IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
TRIAL DIVISION (GENERAL)

Citation: *John Doe v. Roman Catholic Episcopal Corporation of St. Johns*, 2011 NLTD(G) 150
Date: 20111031
Docket: 200901T4501

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BETWEEN:

JOHN DOE – HGM#1 (a pseudonym)

PLAINTIFF

AND:

ROMAN CATHOLIC EPISCOPAL CORPORATION OF ST. JOHN'S

DEFENDANT

AND:

GUARDIAN INSURANCE COMPANY OF CANADA

THIRD PARTY

Before: The Honourable Mr. Justice Richard D. LeBlanc

Place of Hearing: St. John's, Newfoundland and Labrador

Date of Hearing: 21 September 2011

Summary: Third Party Proceedings – Claim for Application of *Res Judicata*

RCEC is the defendant in an action of the plaintiff for damages as regards certain alleged sexual assaults by James Hickey, a priest in the diocese managed by RCEC. RCEC commenced a Third Party claim as against its insurer, Guardian, claiming a right to representation and indemnity under an insurance policy.

In 1992, long before the commencement of the present action, Guardian had consented to a judgment in a proceeding where a different plaintiff had commenced an action against RCEC and others regarding alleged sexual assaults by James Hickey. There they agreed to undertake defending RCEC as well as to provide

indemnification if the plaintiff was successful with its claim. A consent judgment was issued to this effect on September 21, 1992.

RCEC argues that the defence to the Third Party claim filed by Guardian is basically the same as filed in the earlier action and asks the Court to strike the defence filed on the basis of *res judicata*.

HELD:

Both cause of action estoppel and issue estoppel have been established in the circumstances such that the doctrine of *res judicata* can be applied. Here, notwithstanding new evidence coming to light after the consent judgment in September 1992, it would not be unjust to apply the doctrine of *res judicata*. The defence of Guardian was struck and judgment on the Third Party claim is entered in favour of RCEC with an order for solicitor and client costs.

Appearances:

No Appearance	Plaintiff
Thomas J. O'Reilly, Q.C. and Denis J. Fleming	Counsel for the Defendant
Philip J. Buckingham and C. Brodie Gallant	Counsel for the Third Party

Authorities Cited:

CASES CONSIDERED: Roynat Inc. v. Lester (1993) 105 Nfld. & P.E.I.R. 151 (Nfld. T.D.); **Ledrew v. Brake** (1999), 176 Nfld. & P.E.I.R. 288 (Nfld. C.A.); **Danyluk v. Ainsworth Technologies Inc.**, [2001] 2 S.C.R. 460; **Quinlan v. Newfoundland (Minister of Natural Resources)** (2000), 192 Nfld. & P.E.I.R. 144 (Nfld. C.A.); **Doering v. Grandview (Town)**, [1976] 2 S.C.R. 621; **Comeau v. Breau**, [1994] N.B.J. No. 74, 145 N.B.R. (2d) 329 (C.A.); **Angle v. M.N.R.**, [1975] 2 S.C.R. 248; **Hoysted v. Federal Commissioner of Taxation**, [1925] 37 C.L.R. 290, A.C. 155 (Australia H.C.); **R. v. Duhamel** (1984), 57 A.R. 204 (S.C.C.); **Lawyers' Professional Indemnity Company v. Geto Investments Ltd.** (2001), 54 O.R. (3d) 795 (Sup. Ct. J.); **Ernst v. National Trust Co.**, [2003] O.J. No. 4181, CarswellOnt 4060 (Sup. Ct. J.); **Catalyst Fund General Partner I Inc. v. Hollinger Inc.**, [2006] O.J. No. 2818, 20 B.L.R. (4th) 249 (Sup. Ct. J.); **Goodman & Company Investment Counsel Ltd. v. KBSH Capital**

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Management Inc., [2007] O.J. No. 3916, CarswellOnt 6551 (Sup. Ct. J.); **Lee v. Lee**, 2010 ONSC 4524, 91 R.F.L. (6th) 385; **Reddy v. Oshawa Flying Club** (1992), 11 C.P.C. (3d) 154 (Ont. Gen. Div.); **Staff Builders International Inc. v. Cohen**, [1983] O.J. No. 401 (S.C. (Ct. J.)); **Maiocco v. Lefneski**, [1995] O.J. 4014 (Ct. J. (Gen. Div.)); **Cobb v. Holding Lumber Co.** (1977), 79 D.L.R. (3d) 322 (B.C.S.C.); **Toronto (City) v. C.U.P.E., Local 79**, [2003] 3 S.C.R. 77; **Lombard General Insurance Co. of Canada v. Crosbie Industrial Services Ltd.** (2006), 260 Nfld. & P.E.I.R. 96 (N.L.C.A.).

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RULES CONSIDERED: *Rules of Supreme Court, 1986*, S.N.L. 1986, c. 42.

TEXTS CONSIDERED: Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 3rd ed., (Canada: Lexis Nexis Canada Ltd., 2010)

REASONS FOR JUDGMENT

LEBLANC, J.:

INTRODUCTION

[1] On November 24, 2009, the Plaintiff in this matter commenced an action as against the Roman Catholic Episcopal Corporation of St. John's ("RCEC") for damages arising out of alleged sexual assaults by James Hickey, a priest in the diocese of St. John's, that are said to have occurred between 1980 and 1984. The Defendant, RCEC, subsequently filed a Defence and also filed and had issued a Third Party Notice against Guardian Insurance Company of Canada ("Guardian") claiming that Guardian has an obligation to defend the claim of the Plaintiff on their behalf based upon the existence of an insurance contract extending coverage for such claims. Guardian subsequently filed a Defence to the Third Party claim pleading that the insurance contracts are void based upon RCEC's failure to contract in good faith due to a failure in its duty to provide full and complete disclosure regarding complaints involving James Hickey. As well, Guardian claims that any coverage extended did not cover the claims in question based upon the terms of the insurance contracts and the reasonable expectations of the parties.

[2] In 1989, claims by other plaintiffs had been filed against RCEC related to alleged sexual assaults by James Hickey. In one of those claims, RCEC[1] had a Third Party Notice issued and sought a declaration that Guardian was obligated to defend and indemnify it in respect of that claim. In its Defence filed at the time, Guardian claimed that, amongst other things, the insurance policy was rendered void due to RCEC's failure to provide full and complete disclosure of knowledge it had about James Hickey's prior sexual actions and propensities.

[3] As regards that earlier claim, the issue of liability pursuant to the Third Party Notice was tried first by order of the Court and when the matter was set to commence on September 21, 1992, after investigation and discovery proceedings had taken place, Guardian consented to an order that RCEC be defended and indemnified as regards the claim of the Plaintiff in that action.

[4] It is based upon that order, and the actions of Guardian since, that RCEC has now applied to strike out the Defence filed by Guardian to the present Third Party claim on the grounds of *res judicata*. RCEC seeks a declaration that Guardian is obligated to defend and indemnify RCEC as regards the present Plaintiff's claim and also claims solicitor/client costs. In the present application before the Court, while not specifically pleaded, RCEC also argues that in the event that *res judicata* does apply, the doctrine of abuse of process would be an appropriate basis upon which to allow its application.

[5] As will be seen from what follows, I have concluded that RCEC has successfully argued that the criteria or prerequisites for *res judicata* exist and, to me, the most significant issue to be decided is whether or not there are any "special circumstances" that have been demonstrated such that the application of *res judicata* would not serve the interests of justice in this case.

[1] Actually, the Third Party Notice was filed by Alphonsus Penney (the Archbishop) as well as RCEC.

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BACKGROUND CIRCUMSTANCES - 1992 CONSENT ORDER

[6] As referred to above, in July 1989 a claim was made in this Court (1989 St. J. No. 2090) against RCEC and others seeking damages for alleged sexual assaults committed by James Hickey while he was a priest in the diocese. In August 1991, RCEC filed a Third Party claim against two insurers, one of whom was Guardian. Guardian defended the Third Party claim based upon alleged failure of RCEC 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 the some extent, the alleged acts fell outside of any insurance coverage in place.

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[7] For the purpose of my considering its position in this present application, Guardian has filed an affidavit of James P. Adams who acted as counsel for Guardian in the earlier claims. He was their counsel from 1992 until August 7, 1996. In that affidavit, Mr. Adams sets forth material facts regarding his actions on behalf of Guardian at that time, including the timeframe up to the entry of a consent judgment to the Third Party claim that was entered on September 21, 1992.

[8] Mr. Adams stated that in fulfilling his duty as counsel to Guardian, he set about investigating what knowledge, if any, RCEC, 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 RCEC concerning sexual abuse of children by members of the clergy. 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 by the Commission was that RCEC had failed to respond appropriately at the time.

[9] Based upon that report and the information Guardian then had, Mr. Adams, as well as counsel for another insurance company named, began their investigation.

As the Winter Commission's report did not set out the names of persons who gave notice to the church hierarchy of alleged sexual abuse, it was decided that discovery of three of the five commissioners of the Winter Commission was necessary. Gordon Winter, John Scott and Francis O'Flaherty were questioned by Mr. Adams. As well, as the Winter Commission had found that Monsignor David Morrissey, the Vicar General, was aware of allegations made against James Hickey in 1975 and thereafter passed this information on to Archbishop Skinner, discovery was also arranged of Father John Wallis, the Executor of Monsignor Morrissey's estate to determine whether any papers existed that could provide evidence of this.

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[10] According to Mr. Adams' affidavit, discovery of the three commissioners of the Winter Commission proved to be rather unhelpful as they apparently had not kept notes of the evidence tendered or as to the names of witnesses who had provided information to the Winter Commission. As well, they could not discuss the evidence in sufficient detail to assist Guardian with its defence as against RCEC in the opinion of Mr. Adams. This was so, notwithstanding that at Volume 1 of the Winter Commission's report, *The Report of the Archdiocesan Commission of Enquiry into the Sexual Abuse of Children by Members of the Clergy,* at page 12, the following was stated by the commissioners:

> In 1975 Monsignor David Morrissey, Vicar General of the Archdiocese, was told by a male adolescent that James Hickey had sexually assaulted him. At the time of the disclosure the complainant was seventeen years old. Monsignor Morrissey, in his capacity as Vicar General, confronted Hickey about this incident. He denied the charge. The Commission has no evidence that any further action was taken by the Vicar General on this matter.
>
> During the school year 1976-1977 Monsignor Morrissey was informed by a priest that Hickey was accused of sexually assaulting a young man. The priest who brought the information to Monsignor Morrissey's attention on this occasion did not identify the young man. The Commission has strong reason to conclude, however, that the alleged victim in this instance was the same young man who had reported the assault in 1975 and that it was, indeed, the same incident, although the Monsignor probably did not know this. Monsignor Morrissey instructed the priest to leave the matter in his hands. The priest received no further word from Monsignor Morrissey concerning the allegation.
>
> Later in 1977, for the third time, the disclosure first made in 1975 was again reported to Monsignor Morrissey by another priest. Following this reporting, Hickey was summoned to Monsignor Morrissey's parish house in Outer

> Cove to discuss the matter. Hickey again denied the accusation. In his evidence the priest who made the third report to the Vicar General, stated that, in his view, Monsignor Morrissey did not believe the victim.
>
> Hickey's evidence on these disclosures is that he was confronted by Monsignor Morrissey on two separate occasions. Each time he denied any involvement with the young man. Hickey was not charged in court concerning this incident, and continues to deny involvement. He has further stated that the late Archbishop Skinner also knew of the alleged sexual assaults. On one occasion Hickey attempted to raise the subject with Archbishop Skinner, he told the Commission, but was informed that the matter had been dealt with by Monsignor Morrissey and that the Archbishop wanted nothing to do with it.

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[11] Thereafter, Mr. Adams proceeded to discover Father Wallis and reviewed the personal files of Monsignor Morrissey. He concluded no evidence existed in those files which would assist Guardian in its defence as against RCEC.

[12] It does appear that at the time the investigation by Mr. Adams was occurring, Archbishop Skinner was deceased as was James Hickey.

[13] Mr. Adams then went on to discover Archbishop Penney. He denied any knowledge of complaints of a sexual nature against James Hickey prior to 1987 when criminal charges were laid and he testified he had not been informed of this by his predecessor, Archbishop Skinner.

[14] Mr. Adams also discovered Monsignor David Wallis, the former Vicar General from 1979 to 1982, but he too indicated that he was unaware of any complaints of sexual impropriety by James Hickey. Similar results occurred at the discovery of Bishop Raymond Lahey, another former Vicar General, which discovery in fact took place some two weeks before the trial of the Third Party claim was to commence on September 21, 1992.

[15] One person discovered by Mr. Adams who did provide some indication of prior knowledge by those in authority at RCEC was Father Philip Lewis. He

advised that in or about 1977 he was told by a person "in rather vague terms" that James Hickey had made a pass at this individual. Father Lewis stated that he referred this person to Monsignor Morrissey, the then Vicar General of the Archdiocese. As Father Lewis's evidence is an important consideration here, I wish to refer to what seems to be the most germane aspects of it for the purposes of the present application. Beginning at page 100 of the discovery transcript of Father Lewis, the following exchange as between Mr. Adams and Father Lewis took place:

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> Q: Alright. There are allegations in the Winter Commission Report and they're said to be various disclosures right up to the seventh alleged disclosure of information involving James Hickey that came to the attention of Monseigneur Morrissey who was at that time the Vicar-General of the Archdioceses of St. John's concerning James Hickey having sexually assaulted a male adolescent in or about 1975. Had you heard of that at all at any time other than before it became known at the Winter …
>
> A: Yes. I was one of the people who informed Dave Morrissey. Could you let me see that?
>
> Q: Yes, sure.
>
> A: I was looking at it last night, actually. I think that this third disclosure was the first for me.
>
> Q: This is the 1977?
>
> A: Yes.
>
> Q: Okay.
>
> A: That happened after I went to St. Paul's Parish and I didn't go to St. Paul's Parish until August of 1977. That's when we established the Parish and it was in the fall of that year that a young man came to see me, who was from a former parish is the reason why he came to see me, and he told me in rather vague terms that he had … that Jim Hickey had made a pass at him and I immediately set up an appointment with Dave Morrissey for him and that young man had been receiving psychiatric treatment at the time and a few weeks later Monseigneur Morrissey either contacted me on this particular case or in passing mentioned to me that he had seen the young man, that he didn't, I think the way he put it was didn't you know that he is nuts or he is receiving psychiatric treatment or some such thing. So then you could believe, he didn't really believe the young man's allegations. But I didn't follow up on that.

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Q: Did it come as a surprise to you that James Hickey was being accused of that?

A: No, no I wasn't surprised.

Q: At the time of the alleged assault, it said here at the time of the disclosure the complainant was 17 years of age? You recall approximately the age of the complainant at the time of incident?

A: No. No. All I know by that time, he was either in his last year of high school or his first year of university.

Q: That's at the time that he disclosed it to you?

A: To me, yeah. And I don't know, see I've read this and re-read it and I don't know whether at that time he told me it had just happened or that it had happened some time ago or that he had mentioned it to somebody else or what. I can't vouch for any of that. All I know is that he did speak to me and it was in vague terms but I got the gist of what he was saying and I immediately moved it on to the Vicar-General.

Q: Now the … so your recollection is that it was you who initiated the meeting with Monseigneur Morrissey?

A: And this young man.

Q: And this young man.

A: I would think that was the first time that he had met with this young man, right.

Q: Alright.

A: And I did that I'm sure because he had not seen him before or he hadn't made any disclosure before or whatever, I don't know. I'm only presuming that but all I know is that I said to him I will I think you should see the Vicar-General and, in fact, if my recollection serves me correctly, I phoned Dave Morrissey from my office that day while that young man was there with me.

Q: Why would you have informed Monseigneur Morrissey?

A: Oh, because he was the Vicar-General.

Q: And why … what's the significance of that?

A: The significance of that is that he as Vicar-General would have been the troubleshooter for the Archbishop who at that time was Archbishop

Skinner and it was always the way things were done in Archbishop's [sic] Skinner's Administration that any bad news went to the Vicar-General. It didn't go directly to the Archbishop.

…

Q: Did you ever then after Archbishop Penney assumed the office of Archbishop tell him of this incident from 1975?

A: I don't think so, no. I have no recollection of ever having told him directly of this.

Q: Do you have any recollection of having told anybody else in his Administration of this particular event such as his Vicar-General or the Chancellor or somebody like that?

A: I would have no reason to do so.

Q: What, if anything, ever came of this revelation to you about this allegation against James Hickey? Anything or nothing to your knowledge?

A: Nothing until the Winter Commission Report. Until the Winter Commission. I don't know whether it was in response to a direct question or whether it was that I proffered the information when I met with the Winter Commission.

Q: Do you know if this particular incident formed the basis of any of the charges against James Hickey?

A: I know that it didn't.

Q: That it did not?

A: That it did not. I know that it did not because this young man did not make any charges and refused to have anything to do with the Winter Commission actually or with the priests subsequent to it when that came around. So unless there has been some change in his attitude or he has made some move in the last year and a half … When did this come up? In 1990?

Q: July 1990.

A: Yeah. Two years, yeah.

Q: Okay. The …

A: The reason I can say that with a certain amount of surety is the Newfoundland Constab and the R.C.M.P. put together a team to

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investigate following the Winter Commission Report. I think Sgt. Kenny was one of them, I'm not sure, from the Constab and there was another Sgt. from the … and they came to see me and they knew this young man. They could identify him. I didn't identify him. I didn't break that confidence and they asked me if I would speak to him and ask him if he would be prepared to give some testimony which I did and his answer was no. Absolutely no. I don't want anything to do with it and, you know, that's where it is now.

Q: Did he give you some reason as to why he didn't want to be …

A: Yes. He hasn't been well. He has put his life together and he didn't want, he didn't want to be disturbed. He didn't want all this raked up again. He's know you, he's on the balance.

Q: Did you … Were you aware as to whether this information was given by Monseigneur Morrissey to either Archbishop Skinner at the time or subsequently to Archbishop Penney?

A: No. I have no answer to that at all.

[16] It should be noted that at no time during this questioning was Father Lewis asked to identify the person who he referred to Monsignor Morrissey. As well, I have been given nothing to indicate whether either police force was contacted by Mr. Adams in order to ascertain the name of the person who had complained to Father Lewis about James Hickey. In any event, Mr. Adams formed the opinion at that time that Father Lewis had no credible evidence upon which to base Guardian's defence against RCEC.

[17] After the discovery proceeding involving Bishop Lahey and a review of the personnel files of specific priests, Mr. Adams 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 RCEC Third Party claim (paragraph 25 of Affidavit of James P. Adams). As a result, the consent judgment previously referred to was entered in regards action 1989 St. J. No. 2090 on September 21, 1992.

[18] Thereafter, Mr. Adams, on behalf of Guardian, undertook the defence of RCEC as regards that claim. Subsequently, he did the same for other actions that

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had been commenced against RCEC (seven in total) at or about the time of the 1989 St. J. No. 2090 claim. As well, Guardian later undertook the defence of RCEC in six other actions commenced in 1993 and a further one in 1994, all involving allegations of sexual assaults by James Hickey or John Corrigan, both priests in the diocese. After Mr. Adams ended his involvement in these matters in or about August 1996, Robert Sinclair took over and became counsel acting for Guardian in the defence of RCEC in all of these matters.

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NEW EVIDENCE

[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 RCEC. 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.

[20] The new evidence presented before me, new in the sense that it was said to be unknown by Guardian in 1992 notwithstanding what they say was a reasonable and diligent investigation at the time, comes from the affidavits of T.C. and of Father Ronald MacIntyre that have been filed in this matter.

[21] T.C. states in his affidavit that he was sexually assaulted by James Hickey a number of times in 1973 and 1974 and, as a result, spoke to three priests in the diocese about this. One of those priests was Father Philip Lewis. It appears that T.C. was the person Father Lewis referred to in the discovery evidence earlier set out. T.C. stated that Father Lewis had set up an appointment for him to meet with Monsignor Morrissey and that he did so. He told Monsignor Morrissey of the sexual abuse by James Hickey when they met. According to T.C., Monsignor

Morrissey offered no help and no further contact took place between them. He said that James Hickey had confronted him about his complaint after and had indicated that he was not responsible for things he had done while sleeping.

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[22] T.C. also stated in his affidavit that in 1974-1975, he informed Father Ronald MacIntyre of James Hickey's sexual abuse. In the affidavit before me of Father MacIntyre, he states that he was with the church in this province as a priest from 1970 to 1979 and did chaplaincy work at the Irish Christian Brothers schools throughout the province. He returned once again to Newfoundland in approximately September 1992. Father MacIntyre states that part of his duties in the 1970's was to act as co-chaplain with James Hickey at Brother Rice High School. He attests that in 1974 or 1975, he was approached by a youth who advised him of an incident which he concluded amounted to sexual abuse by James Hickey. The youth had told him that while overnighting at the cabin of James Hickey, the youth felt that he was in a state of stupor of some sort and recalled being in bed and seeing James Hickey standing by the bed naked. According to Father MacIntyre, when describing this, the youth was visibly distraught and weeping. Father MacIntyre states in his affidavit that he concluded that the incident had progressed to sexual contact. As a result, and having been given permission by the young person to do so, Father MacIntyre met with Monsignor Morrissey, the Vicar-General, and advised him of the incident and the seriousness of it. He recalls Monsignor Morrissey telling him to "leave it with me Ron and we'll take care of it" or "leave it to us and we'll take care of it". Father MacIntyre said that he did not tell Monsignor Morrissey the youth's name but that it was T.C.

[23] Finally, T.C. also states in his affidavit that in or about 1976, he informed Father Frank McGee, a priest of St. Pius X, that he had been sexually abused by James Hickey.

[24] The other new evidence referred to by Guardian for the purpose of this application resulted from a discovery of Randy Joseph Barnes, a former seminarian posted in Rushoon when James Hickey was the parish priest there. His discovery actually took place, based upon what is before me, on August 31, 1993, which was approximately a year after the September 21, 1992 consent judgment. James Adams was then involved in defending RCEC on behalf of Guardian. During that

discovery, Mr. Barnes stated that, while in Rushoon, he was aware of boys spending evenings at the parish home of James Hickey and that sexual activity was ongoing involving James Hickey. Mr. Barnes said in his discovery that he had met with Archbishop Penney in or about May of 1980 and disclosed this to him. This disclosure was apparently made at a meeting that Mr. Barnes had with the Archbishop at the time he was also advising him that he wished to take a leave from being a seminarian. At the time, Mr. Barnes indicated that he told Archbishop Penney that when in Rushoon, James Hickey had been sexually abusing boys as well as another seminarian. According to Mr. Barnes, it appeared to him that the Archbishop was not listening and indicated that he would take the matter into consideration. Such evidence obviously contradicts the evidence given by Archbishop Penney in his own discovery done prior to the September 21, 1992 consent judgment.

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

THE REQUESTED RELIEF

[26] As discussed with counsel during the hearing, I am concerned that the parties want something more here than can be obtained if Rule 17 of the *Rules of Supreme Court, 1986*, S.N.L. 1986, c. 42, is appropriately applied.

[27] RCEC has grounded its application for relief here on Rule 17 seeking an order pursuant to Rules 17.02.(b) and (k) and 17.05. Rule 17 deals with the ability of a party to seek a summary judgment as described in that rule. Rule 17.02.(b) and (k) allow a court to grant an order in favour of the Third Party claimant or any order the Court thinks just.

[28] Where a plaintiff, including a third party claimant, can prove the claim clearly and the other party is unable to provide a *bona fide* defence or raise an issue which ought to be tried as regards that claim, a court can order judgment in favour

of an applicant without there being a trial. In order to avoid a summary judgment being entered under this rule, a respondent must satisfy the court that there are facts or legal positions being put forward that, if accepted at trial, could constitute a good defence in a trial. It is accepted that once the applicant establishes a basis for the claim, the respondent bears an evidential burden of convincing a court that there is a factual or legal basis to merit a trial.

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[29] It is also clear that in a summary judgment application it is not for the judge hearing same to assess reliability, weigh evidence or make findings of fact. As stated by Barry, J. in **Roynat Inc. v. Lester** (1993), 105 Nfld. & P.E.I.R. 151 (Nfld. T.D.), at page 15:

> … a summary judgment should not be allowed if there is conflicting evidence or a question of law which, following a hard look, the judge concludes is not being put forward merely to set up a sham defence and which, if found factually established by the trial judge, would form the basis for an arguable case on a matter of substance. This is what I understand to be the effect of the "fair probability that the Defendant has a bona fide defence" test applied in Crane Canada ...

[30] Such an approach differs from an application under Rule 17A. In such an application, the judge may in appropriate cases decide the conflicting claims where he or she has the ability to find the facts necessary to do so (see **Ledrew v. Brake** (1999), 176 Nfld. & P.E.I.R. 288 (Nfld. C.A.)).

[31] Here, the application before me deals with whether Guardian is entitled to defend the Third Party claim on the basis of its amended defence or whether such is barred by the application of *res judicata* or abuse of process. Based upon what is before me, I cannot conclude that Guardian has no fair probability of a *bona fide* defence or an arguable case on a matter of substance on this question. As such, I would have had to deny the Rule 17 application if the parties had not agreed that I should convert the present application to one under Rule 17A. The parties have clearly asked this Court to fully resolve this question and, in my view, Rule 17A will permit me to do so. Rule 17A.03.(2) and (4) permit a court to grant judgment in favour of either party notwithstanding the existence of a genuine issue for trial where the judge is able on the whole of the evidence presented to find facts

necessary to decide questions of fact or law (Rule 17A.03(2)) or where a court is able to determine a question of law (Rule 17A.03(4)).

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[32] As a result, I grant leave to convert the present application to an application for a summary trial pursuant to Rule 17A.

[33] One further comment must be made as regards the application filed by RCEC and its ambit. As alluded to earlier, counsel for RCEC in his brief and argument before me argues that the defence of Guardian to the Third Party claim of RCEC should be struck not only on the basis of *res judicata* but, in the event that *res judicata* were not to apply, also on the basis of the doctrine of abuse of process. Abuse of process was not pleaded in the application itself. This matter was raised by counsel for Guardian before me but, nevertheless, he did fully address the abuse of process claim of RCEC in his brief and in argument. As such, I feel it is appropriate here to grant leave to RCEC to amend its application such that abuse of process is formally made a part of it.

THE LAW OF *RES JUDICATA*

[34] The doctrine of *res judicata* has as its object that there should be finality in litigation and the prevention of multiple fragmented proceedings regarding the same parties. As a result, litigants are expected to put their best foot forward as regards a cause of action to establish the truth of their positions when first called upon to do so (see **Danyluk v. Ainsworth Technologies Inc.**, [2001] 2 S.C.R. 460, and **Quinlan v. Newfoundland (Minister of Natural Resources)** (2000), 192 Nfld. & P.E.I.R. 144 (Nfld. C.A.)).

[35] There are two forms of *res judicata*[2]. These were described in the **Quinlan** case by Green, J.A. (as he then was), at paragraphs 6 and 7, as follows:

> … 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.

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[36] It is also to be noted that it is the substance of the matter actually decided that must be considered and not merely the form of any previous judgment. In **Quinlan**, Green, J.A., at paragraph 12, described the approach to be taken as to prove *res judicata* as follows:

> … The factual background necessary to determine the matter did not need to be supplied by the presentation of oral evidence. What was required was an examination of the pleadings, orders, reasons for judgment and other formal documents relating to the original proceeding, in comparison with those involved in the current proceeding. Such materials are admissible without formal proof because they are matters of record. …

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[2] In Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 3rd ed., (Canada: Lexis Nexis Canada Ltd., 2010) at page 11 it is stated that there are six types of estoppel that have developed in Canada to support the application of *res judicata*. These are:

(1) Issue estoppel bars an issue which has been actually been decided in the first proceeding.

(2) Issue estoppel under the rule in *Henderson* bars an issue which could have been brought in the first proceeding.

(3) Cause of action estoppel, the true *res judicata*, bars a cause which has actually been decided in the first proceeding.

(4) Cause of action estoppel under the rule in *Henderson* bars a cause which could have been brought in the first proceeding.

(5) Abuse of process by relitigation bars a second proceeding when the integrity of the judicial decision-making process in the first proceeding will be undermined.

(6) Collateral attack bars a second proceeding when a party, bound by an order, seeks to avoid compliance with that order by challenging the order itself and its enforceability, not directly but indirectly in a separate forum.

[37] For each type of estoppel described, the final determination as to whether *res judicata* will be found to apply involves a two-step analysis. First of all, the Court must be satisfied that the prerequisite requirements for either cause of action estoppel or issue estoppel are present. The second step is that, notwithstanding that either form of estoppel has been established, the Court must go on to consider whether "special circumstances" exist such that the application of the doctrine of *res judicata* would not serve the interests of justice (see **Danyluk v. Ainsworth Technologies Inc.** and **Doering v. Grandview (Town)**, [1976] 2 S.C.R. 621). Special circumstances include the discovery of new evidence subsequent to the earlier judgment or order.

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[38] I will now discuss firstly the prerequisites for both types of estoppel and proceed to consider whether either has been made out in the circumstances of this case. I will then go on to consider whether "special circumstances" have been established to make it unjust to apply the *res judicata* doctrine in these circumstances in the event that the criteria for one of the forms of *res judicata* is found to exist.

A. *Cause of Action Estoppel*

[39] For cause of action estoppel the following four criteria must be established:

a) there must be a final decision of a court of competent jurisdiction in the prior action;

b) the parties to the subsequent litigation must have been parties to or been privy with the parties to the prior action (mutuality);

c) the cause of the prior action must not be separate and distinct; and

d) the basis of the cause of action and the subsequent action is argued or could have been argued in the prior action, if the parties had exercised reasonable diligence.

(See **Doering v. Grandview (Town)**)

[40] In the **Danyluk** case earlier referred to, Binnie, J. referred to a cause of action as follows at paragraph 54:

> A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: Poucher v. Wilkins (1915), 33 O.L.R. 125 (C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. It is apparent that different causes of action may have one or more material facts in common. …

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[41] In **Comeau v. Breau**, [1995] N.B.J. No. 74, 145 N.B.R. (2d) 329 (C.A.), a cause of action was defined in terms of estoppel as the combination of facts which give rise to the right of action by a party against another in the first action. It is with this in mind that I now go on to determine if each of the criteria for cause of action estoppel is made out in this case.

I) <u>Final Decision of the Court of Competent Jurisdiction</u>

[42] Both parties acknowledge here that the consent judgment of September 21, 1992 as between RCEC and Guardian constitutes a final decision made by a court of competent jurisdiction.

II) <u>The Same Parties</u>

[43] RCEC argues that the proceeding most directly related to the consent judgment issued in 1992 was a Third Party claim between primarily itself and as against Guardian. Notwithstanding that the Order ultimately bound the parties as regards the claim of the specified plaintiff in that earlier case, who is different from the Plaintiff in the present case, RCEC argues that the parties are the same in the sense that the consent judgment in 1992 arose out of a Third Party claim that really had no involvement by that Plaintiff. The present Third Party claim presents the same situation although Alphonsus Penney is not named as a Defendant or a Third Party claimant.

[44] Guardian argues that an examination of both claims shows that the parties are not the same, as the plaintiff in both causes of action are different and, therefore, both therefore causes of action must be considered to be different.

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[45] Based upon my consideration of this prerequisite for cause of action estoppel, I am satisfied that the material proceeding to consider as regards the parties at this time was and is the Third Party claim of RCEC attempting to force Guardian to defend the claims being made by the different plaintiffs in both cases. As such, I am satisfied that the consent judgment in issue clearly is between the same parties in these circumstances.

[46] As well, the fact that Alphonsus Penney is not referred to in the present matter, as he was in the earlier one, is not material here. The substance of the claim by the Plaintiff in the present proceeding is in effect the same as was the claim in the earlier case to which the Third Party claim was made. The fact that the plaintiffs in both actions are different does not mean in these circumstances that the second criterion for cause of action has not been established in these circumstances.

III) <u>The Final Two Prerequisites - Same Cause of Action and New Grounds of Defence</u>

[47] Here, I intend to deal with the final two criteria for cause of action estoppel together.

[48] RCEC argues that the matter resolved by the parties in 1992 by the consent judgment and to be resolved in the present one does not constitute separate and distinct causes of action. As occurred in the earlier proceeding, at present RCEC seeks a declaration that it is entitled to coverage under an insurance policy with Guardian for any liability proven as a result of the alleged sexual acts committed by James Hickey. In both cases, it submits that Guardian has primarily argued that the policy should not be enforced on the basis of a lack of good faith by RCEC. The fact that there are now defences alleged based upon the extent of the coverage of the policy should be of no matter based upon Guardian's earlier

acknowledgement of coverage and/or their duty to put forward all possible defences that it had at that time.

[49] Guardian argues that in order to determine if these final two prerequisites are established, it is necessary to closely examine both claims to determine if they in fact are separate and distinct. In the earlier action, the plaintiff had claimed damages arising out of sexual abuse on him by James Hickey between 1979 and 1986. Guardian states that when it denied insurance coverage, RCEC commenced a Third Party claim against it seeking indemnification for any liability found against it for assaults by James Hickey involving <u>that</u> plaintiff as well as a further declaration that Guardian be required to defend in the names of two of the defendants in that action.

[50] Guardian goes on to state that in the present action, the Plaintiff claims damages arising out of sexual assaults upon him by James Hickey between 1980 and 1984. Again, Guardian is denying coverage as a result of which RCEC has commenced third party proceedings against Guardian claiming a declaration that Guardian, at its cost and on behalf of RCEC, defend the within action.

[51] While it admits there is some commonality in the factual basis for both claims, Guardian argues that there are differences in the two claims. They raise the fact that there are different plaintiffs, the abuses occurred separately, the timeframes are distinct and the damages claimed by each of the plaintiffs are unique to that plaintiff. As such, Guardian claims that the causes of actions are separate and distinct.

[52] After considering the full argument of each party, I am satisfied that the causes of action cannot be found to be separate and distinct. While I agree that the duty to defend arises necessarily in circumstances where coverage is provided for by the insurance policy, here there is sufficient commonality in the underlying facts that the claims cannot be said to be separate and distinct. The earlier consent judgment arose from a Third Party proceeding wherein the plaintiff in the earlier action had no involvement. Similarly, that is the situation in the present matter and the relief sought amounts to the same as in the earlier proceeding. Of significance

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here is that the cause of action is premised in both cases, at least in large part, by Guardian's claim that the policy is not enforceable due to a lack of good faith by RCEC based upon a failure to disclose knowledge it had of sexual activities of James Hickey at the relevant time. In the first proceeding, not only did Guardian consent to a judgment that required it to defend a plaintiff's claim based upon its inability to prove its defence of a lack of good faith as described above, it also admitted certain aspects of coverage to RCEC and its employees, notwithstanding it had claimed there were also certain restrictions or limitations in the policy. Ultimately, Guardian consented to a judgment that required it to indemnify RCEC as regards liability for the assaults allegedly committed by James Hickey on the first plaintiff during the period of 1982 to October 1985 and, further, it agreed it was required to defend RCEC and the other defendants in that cause of action. The substance of both causes of action is the same in these circumstances.

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[53] In my view, what is being claimed in the present Third Party proceeding before me is subject matter that amounts to a cause of action that is one that cannot be said to be separate or distinct from that in the earlier action. To suggest otherwise in such circumstances would in effect restrict the application of the *res judicata* doctrine inappropriately, especially considering the purpose and object of that doctrine.

[54] Dealing with the fourth prerequisite for cause of action estoppel, I find that the inclusion in the present Defence of other grounds upon which to deny coverage does not assist Guardian here. It is claimed, for instance, that sexual assault is not within the coverage provided by the policy in question. To permit Guardian to rely on this at this stage would, in my view, amount to ignoring the accepted responsibility of litigants to put their best foot forward in dealing with an issue or claims so as to avoid multiplicity or fragmentation of proceedings (see **Danyluk v. Ainsworth Technologies Inc.** at para. 18). This has also been referred to by the Supreme Court of Canada and in the case of **Doering v. Grandview (Town)** where the following conclusion was stated:

> … a judgment between the same parties is final and conclusive, not only as to the matters dealt with, but also as to questions which the parties had an opportunity of raising. … (Fenerty v. City of Halifax (1920), 50 D.L.R. 435)

[55] All of the alleged defences put forward by Guardian in the present matter were or could have been argued in the earlier claim with the exercise of reasonable due diligence. For whatever reason, these other defences were not argued previously and to permit same here would be to ignore the law as explained above.

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[56] Therefore, having reviewed the pleadings as well as everything placed before me, I conclude that RCEC has established that cause of action estoppel in these circumstances has been made out.

[57] It is now for me to consider the second part of the test for the application of *res judicata* doctrine that being a determination as to whether "special circumstances" exist that would make it unjust to apply that doctrine. However, before doing so, notwithstanding I have found that the prerequisites for cause of action estoppel have been made out here, I will go on to consider a second form of *res judicata*, that being issue estoppel. I will deal with this somewhat more briefly due to my finding that cause of action estoppel has been established. As will be seen, the rather unique circumstances in this case permit a finding that both forms of *res judicata* have been established.

B. ***Issue Estoppel***

[58] The Supreme Court of Canada has set out the requirements for issue estoppel in **Angle v. M.N.R.**, [1975] 2 S.C.R. 248, as follows:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

(See also: **Quinlan v. Newfoundland (Minister of Natural Resources)**)

[59] The distinction to be made as between cause of action estoppel and issue estoppel was generally referred to in my earlier reference to the **Quinlan** case and the comments of Green, J.A.. Acknowledgement of a distinction was also given in the **Angle** case by Dickson, J. where at page 254, quoting from the High Court of Australia's decision in **Hoysted v. Federal Commissioner of Taxation**, [1925] 37 C.L.R. 290, A.C. 155, at page 561, he stated:

> I fully recognize the distinction between the doctrine of *res judicata* where another action is brought for the same cause of action as has been the subject of previous adjudication, and the doctrine of estoppel where, the cause of action being different, some point or issue of fact has already been decided (I may call it "issue-estoppel").

[60] Issue estoppel will apply notwithstanding that the two proceedings involved different causes of action. Where the different causes of action involve issues of fact or law which were an essential or fundamental step in the logic of the prior decision, issue estoppel will arise. (See **R. v. Duhamel** (1984), 57 A.R. 204 (S.C.C.).)

[61] Above I have found that the cause of action in the earlier proceeding as between the parties, namely the Third Party proceedings leading up to the consent judgment of September 21, 1992, to be the same as in the present Third Party proceeding before me. That cause of action was the enforceability of the insurance contract. For issue estoppel, as referred to above, I must find that the same question was decided in the earlier proceeding. Obviously, I must also find that the prior judicial decision was final and that the parties are the same.

[62] For reasons similar to those referred to in my earlier analysis of cause of action estoppel, I am satisfied that the same questions raised in this proceeding were, or should have been, dealt with in the earlier proceeding. What I have stated earlier as to additional grounds in the defence related to non-good faith matters applies to the application of issue estoppel in my view. In fact, the defence filed in

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the earlier proceeding may well have accepted that the policy covered RCEC and its employees for the sexual abuse alleged as has been submitted by counsel for RCEC before me.

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[63] It is difficult to distinguish the prior and present Third Party claims in a consideration of cause of action estoppel and issue estoppel. Again, while there was a different plaintiff in the earlier action and the consent judgment referred only to that action, this does not detract from the fact that the same question or issue was really being dealt with in the circumstances of this case and the same parties were involved in that third party action. That issue most significantly related to what, in effect, is a lack of good faith defence by Guardian. The parties included RCEC and Guardian. The fact that Alphonsus Penney is not named in the present matter is of no consequence in my opinion based upon the ultimate effect of the earlier proceeding and the present matter. As a result, I find that the parties must be found to be the same in both matters.

[64] Guardian, as regards the existence of issue estoppel, puts emphasis in its brief and argument that in this case the consent judgment of September 21, 1992 was not in fact a "judicial decision". Guardian contends that issue estoppel cannot be made out where there has been no final "judicial" adjudication, meaning one where there has been no decision made on the merits of the claim put forward. Cited as authority for this are the cases of **Lawyers' Professional Indemnity Company v. Geto Investments Ltd.** (2001), 54 O.R. (3d) 795 (Sup. Ct. J.); **Ernst v. National Trust Co.**, [2003] O.J. No. 4181, CarswellOnt 4060 (Sup. Ct. J.); **Catalyst Fund General Partner I Inc. v. Hollinger Inc.**, [2006] O.J. No. 2818, 20 B.L.R. (4th) 249 (Sup. Ct. J.); **Goodman & Company Investment Counsel Ltd. v. KBSH Capital Management Inc.**, [2007] O.J. No. 3916, CarswellOnt 6551, (Sup. Ct. J.); and **Lee v. Lee**, 2010 ONSC 4524, 91 R.F.L. (6th) 385.

[65] In the **Lawyers' Professional Indemnity Company** case, Nordheimer, J. held, referring to **Reddy v. Oshawa Flying Club** (1992), 11 C.P.C. (3d) 154 (Ont. Gen. Div.), that the case law was not clear that a consent order which ends a cause of action has the same effect as a judgment issued by a court after a trial or hearing. He did go on, however, to say that where the consent order has an "adjudicative aspect to it" then *res judicata* may apply. The reasonableness of the

view taken by Nordheimer, J. that issue estoppel requires adjudication on the merits has been questioned.[3]

[66] Even if I were to accept the reasoning in the line of cases referred to by Guardian as set out above, it is of importance to note that in most of those cases the court was dealing with a consent order to dismiss the proceeding or an application to dismiss after settlement had been reached between the parties in the earlier proceeding. In the present case, there is actually a consent judgment made binding Guardian to act in accordance with the order made. There are positive obligations created for Guardian as a result of that consent judgment. Even if I were to accept what Nordheimer, J. held as regards the effect of a consent judgment, I would find here that the consent judgment of September 21, 1992 in these circumstances had "an adjudicative aspect" to it.

[67] There really is no difference between the present situation and that in **Staff Builders International Inc. v. Cohen**, [1983] O.J. 401 (S.C. (Ct. J.)), where after a consent judgment was entered into for $275,000 in favour of Staff Builders, such was found to ground the application of *res judicata* (see also the circumstances in **Maiocco v. Lefneski**, [1995] O.J. 4014 (Ct. J. (Gen. Div.)).

[68] Therefore, had cause of action estoppel not been established in this particular case by RCEC, I would still have concluded that the requirements of issue estoppel have been established. In the circumstances in this case, both types of estoppel are established based upon my finding that the Third Party claims in the earlier and present claims are the material causes to consider and based upon the claim and issues in question. There is sufficient commonality between the question to be decided and the cause of action it is part of that disposing of the question in effect disposes of the cause of action.

[3] See *The Doctrine of Res Judicata in Canada* at page 358.

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C. ***Special Circumstances***

[69] Notwithstanding that the requirements for estoppel grounding the application of the doctrine of *res judicata* have been established, I must now go on to a second stage, that is to determine whether it would be unjust to apply that doctrine. Such a consideration requires a determination as to whether exceptional or special circumstances exist so as to cause it to be contrary to the interests of justice that *res judicata* apply. Such applies as regards cause of action estoppel or issue estoppel, whichever is proven.

[70] Here the exceptional or special circumstances relied upon by Guardian are based specifically on what it submits is new evidence obtained after the 1992 consent judgment. It seems clear that in order for new evidence to justify the non-application of *res judicata*, that new evidence must be decisive (see for instance **Cobb v. Holding Lumber Co.** (1977), 79 D.L.R. (3d) 322 (B.C.S.C.) at page 334). The new evidence referred to directly goes to the defence of lack of good faith on the part of RCEC and their failure to disclose to Guardian its awareness of the sexual abuse by James Hickey as outlined previously. Such evidence, Guardian argues, was not available at the time of the consent judgment notwithstanding the reasonable and diligent investigation conducted by its legal counsel, Mr. Adams, at the time. Based upon the evidence available at the time, including the discovery evidence of Archbishop Penney, Mr. Adams had determined that no reliable evidence existed to support the defence that had been put forward by Guardian. This was so with a full appreciation of the evidence of Father Lewis that it had. However, it was during its carriage of its defence on behalf of RCEC in the earlier cause of action, as well as in its defence of other claims it undertook representation on for RCEC, that additional evidence came to light. Specifically, reference is made to the affidavit evidence of T.C., the discovery of Randall Barnes on August 31, 1993 as well as the discovery evidence of Father Ronald MacIntyre on February 17, 1997.

[71] I must agree with counsel for RCEC that the affidavit evidence presented from T.C. would not be, strictly speaking, new evidence of the type required. Similarly, this is so for the evidence of Father MacIntyre as I find that this evidence was reasonably discoverable prior to the time of the consent judgment. While not

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named, it appears that Father MacIntyre was the priest the Winter Commission was referring to when it made reference in its report to a second complaint to a priest as earlier set out. I am satisfied here that the evidence of T.C. as well as that of Father MacIntyre existed prior to the consent judgment but, for reasons unknown to me and unexplained by Guardian, were not followed up on by Guardian. I am satisfied that the name of T.C. could reasonably have been determined through the discovery process of Father Lewis or even through discovery of named police officers or agencies that Father Lewis referred to in his discovery proceeding. While it is uncertain why Father MacIntyre was not discovered prior to the consent judgment, nor is that explained, I conclude that with further investigation and diligence he would have been able to be identified.

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[72] What I do find was unknown by Guardian for certain at the time of the consent judgment was the information provided by Randall Barnes 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.

[73] In response to this new evidence and its justification to cause a denial of the application of *res judicata*, counsel for RCEC argues that notwithstanding Guardian became aware of the evidence of the disclosure to Archbishop Penney in August 1993 through the discovery of Mr. Barnes, Guardian maintained or took on the defence of RCEC subsequently on all 14 claims previously referred to. At least one or more of these claims were commenced after the evidence of Mr. Barnes became known. It is submitted by counsel for RCEC that this, of itself, should cause me to conclude that it would not be unjust to apply the *res judicata* doctrine in these circumstances.

[74] In response, Guardian argues that the investigation and discoveries conducted by Mr. Adams at the time of the earlier matter were both reasonable and diligent. At that time, Mr. Adams concluded that there was no credible, probative or admissible evidence to establish RCEC had knowledge of the sexual misconduct of James Hickey at the relevant times. It was subsequently, in the conduct of its defence on behalf of RCEC to the claims that had been made, that new and credible evidence came to light which Guardian claims clearly establishes prior knowledge of individuals in the hierarchy of RCEC as regards James Hickey's sexual misconduct, specifically on the part of Archbishop Penney. As such, counsel for Guardian submits that Guardian should be able now to have this issue of non-disclosure and material misrepresentation adjudicated notwithstanding the earlier consent judgment.

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[75] In considering this matter, I have borne in mind that there are two main policy concerns at the heart of the application of *res judicata*. One is finality so as to uphold the validity of a judgment and the public interest to have litigation finally determined and ended. Such, however, must be weighed against fairness to the parties to have access to adjudication by a court of matters on the full merits. The second stage of the test for the application of *res judicata* goes clearly to the policy concern of fairness. In fact, in **Danyluk**, Binnie, J. referred to the aspect of potential injustice as "a final and most important factor".

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

[77] A balancing of these two policy concerns has been discussed by the Supreme Court of Canada. In **Toronto (City) v. C.U.P.E., Local 79**, [2003] 3 S.C.R. 77 at paragraph 52, Arbour, J. stated:

> 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: (1) when 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. This was stated unequivocally by this Court in Danyluk, at para. 80.

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[78] In the context of a case where cause of action estoppel was made out, Ritchie, J. for the majority in **Doering v. Grandview (Town)** stated:

… in my view the circumstances here are to be considered in the light of the principles established in Phosphate Sewage Co. v. Molleson [(1879), 4 App. Cas. 801.], where Lord Cairns said, at pp. 814-5:

> 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. Now I do not stop to consider whether the fact here, if it had come under the description which is represented by the words res noviter veniens in notitiam, would have been sufficient to have changed the whole aspect of the case. I very much doubt it. It appears to me to be nothing more than an additional ingredient which alone would not have been sufficient to give a right to relief which otherwise the parties were not entitled to.

This passage was adopted by the Supreme Court of Nova Scotia in Fenerty v. The City of Halifax [(1920), 50 D.L.R. 435.], where it was said at pp. 437-8:

> The doctrine of res judicata is founded on public policy so that there may be an end of litigation, and also to prevent the hardship to the individual of being twice vexed for the same cause. The rule which I deduce from the authorities is that a judgment between the same parties is final and conclusive, not only as to the matters dealt with, but also as to questions which the parties

> had an opportunity of raising. It is clear that the plaintiff must go forward in the first suit with his evidence; he will not be permitted in the event of failure to proceed with a second suit on the ground that he has additional evidence. In order to be at liberty to proceed with a second suit he must be prepared to say: "I will shew you 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."
>
> …
>
> … In my opinion the burden lay upon the respondent to at least allege that the new fact could not have been ascertained by reasonable diligence at the time when the first action was commenced before he could invoke it so as to expose the appellant a second time to litigation arising out of the same conduct.

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[79] As a result, I accept from these cases, as well as others referred to by counsel, that where the result in the earlier proceeding was obtained by fraud or dishonesty, when new evidence comes to light that could not reasonably have been discovered in the earlier proceeding and 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.

[80] Here, considering the full circumstances of this case, I recognize that while Guardian had some knowledge as regards the Winter Commission's reasoning for its conclusion that prior knowledge of James Hickey's sexual misconduct existed within the hierarchy of RCEC, there was some difficulty for Guardian to find out the full evidential basis for that conclusion. I say this bearing in mind specifically the discovery evidence of the three commissioners. While the other two commissioners were not examined for reasons unknown to me, it appears that no notes, transcripts of evidence or even names of witnesses who provided information to the Commission were readily available prior to the consent judgment on September 21, 1992.

[81] Having said that, I also accept that with some further investigation, reasonably undertaken, more evidence of knowledge on the part of RCEC could well have surfaced at the time. I accept the submission of counsel for RCEC 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.

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[82] However, as concluded above, I am satisfied that the evidence of Mr. Barnes, 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.

[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 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 started 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 Mr. Barnes' evidence became known.

[85] Balancing the interests involved, I find that it would not be unjust in these full 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 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 RCEC pursuant to the insurance contract in place.

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[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.

ABUSE OF PROCESS

[87] As a result of my finding that the *res judicata* doctrine should be applied, it is unnecessary for me to fully consider whether or not abuse of process could have been successfully argued in this case. However, I will speak to this doctrine and its application very briefly.

[88] Based upon the cases put before me, abuse of process has been argued successfully to apply in cases involving relitigation where the requirements for cause of action or issue estoppel are not able to be established but where, in the circumstances, it would amount to an abuse of process to allow the relitigation to occur. As was stated by Arbour, J. in **Toronto (City)** at paragraph 38:

> … the doctrine of abuse of process has been extended beyond the strict parameters of *res judicata* while borrowing much of its rationales and some of its constraints.

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[89] Arbour, J. went on in the **Toronto (City)** case to refer to abuse of process as being “more of an adjunct doctrine” to *res judicata* than an independent doctrine. Abuse of process will be applied to bar relitigation where such would impact the integrity of the decision-making process in the earlier proceeding. While the same question test for issue estoppel applies to the abuse of process by relitigation, the same parties test does not. It is also clear that relitigation may be necessary to enhance the credibility and effectiveness of judicial decision-making where special circumstances exist.

[90] Here, estoppel has been made out such that *res judicata* will be applied. I need not go further to assess the application of abuse of process by relitigation in these circumstances and based upon my findings as set out above.

CONCLUSION

[91] Based upon what I have concluded above, I order that the application of RCEC pursuant to Rule 17.A is allowed such that the Amended Defence of the Third Party will be struck on the grounds of *res judicata*. I also declare that Guardian is required to defend RCEC in the present claim and to indemnify it in accordance with the policy in place.

[92] While both parties have referred to cases on costs which indicate that costs, based on the result here, be on solicitor and client basis, I have considered in these circumstances ordering a lesser form of costs to RCEC. However, having reviewed the decision of our Court of Appeal in **Lombard General Insurance Co. of Canada v. Crosbie Industrial Services Ltd.** (2006), 260 Nfld. & P.E.I.R. 96, it is clear that I am bound to order that RCEC is entitled to full indemnity of its costs related to enforcing Guardian’s duty to defend it based upon what has been recognized as the unique nature of an insurance contract. Here, Guardian does not rely on any “unusual circumstances” which could obviate the rule regarding full indemnity applying. Therefore, RCEC is entitled to an order for solicitor and client costs pertaining to its defence of the Plaintiff’s claim up to the time Guardian begins to defend on its behalf as well as the Third Party proceedings, including the present application.

RICHARD D. LEBLANC
Justice

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