim, as it might be applied in other cases.

[127] The Interlocutory Application initiating this issue in the Trial Division does not assert that Guardian's actions engendered any belief by RCEC

about the future position of Guardian. No affidavit evidence was filed by anyone from RCEC (except a solicitor's affidavit verifying the contents of the Application) suggesting reasonable reliance either.

[128] Furthermore, there is nothing on the record to suggest that RCEC suffered any prejudice from the actions of Guardian in acting on and settling these cases. In fact, if anything, the payment of the claims by Guardian was to the benefit of RCEC. As well, there is no evidence that Guardian was consciously abandoning its rights in respect of future cases by settling certain ones.

[129] Before a claim of estoppel, waiver or laches can be made out, the ordinary principles relating to those doctrines must be established. That means that, with respect to promissory estoppel, there must be an inquiry into and a finding of the existence of a promise or assurance by words or conduct that was intended to affect a legal relationship and a reliance thereon leading to a change of position, before estoppel can be relied on: *Maracle v.Travelers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50 at para. 13. To establish waiver, it must be shown that the party waiving had full knowledge of his or her rights and made an unequivocal and conscious intention to abandon them: *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Company*, [1994] 2 S.C.R. 490 at para. 20. There is no basis on the record for a conclusion that such elements were present here. For laches to be effective, there must be either alteration of position as a result of reliance on another's inactions or acquiescence amounting to an inference of waiver: *M. (K.). v. M. (H.)*, [1992] 3 S.C.R. 6 at paras. 98-101. Those are elements that are present either in the doctrines of estoppel or waiver, which as I have said are not present on the facts here.

[130] It follows that the mere fact that Guardian undertook the defence and settlement of the other claims does not in itself justify the conclusion that RCEC was led by Guardian's actions to believe that it would not resile from the 1992 Consent Order in the future in respect of other claims and that it would defend any new claims that arose or that the RCEC acted on such an implied representation to its detriment. Nor is there any indication that by settling Guardian was making an unequivocal and conscious decision to abandon its right to challenge the effectiveness of coverage for future cases. Without that, there is no basis for relying on the fact of settlement as a factor favouring RCEC. In the circumstances of this case, the judge should in fact have "disregarded" that fact instead of saying it was "impossible for me to disregard" it.

[131] The other reason given by the judge for applying the doctrine (Guardian wanted to "relitigate" its obligation to defend) is not a justification for its application. It begs the question at issue. In every case where the application of the doctrine is raised, the party resisting its application wants to litigate again. The question is whether the policies underlying the doctrine justify preventing that from happening. If the factual circumstance under which the original decision was made is undermined by the discovery of new information that entirely changes the aspect of the case, and which was not, with reasonable diligence, discoverable, then the policy is not violated if there is further litigation. Here, Guardian is in fact asserting such a justification. The judge's reliance on the simple fact that Guardian wanted to relitigate does not take account of the fact that he has already found that the new evidence "could ground a decision … not to apply *res judicata*." (Decision, paragraph 82).

[132] In deciding whether to exercise a discretion to apply or not to apply the doctrine (assuming such discretion exists) the judge must take into consideration factors affecting both parties. Thus, prejudice to the party seeking to have the doctrine applied (assuming it could be established, which as discussed above, it was not) would be important, but so also would the impact on the other party if that party is not able to proceed. Here, the judge did not appear to consider the fact that RCEC had a good faith duty to make available to Guardian any information (including information about potential abusive activities of Hickey) that would materially affect the insurance risk, and that by taking the position it did on the application it was effectively trying to take advantage of its failure to make that disclosure.

[133] It is somewhat disingenuous on the part of RCEC now to say that even though, if Barnes' information is to be believed (and there is no suggestion at this point that it should not), there may have been knowledge on the part of RCEC of abuse at the relevant time, it is entitled to hold Guardian to a duty to defend even though it may not have complied with its duty of good faith, simply because Guardian made business decisions to settle other cases in the absence of demonstrable prejudice suffered by RCEC.

[134] It may have been this situation which prompted the trial judge to comment that "this result does not rest fully satisfactorily with me" (paragraph 86).

[135] Accordingly, I conclude that, if the trial judge had a discretion to apply or not apply *res judicata*, he erred in failing to exercise his discretion not to apply the doctrine of *res judicata* in the circumstances of this case. Far from it being unjust not to apply the doctrine (as the judge concluded) it would be unjust *not* to allow Guardian to have a chance to litigate the issue of whether it had a duty to defend and indemnify in light of the new evidence that indicates that RCEC did in fact know of the abusive behavior of Hickey. The policy against re-litigation loses its force once new evidence indicates that the factual substratum on which the result of the first litigation was based is undermined and that that new evidence could not have been discovered with reasonable diligence before the first decision. At that point, the policy of ensuring cases are decided on their merits so that a fair result on proper evidence is obtained in fact favours relitigation.

(d) Additional Reasons for Applying *Res Judicata?*

[136] Though not articulated or relied on by the trial judge, and not argued by counsel, my colleague, Welsh J.A., advances in paragraphs 183-190 of her judgment, an additional reason as justification for applying *res judicata* . She points to the duty on the part or an insurer, once it becomes aware of information materially affecting the risk and possibly justifying the insurer voiding the coverage obligation, to act in such a way as not to mislead or prejudice the insured and, if necessary, to take steps promptly to avoid the policy. She asserts: "[d]epending on the circumstances, failure by an insurer to act may indicate an election to affirm the contract."

[137] From this position, my colleague asserts that the effect of Guardian's settling some of the Subsequently Resolved Cases after becoming aware of the R.J.B. Allegations "must be the same" as if those claims had been adjudicated in court because "it was open to the insurer … to make an application similar to that which was made in this case" to have the issue of whether *res judicata* would be involved determined. From this proposition, my colleague then reasons that in the absence of Guardian taking any action RCEC "could rightfully rely on the finality" of the 1992 Consent Order should additional claims arise in the future.

[138] The answer to this analysis is that there is no evidence that RCEC relied on the "finality" of the 1992 Consent Order to its detriment; indeed, as discussed earlier, the 1992 Consent Order by its terms related to the resolution of only one particular indemnity claim and there is nothing on the record to suggest that there were any representations by or on behalf of

Guardian that its consent to defend and indemnify in that case was intended as a blanket acknowledgement that it would thereafter take the same position with respect to any future claims.

[139] For my colleague to assert that no evidence of prejudice or misleading actions by Guardian is necessary because RCEC "was entitled to rely on the decision that Guardian had a duty to defend against claims engaging the same cause of action" is to reach too far. As discussed earlier, the *causes of action* are not the same. For this argument to have any traction, one must assume, in the absence of evidence, that the act of consenting to judgment in 1992 in respect of one cause of action over settling some of the other Subsequently Resolved Cases necessarily amounted to a representation that by so doing Guardian was acknowledging liability with respect to any other future causes of action of a similar type. Such a proposition would have profound effects on insurance practice. In my respectful view, there is, in fact, a fundamental difference, for the purposes of application of the doctrine of *res judicata* (the only matter at issue in this case), between a decision taken by the insurer that is embodied in a consent order and one that is not.

(e) Abuse of Process by Re-litigation

[140] Having concluded that the doctrine of *res judicata* should not be applied in the circumstances of this case, it becomes necessary to consider whether Guardian's ability to rely on the new evidence should nevertheless be precluded by application of the doctrine of abuse of process.

[141] It was not necessary for the trial judge to reach any conclusion on this issue (and he did not do so) because of his finding that *res judicata* applied. On this appeal, however, RCEC argued that even if the trial judge's ruling on *res judicata* were not upheld, the decision could nevertheless be supported by application of the abuse of process doctrine. I disagree.

[142] Abuse of process, in whatever context it is applied, involves the application of the inherent power of the court to prevent a misuse of its processes in a way that would bring the administration of justice into disrepute. In *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.) Goudge J.A., dissenting (but whose judgment was upheld on appeal to the Supreme Court of Canada, 2002 SCC 63, [2002] 3 S.C.R. 307) described the scope of the doctrine as follows:

> [55] The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would be manifestly unfair to a party to litigation before it or would in some other way bring the administration of justice into disrepute. It is a flexible doctrine unencumbered by the specific requirements of concepts such as issue estoppel. …
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> [56] One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined.

[143] In *Toronto*, Arbour J., writing for the majority, again affirmed Goudge J.A.'s dissent in *Canam* and added:

> [37] … Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nevertheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice ...
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> …
>
> [43] … In all of its applications, the primary focus of the doctrine of abuse of process is the integrity of the adjudicative functions of the courts. … [T]he focus is less on the interest of parties and more on the integrity of judicial decision-making as a branch of the administration of justice. In a case such as the present one, it is that concern that compels a bar against relitigation, more than any sense of unfairness to a party called twice to put its case forward, for example. When that is understood, the parameters of the doctrine become easier to define, and the exercise of discretion is better anchored in principle.

[144] After pointing out that if an issue is relitigated and the result is inconsistent with the previous decision, "the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality" (paragraph 51), Arbour J. went on to comment, in words quoted previously but which bear repeating in the present context:

> [52] … relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: (i) where the first proceeding is tainted by fraud or dishonesty, (2) when fresh new evidences, previously unavailable, conclusively impeaches the original results, or (3) when fairness

> dictates that the original result should not be binding in the new context. This was stated unequivocally by this Court in *Danyluk*.
>
> (Underlining added.)

[145] It is easy to understand why the discovery of previously unavailable evidence that impeaches the original result might enhance, rather than impeach, the integrity of the judicial system. It has a similar rationale for why it provides an exception to the application of the *res judicata* doctrine – the effectiveness and fairness of the system will be called into question where, as a result of the discovery of the new evidence, it is now apparent that the previous decision proceeded on a false premise. The knowing perpetuation of obvious error only compounds a tarnished image of the system and will bring it further into disrepute.

[146] I recognize, as noted earlier, that later in the *Toronto* judgment (paragraph 54) Arbour J. appears to discuss the discovery of new evidence in the context of the fairness considerations that would go to deciding whether to exercise the discretion to deny relitigation for abuse of process generally, rather than as a stand-alone ground for not applying the doctrine. On its face, this appears to be inconsistent with her disjunctive listing of factors justifying non-application of the doctrine in paragraph 52 quoted above. There, her listing suggests that fraud, dishonesty and new evidence could be separate justifications that were operative outside of the third fairness factor that gave an additional discretion for non-application. In other words, fraud, dishonesty and new evidence, by their very nature, justify non-application because their existence would impeach the judicial system if the original decision were allowed to stand.

[147] It is to be noted, however, that in discussing, in paragraph 53, the exercise of the discretion not to apply the doctrine of abuse of process, Arbour J. stated:

> [53] … An inadequate incentive to defend, the discovery of new evidence in appropriate circumstances, or a tainted original process may all overcome the interest in maintaining the finality of the original decision.
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> (Underlining added.)

[148] By referring to the discovery of new evidence only "in appropriate circumstances" she appears to be recognizing that the new evidence must meet the strict test for its use. I prefer to regard the reference here to new

evidence to be simply indicating that once the new evidence meets the requisite test, it will in itself be normally sufficient to justify the exercise of the discretion not to apply the abuse of process doctrine.

[149] Neither *Canam* nor *Toronto* were cases involving the discovery of new evidence nor were any other cases of that type cited on this appeal.

[150] I am satisfied here that the refusal to allow use of the new evidence in the current proceeding would undermine, rather than enhance, the judicial system in this case. The 1992 Consent Order, on its face, only applied to one abuse claim that called for indemnity. It involved a concession by Guardian that, with respect to that claim, it would not be raising any defence, including the assertion that RCEC breached its obligation of good faith by non-disclosure. Guardian had every right to make such a concession either because it had no evidence of RCEC's prior knowledge of Father Hickey's activities or for other commercial reasons. By choosing, for whatever reason, to assert a similar defence in the 2009 Proceeding in relation to another claim, Guardian is not in any way challenging the validity of the 1992 Consent Order in relation to the claim dealt with in that proceeding. There is no inconsistency of result that would bring the justice system into disrepute.

[151] To the argument that there is inconsistency in asserting in 1992 that it had no evidence and that it has such evidence in 2009, the answer is that new evidence has been discovered which undermines the decision to consent to judgment in 1992 and, therefore, inability to bring it forward now would only further tarnish the system as a source of truth rather than undermine it. In fact, to allow Guardian to bring forward the evidence in the current proceeding will not "twice vex" RCEC because it was not brought forward in the first proceeding, which resulted in a consent order without trial at all.

[152] The fact that Guardian also agreed to settle some of the Subsequently Resolved Cases after becoming aware of the new evidence also does not change the situation. Each one was separately undertaken and, as suggested earlier, might have its own rationale for Guardian agreeing to settle on RCEC's behalf rather than to defend liability. As noted, there was no evidence of a blanket assumption of liability in all subsequent cases or of RCEC relying to its detriment on any representations to such an effect. In any event, as stressed in *Toronto*, the focus on abuse of process is not on fairness issues between the parties but on the integrity of the judicial system as a whole.

[153] I agree with counsel for Guardian's submissions before the trial judge on this issue:

> To suggest that a consent order entered into when the work of a solicitor that was competent, diligent and reasonable could not ferret out evidence that later surfaces will forever bind Guardian to indemnify RCEC *ad infinitum* for an unlimited number of potential claims is unfair and unjust. To ask that Guardian have access to the court process to determine through the adjudicative process its obligations vis-à-vis RCEC is not an abuse of process but rather is an affirmation that litigants are entitled to have matters in dispute determined by a court of competent jurisdiction.
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> (Guardian's Trial Brief, Appeal Book, Vol. 1, pp. 332-333.)

Conclusion

[154] I would allow the appeal, set aside the judgment of the trial judge and enter a judgment dismissing the RCEC's summary trial application seeking an order striking out Guardian's amended defence and for a declaration that the doctrine of *res judicata* applies.

[155] Taking into account the seniority of counsel and the complexity of the matter, Guardian should be entitled to its costs at trial and on this appeal on a party and party basis, using column 4 of the scale of costs in Rule 55.

J. D. Green C.J.N.L.

I concur:

M. F. Harrington J.A.

Dissenting reasons by Welsh J.A.

[156] At issue in this appeal is whether the trial judge erred in concluding that, by reason of the application of *res judicata*, Guardian Insurance Company of Canada is required to defend and, if necessary, to indemnify the Roman Catholic Episcopal Corporation of St. John's in the within action brought by John Doe alleging sexual abuse by a Roman Catholic priest.

BACKGROUND

[157] On November 24, 2009, John Doe commenced the action in this case claiming damages against the Roman Catholic Episcopal Corporation of St. John's (the "Episcopal Corporation") based on alleged sexual abuse by James Hickey, a Roman Catholic priest who is now deceased. In an action commenced in 1989, other plaintiffs brought claims against the Episcopal Corporation for damages based on similar allegations against James Hickey. After conducting investigations and discovery proceedings, Guardian Insurance Company of Canada ("Guardian") consented to an order that it defend and indemnify the Episcopal Corporation in the 1989 action. The trial judge explained (2011 NLTD(G) 150, 315 Nfld. & P.E.I.R. 179):

> [6] … In August 1991, [the Episcopal Corporation] filed a Third Party claim against two insurers, one of whom was Guardian. Guardian defended the Third Party claim based upon alleged failure of [the Episcopal Corporation] to act in good faith when contracting insurance coverage in that it failed to disclose knowledge it had, or reasonably should have had, about the actions of James Hickey at the time the insurance policy was put in force. It was also pleaded that, at least to some extent, the alleged acts fell outside of any insurance coverage in place.
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> …
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> [8] [Counsel] stated that in fulfilling his duty as counsel to Guardian, he set about investigating what knowledge, if any, [the Episcopal Corporation], through those in authority in that body, had regarding the alleged sexual misconduct of James Hickey at and after the time insurance coverage was put in place. At that time, a report had been published by the "Winter Commission" which had conducted an inquiry at the behest of [the Episcopal Corporation] concerning sexual abuse of children by members of the clergy. <u>One of the conclusions of that Commission was that [the Episcopal Corporation] and those in authority in the Archdiocese were indeed aware of allegations of sexual abuse by James Hickey prior to this having become public knowledge and that such knowledge was had as far back as 1975. Furthermore, a conclusion reached by the Commission was that [the Episcopal Corporation] had failed to respond appropriately at the time</u>.

(Emphasis added.)

[158] During discovery, Archbishop Penney and Bishop Lahey, Vicar-General at the time, both denied knowledge of sexual impropriety by James Hickey. The trial judge summarized:

> [17] After the discovery proceeding involving Bishop Lahey and a review of the personnel files of specific priests, [counsel] came to the final conclusion that he had no "credible, probative or admissible evidence that would allow with any certainty the maintenance of the defence" that had been filed by Guardian in response to [the Episcopal Corporation's] Third Party claim (paragraph 25 of [counsel's affidavit]). As a result, the consent judgment previously referred to was entered in regards to action 1989 St. J. No. 2090 on September 21, 1992.

[159] Having been served with a third party notice in the case now before this Court, Guardian challenged the notice by means of an application that was converted into a summary trial. Guardian took the position that it is not bound by the earlier consent order. The trial judge explained:

> [19] Guardian now claims that it has credible evidence to establish knowledge of the activities of James Hickey by Archbishop Penney as well as Monsignor Morrissey, the Vicar-General, at the relevant times. Therefore, Guardian claims that it should be permitted to defend the present Third Party claim on the basis of a lack of good faith on the part of [the Episcopal Corporation]. Other defences are also raised related to the coverage extended by the policies. Counsel for Guardian now argues that in the event that *res judicata* through one of its forms, either cause of action estoppel or issue estoppel, is made out here based upon the 1992 consent judgment, this new evidence amounts to special circumstances wherein the application of *res judicata* would not serve the interests of justice and the Court should exercise its discretion not to order that it be applied.

[160] The new evidence relied upon by Guardian consists of the affidavit of T.C., a man who says that he was sexually assaulted by Hickey in 1973 and 1974 and that he told three priests about it, and the affidavit of Father R. MacIntyre who says he was approached by a youth in 1974 or 1975 who told him about an incident of sexual abuse by Hickey which Father MacIntyre says he reported to Monsignor Morrissey. In addition, during discovery which took place on August 31, 1993, approximately one year after the consent order was made, evidence was provided by Mr. R. Barnes, a former seminarian. Mr. Barnes stated that he had met with Archbishop Penney about May 1980 and told him that Hickey had been sexually abusing boys. As noted by the trial judge, this evidence contradicts that given by

Archbishop Penney during the discovery which occurred prior to the September 21, 1992 consent order. Further, the trial judge noted:

> [25] Notwithstanding the discovery of this information by Guardian, it continued to defend the claims referred to above on behalf of [the Episcopal Corporation], including claims commenced after Mr. Barnes had given his evidence at the discovery.

[161] The trial judge, after discussing the law and considering relevant factors, concluded that *res judicata* properly applies in the circumstances. He, therefore, ordered that Guardian's statement of defence in the third party proceeding be struck and that Guardian defend and, if necessary, indemnify the Episcopal Corporation in accordance with the insurance policy.

[162] Guardian appeals on the basis that the trial judge erred in his consideration of new evidence and material non-disclosure by the Episcopal Corporation, and that, by reason of special circumstances, the doctrine of *res judicata* should not be applied.

ISSUES

[163] At issue is whether the trial judge erred in determining that, by reason of *res judicata*, Guardian is required to defend and, if necessary, indemnify the Episcopal Corporation in the within action. In particular, did the trial judge err in: (1) finding that the evidence of T.C. and Father MacIntyre was not new evidence; (2) finding that the evidence of Mr. Barnes, while new evidence, did not amount to an exception to the application of *res judicata*; and (3) failing to conclude that the duty of utmost good faith owed by the insured resulted in special circumstances which would negate the application of *res judicata*?

ANALYSIS

[164] The doctrine of *res judicata* has long been a part of the common law. In *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460, Binnie J., for the Court, stated the underlying rationale for the doctrine:

> [18] … An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

[165] The determination of whether *res judicata* applies in a particular situation requires consideration of estoppel, of which there are two types, cause of action and issue estoppel. The distinction between the two types of estoppel is referenced in *Furlong v. Avalon Bookkeeping Services Ltd. et al.*, 2004 NLCA 46, 239 Nfld. & P.E.I.R. 197. Roberts J.A., for the Court, explained:

> [15] Green J.A., for this court (now Green, C.J.T.D.) considered the distinction between the two branches of res judicata in **Quinlan v. Newfoundland (Minister of Natural Resources)** (2000), 192 Nfld. & P.E.I.R. 144; 580 A.P.R. 144 (Nfld. C.A.), at paras 6 and 7:
>
> > "… Subject to the restrictive rules respecting reopening a case on the grounds of mistake or fraud or to allow for the reception of new evidence, a litigant ought not to be able to retry a cause of action, or to claim any relief flowing therefrom, that has already been litigated between the same parties or their privies (often referred to as 'cause of action estoppel' or 'merger' of the cause of action in the original judgment).
> >
> > "The doctrine also applies (sometimes referred to as 'issue estoppel') to prevent a litigant from relitigating an issue that was fundamental to, and was decided in, previous litigation between the same parties or their privies even though the causes of action in the two proceedings were not identical. …" (Emphasis added [in *Furlong*].)

[166] In this case, the trial judge concluded that the elements of both types of estoppel had been satisfied. That conclusion was not appealed. By accepting that the elements of cause of action estoppel have been satisfied, the parties have conceded that: (1) "there is a final decision of a court of competent jurisdiction in the prior action"; (2) the parties in the present action were parties in the prior action; (3) "the cause of action in the prior action [is] not separate and distinct" from the present action; and (4) the "basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence" (*Furlong*, at paragraph 17). In light of this concession, with which I agree, for the reasons that follow, the analysis is properly conducted under cause of action, rather than issue, estoppel.

[167] In *Furlong*, Roberts J.A. explained that issue estoppel only arises in the absence of cause of action estoppel:

> [50] I must also note that the issue of liability engaged cause of action estoppel, not issue estoppel. Issue estoppel is only relevant where the cause of action in the

> second action is different from the one in the first, but, notwithstanding that, a particular issue in the second action has been decided in the first. …

[168] Because the operation of *res judicata* may lead to apparently harsh results, the courts have recognized exceptions to its application. In *Danyluk*, the Supreme Court of Canada endorsed the use of judicial discretion not to apply issue estoppel in appropriate circumstances. In *Furlong*, at paragraphs 40 to 44, Roberts J.A. questioned the use of a comparable discretion in the context of cause of action estoppel. First, he noted that in *Danyluk*, Binnie J. commented that the parties did not argue cause of action estoppel and that he would "therefore say no more about it" (*Furlong*, at paragraph 40). Second, Roberts J.A. noted that the Court in *Danyluk*:

> [41] … did not modify the Court's statement in **Naken** [[1983] 1 S.C.R. 72] that where the defence of res judicata is raised in the context of court proceedings "such a discretion [not to apply res judicata] must be very limited in application". Rather, he confirmed **Naken**, while at the same time making an exception for the broader use of discretion "in relation to the prior decisions of administrative tribunals …".

[169] Third, in *Danyluk*, Binnie J. identified potential injustice as a relevant consideration in whether discretion may be exercised not to apply issue estoppel. In *Furlong*, Roberts J.A. wrote:

> [42] The potential injustice consideration, in my opinion, only becomes relevant, in the context of court proceedings, where, having exercised due diligence, a party has not received a full and fair hearing. …
>
> …
>
> [44] As an aside, another reason why I query the application of **Danyluk** to cause of action estoppel is that the requirements for issue estoppel do not include the fourth requirement in **Grandview** [[1976] 2 S.C.R. 621] to have exercised reasonable diligence.

[170] It follows from the discussion in *Furlong*, *Danyluk* and *Naken* that, in the context of cause of action estoppel in court proceedings, the trial judge has discretion not to apply *res judicata* only in very limited circumstances. The discretion is narrower than that available in respect of issue estoppel.

[171] In the case now before this Court, Guardian submits that, in light of the new evidence, the trial judge should have exercised his discretion not to

apply cause of action estoppel. The exception for new evidence is referenced in *Quinlan* (paragraph 165, above).

[172] In making this submission, Guardian is relying on information provided by T.C., Father MacIntyre and Mr. Barnes. In assessing whether that information would constitute fresh evidence, the trial judge reviewed Guardian's conduct in gathering evidence prior to consenting to the order in 1992 requiring it to defend and indemnify the Episcopal Corporation. In accordance with the fourth criterion set out in *Grandview* and referenced in *Furlong* (paragraph 169, above), a fundamental consideration is whether Guardian exercised reasonable diligence in obtaining relevant evidence at the time.

[173] The trial judge was satisfied that Guardian had difficulty obtaining evidence from the Winter Commission that would provide a useful level of detail. Nonetheless, he concluded:

> [81] Having said that, I also accept that with some further investigation, reasonably undertaken, more evidence of knowledge on the part of [the Episcopal Corporation] could well have surfaced at the time. I accept the submission of counsel for [the Episcopal Corporation] that the identity of T.C. was discoverable and, had he been questioned at that time, the involvement of Father MacIntyre would likely have been learned. While I am satisfied that generally what Guardian did at the time prior to the consent judgment amounted to a diligent investigation, I am not fully able to conclude in these circumstances that the evidence of T.C. and Father MacIntyre was not discoverable. In other words, more could reasonably have been done to obtain the information Guardian presently has in this regard.

[174] Guardian has not provided any basis on which to conclude that the trial judge erred in this determination. The judge recognized difficulties faced by Guardian but, on balance, concluded that "more could reasonably have been done", indicating that the determination was made on the basis of an objective standard, as is required.

[175] However, the trial judge concluded that the evidence of Mr. Barnes, which was obtained in August 1993 approximately a year after the consent order, would constitute "the type of new evidence that could ground a decision by this Court not to apply *res judicata*" (decision of the trial judge, at paragraph 82). The trial judge went on to consider this factor in the exercise of discretion not to apply *res judicata* on the basis of special circumstances:

> [83] That being said, I cannot ignore the circumstances subsequent to that evidence becoming known to Guardian in the exercise of my discretion here. While I find Guardian's actions in continuing to defend all of the claims against [the Episcopal Corporation] that had been commenced prior to the date of the consent judgment is not of any significant consequence in my assessment of fairness and justice, I find otherwise as regards the undertaking of the defence of [the Episcopal Corporation] to one or more claims commenced after the discovery of Mr. Barnes as did occur here.
>
> [84] Guardian's counsel submits that the events occurring after the consent judgment are not material to my decision here. While I accept that this is true as regards the first step in the test for applying the doctrine of *res judicata*, in considering the second part of the test, an assessment of justice and fairness, I am of the view that what transpired after the consent judgment cannot be ignored. As stated earlier, my task here ultimately is balancing appropriately the objectives of finality and fairness. In doing so in these circumstances, it is impossible for me to disregard the continued willingness of Guardian to defend [the Episcopal Corporation] particularly as regards an action or actions commenced after Mr. Barnes' evidence became known.
>
> (Underlining in original.)

[176] In the result, the trial judge concluded that *res judicata* would properly apply in the present matter and that this conclusion was not altered by special circumstances. He explained:

> [85] … What is the difference between the new cause or causes of action that were commenced after Guardian had learned of Mr. Barnes' evidence in the 1990's and the present cause of action? To me there can really be no distinction and it appears that, for whatever reason, Guardian has determined that, as regards this matter, it now wishes to relitigate the question of its obligation to [the Episcopal Corporation] pursuant to the insurance contract in place.
>
> [86] Taking all of what I have stated above, I have come to the conclusion that Guardian has not established special circumstances that would justify a finding that to apply *res judicata* here would be contrary to the interests of justice. …

[177] In reviewing this conclusion, it is necessary to consider the principles relevant to the question of new evidence. If new evidence is to result in a decision not to apply *res judicata*, in addition to meeting the criterion that the evidence could not have been discovered through reasonable diligence, the evidence must be decisive in the sense that it would have affected or altered the final decision. In *Town of Grandview v. Doering*, [1976] 2 S.C.R. 621, Ritchie J., for the majority, at pages 635 and 636, referred to the principles established in *Phosphate Sewage Co. v. Molleson* [(1879), 4 App.

Cas. 801 (H.L.)], quoting from what Lord Cairns said, at pages 814 to 815 of the *Phosphate* decision:

> As I understand the law with regard to *res judicata*, it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in a litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up to the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. My Lords, the only way in which that could possibly be admitted would be if the litigant were prepared to say, I will shew you that this is a fact which entirely changes the aspect of the case, and I will shew you further that it was not, and could not by reasonable diligence have been, ascertained by me before.
>
> (Emphasis added.)

[178] In *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, Arbour J., for the Court, referring to principles stated in *Danyluk*, in the context of abuse of process, commented:

> [52] In contrast, proper review by way of appeal increases confidence in the ultimate result and affirms both the authority of the process as well as the finality of the result. It is therefore apparent that from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole. There may be instances where relitigation will enhance, rather than impeach, the integrity of the judicial system, for example: … (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; …

[179] In *The Doctrine of Res Judicata in Canada*, third edition (Markham, ON: LexisNexis, 2010), Donald Lange reviews the question of fresh evidence as a special circumstance in the context of *res judicata*. In addition to reference to the decision in *Town of Grandview* which adopted the language, "a fact which entirely changes the aspect of the case", the author points to Supreme Court of Canada authority using the "practically conclusive" test, at page 287:

> The practically conclusive test in *Varette* [*v. Sainsbury*, [1928] S.C.R. 72, at page 76] was quoted with approval by the Supreme Court of Canada in *Dormuth v. Untereiner* [[1964] S.C.R. 122]. Ritchie J. noted that the same test had been adopted by the Supreme Court of Canada in *Gootson v. R.* [[1948] 4 D.L.R. 33

> (S.C.C.), at pages 34 to 35] from which a passage similar to *Varette* was quoted. In *Dormuth*, Ritchie J. further examined whether the word "conclusive" was "too strong a word to use in this context" and concluded that "the phrase 'practically conclusive' has been employed more than once in this court and I see no reason for departing from it." Thus the Supreme Court of Canada has firmly established that the test for new evidence is a practically conclusive test.

[180] I take from the above that, where new evidence that could not have been discovered through reasonable diligence is adduced, *res judicata* will, nonetheless, apply unless the proponent also establishes that the evidence is "decisive" or "practically conclusive" in the sense that the evidence entirely changes the aspect of the case.

[181] An example where this test is met is found in *Sun Alliance Insurance Co. v. Thompson* (1981), 56 N.S.R. (2d) 619 (NSTD). In that case, the Thompsons' house was destroyed by fire. Both Mr. and Mrs. Thompson denied knowledge of the origin of the fire. In the absence of proof, the insurance claim was settled. Some months later, the Thompsons separated and Mrs. Thompson gave a statement to the police that her husband had set the fire.

[182] Factors of assistance in determining whether new evidence clears the hurdles necessary to permit setting aside a final judgment are referenced in *Tsaoussis (Litigation Guardian of) v. Baetz* (1999), 165 D.L.R. (4th) 268 (ONCA). After referring to the decision in *Doering*, Doherty J.A., for the Court, wrote:

> [44] These and numerous other authorities (e.g. *Whitehall Development Corporation Ltd. v. Walker*, [(1977), 17 O.R. (2d) 241]) recognize that the finality principle must not yield unless the moving party can show that the new evidence could not have been put forward by the exercise of reasonable diligence at the proceedings which led to the judgment the moving party seeks to set aside. If that hurdle is cleared, the court will go on to evaluate other factors such as the cogency of the new evidence, any delay in moving to set aside the previous judgment, any difficulty in re-litigating the issues and any prejudice to other parties or persons who may have acted in reliance on the judgment. <u>The onus will be on the moving party to show that all of the circumstances are such as to justify making an exception to the fundamental rule that final judgments are exactly that, final</u>. …
>
> (Emphasis added.)

[183] The requirement that the evidence of Mr. Barnes, being new evidence, entirely changed the aspect of the case must be considered in the context of particular considerations applying to the insurance relationship. I begin with the comment in *Progressive Homes Ltd. v. Lombard General Insurance Co. of Canada*, 2010 SCC 33, [2010] 2 S.C.R. 245, regarding the insurer's duty to defend:

> [19] An insurer is required to defend a claim where the facts alleged in the pleadings, if proven to be true, would require the insurer to indemnify the insured for the claim. [Authorities omitted.] It is irrelevant whether the allegations in the pleadings can be proven in evidence. That is to say, the duty to defend is not dependent on the insured actually being liable and the insurer actually being required to indemnify. What is required is the mere possibility that a claim falls within the insurance policy. …
>
> (Emphasis added.)

[184] When obtaining insurance, an insured has a duty to disclose all matters of which the insured has knowledge that would be relevant in determining the nature and extent of risk the insurer is undertaking. However, there are exceptions to this requirement, in particular where the insurer has the information, albeit from a different source. In *Canadian Indemnity Co. v. Canadian Johns-Manville Co.*, [1990] 2 S.C.R. 549, the Court was considering the interpretation of language in the *Quebec Civil Code*. However, in so doing, Gonthier J., for the Court, referring to a common law principle stated in *Carter v. Boehm* (1766), 3 Burr. 1905, 97 E.R. 1162, wrote, at page 578:

> … Lord Mansfield stated at pp. 1164-65 that "[t]here are many matters, as to which the insured may be innocently silent – he need not mention what the under-writer knows … The insured need not mention what the under-writer ought to know; what he takes upon himself the knowledge of; or what he waves being informed of." …

In the instant case, where the insurer obtained the relevant information from the discovery process, there was no remaining duty of disclosure on the insured.

[185] Further, in circumstances where an insurer obtains information that may affect the insurance contract, the insurer has a responsibility to act so as not to mislead or prejudice the insured. This consideration is referenced in

Brown, Menezes, Brock and Blackwell, *Insurance Law in Canada*, looseleaf edition (Toronto, ON: Carswell, 2009), at page 5-6, paragraph 5.2:

> … It is contrary to good faith for an insurer to accept premiums from a customer when it knows or should know that there is information relevant to the risk which the customer has not divulged and then to raise that as a defence should the customer try to claim under the policy.

Accordingly, depending on the circumstances, failure by an insurer to act may indicate an election to affirm the contract. In any event, the insured, assuming coverage, would have no reason to seek alternate insurance to cover claims arising years later, as in the instant case.

[186] In considering the trial judge's decision, it is necessary to begin with the fundamental principle that the onus is on Guardian to establish that, based on the new evidence, *res judicata* should not be applied. The Episcopal Corporation has no obligation to establish that the doctrine does apply.

[187] The new evidence at issue here is Mr. Barnes' allegation that Archbishop Penney and Monsigneur Morrisey had received information about Hickey's conduct but did not advise Guardian. Mr. Barnes' information contradicts the discovery evidence of the two Church officials. Without more, the argument could be made that Mr. Barnes' evidence changed an important aspect of the case against the Episcopal Corporation. This would, at least, open the door for the court to consider whether such evidence satisfied the test that the evidence would be decisive or practically conclusive in the sense that it entirely changes the aspect of the case. That test would, of course, have to be applied in the context of the low threshold to be satisfied in a "duty to defend" application.

[188] However, that is not the totality of the evidence that is relevant in this case. After the insurer became aware of the information, it did not take steps to challenge the earlier decision that it had a duty to defend the claims against the Episcopal Corporation. Rather, despite having that information, the insurer settled three additional claims, involving the same cause of action. While, as a result of the settlements, these claims were not adjudicated by the court, the effect must be the same. It was open to the insurer, before undertaking settlement of the claims that followed Mr. Barnes' evidence, to make an application similar to that which was made in this case. This would not have involved a full trial, but simply, as here, a

summary trial to determine whether the new evidence was such as to entirely change the aspect of the case and engage the operation of judicial discretion not to apply *res judicata*.

[189] Given the nature of the allegations against Hickey, and the fact that additional cases had arisen after the initial consent by Guardian to defend on behalf of the Episcopal Corporation, it could have been expected that other similar allegations may arise in the future. In the circumstances, if Guardian believed that the new evidence was sufficient to have the court set aside the earlier decision imposing a duty to defend under the insurance contract, it was incumbent on the insurer to act without delay. The issue could have been determined by means of an application to court. As noted in *Tsaoussis*, the onus was on Guardian to demonstrate justification for "making an exception to the fundamental rule that final judgments are exactly that, final" (paragraph 182, above). In the absence of action by Guardian prior to settling the claims that arose after Mr. Barnes' information was known, the Episcopal Corporation could reasonably rely on the finality of the earlier decision, and its application, should additional claims arise in the future. Failure by the insurer to act at the earliest reasonable opportunity, certainly before the passage of more than fifteen years, put the Episcopal Corporation at a disadvantage in determining its insurance requirements to protect against claims that might arise over the years.

[190] Further, in my view, for purposes of the summary trial, the Episcopal Corporation was not required to provide affidavit evidence as to the effect of the delay, whether it was prejudiced or misled. Rather, it was entitled to rely on the decision that Guardian had a duty to defend against claims engaging the same cause of action. In the circumstances, the manner in which the insurer became aware of the new evidence and its possible effect on the earlier contradictory information provided by Church officials became moot. What is relevant to the question of *res judicata* is the manner in which Guardian chose to deal with that new evidence. As discussed above, the insurer's conduct was not such as to warrant the exercise of discretion not to apply *res judicata*.

[191] The conclusion follows that the trial judge did not err in determining that *res judicata* applies and that Guardian is required to defend against the claim and, if necessary, indemnify the Episcopal Corporation in accordance with the insurance contract.

SUMMARY

[192] The trial judge did not err in concluding that the evidence of T.C. and Father MacIntyre did not constitute new evidence. Further, in the circumstances, in light of Guardian's conduct, the new evidence of Mr. Barnes would not provide a basis on which discretion should be exercised not to apply *res judicata*. In the result, the trial judge did not err in his determination that *res judicata* applies.

[193] Accordingly, I would dismiss the appeal. I would order that the Episcopal Corporation and the second respondent are entitled to their costs on a solicitor and client basis (*Ultramar Ltd. v. Rancur Petroleum Services Ltd. et al.*, 2006 NLCA 55, 260 Nfld. & P.E.I.R. 96).

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B. G. Welsh J.A.