to effectively and fairly compensate all victims of the clerics from the Diocese for over a period of thirty years, I must concur with Aviva's position that the payment of these claims were voluntary and that it has not been established that they were claims for which the Diocese was obligated to pay due to liability imposed upon it by law at the time they were claimed or made. I come to this conclusion for a number of reasons and with a number of factors in mind which are enumerated, in no particular order of importance, as follows:

1. The claims were sought out by the Diocese by open and public invitation in the churches of the Diocese and in the press;

2. At the time of establishing the process, there were 3 to 4 identified claimants who professed an intention to pursue claims and by the end of the process there were approximately 114 purported victims and claimants;

3. Potential claimants were assured of the resolution and payment of claims through a confidential process;

4. The process was to be non-adversarial and indeed appears also to have been essentially non-confrontational which accords with the purpose of furthering the objectives of reconciliation and forgiveness;

5. Mr. Bastarache confirmed that one of the important premises of the process was that victims were given the benefit of the doubt in their stories unless there was something found to contradict it such as if a priest was not even ministering in the Diocese at the time of the alleged assault;

6. Neither a legal standard of proof nor any defined standard of proof was identified or applied to assess the Diocese's legal obligation to pay any individual victim's claim;

7. The claimants being given the benefit of the doubt with respect to the validity of their claims appears to have been the extent of the standard of proof applied in evaluating the validity of their claims and the Diocese's legal obligation to pay compensation;

8. Legal defences under the *Limitations of Actions Act* were not assessed and not even considered for their applicability despite the fact that time limits within which the claimants had to commence legal proceedings had presumptively expired by 2010 with their actions being barred at law, subject to potential discoverability issues. Mr. Bastarache confirmed that most of the victims told him that the single most important reason why they came forward was the confidentiality of the process that was being offered. He also confirmed that most of the victims were abused decades before the process began and most of them had been living with the trauma. But for this process many of them told him they would not have gone through the litigation process.

   Contrary to the submission of counsel for the Diocese there is no presumption in law at the time that limitation of actions defences did not apply to sexual assault cases until the victim sought therapy and with the type of evidence just referred to as coming from the victims there would have potentially been a strong basis for opposing a discoverability argument from a victim on the limitation of actions defence. Further, although section 14.1 of the *Limitations of Actions Act*, S.N.B. 2010, c. L-8.5 that was proclaimed on May 1, 2010 now provides that there is no limitation period in respect of a claim for damages for trespass to the person, assault or battery if the act complained of is of a sexual nature, section 27.2 provides that nothing in the Act permits a claim to be brought if the former limitation period expired before the Act came into force;

9. Liability and vicarious liability was presumed with no apparent *Bayzley* analysis conducted to determine whether or not each alleged instance of abuse occurred in circumstances where either direct liability or vicarious liability on the part of the Diocese could or would likely be established.

(126) I make these observations, not to be critical of the process, Monsignor Vienneau, or Mr. Bastarache. The process appears to have been well designed to fairly achieve the objectives set for it. However, the process was not established to determine whether the Diocese was obligated to pay compensation to the victims by reason of liability imposed upon it by law or to settle only claims where there was evidence advanced to establish a reasonable likelihood of such an eventuality. In this instance, the Diocese was admitting liability and offering compensation to alleged victims without subjecting the claims to any reasonable legal analysis or rigour to determine these essential questions. To be fair, there was of course no need to subject the claims to such an analysis for the purposes of the conciliation process as the premise of the endeavour was that the Diocese was admitting legal liability for its clerics' alleged abuses. Mr. Bastarache's role as conciliator also constrained him from subjecting the claims to a rigorous legal liability analysis in order to maintain his independence from the Diocese in the process and the perception of his independence in the eyes of the victims.

(127) Again, the issue is not whether the process was a laudable endeavour on the part of the Diocese in its effort to validly attempt to reconcile with and seek forgiveness from the victims of its clerics while at the same time providing the victims with fair compensation, as much as that can be achieved, for their injuries. The issue is whether it has been established that the Diocese was obligated to pay the claims by reason of liability imposed upon it by law. For the reasons just stated, that has not been established, as in my view, the claims paid were voluntary payments made by the Diocese following its solicitation of potential claimants in its efforts to seek forgiveness, reconciliation and to offer reasonable compensatory redress to those who claimed to have been victimized by priests of the Diocese and not pursuant to a determination or even an

assessment in each case of whether an obligation at law on the part of the Diocese to pay the individual claims could or would likely be established.

(128) In such circumstances, the Diocese has not established that it is entitled to indemnification for the voluntary payments it made to victims within the Conciliation Process. Of course at this stage no evidence has been presented with respect to the voluntary payments issues, if any, in relation to the settlements reached with plaintiffs outside of the Conciliation Process and in the course of litigation commenced against the Diocese or with respect to any pending claims. Those issues, if any, will be addressed in the continuation of the trial.

Diocese's Failure to Disclose Material Risks

(129) Aviva submits that the Diocese had an obligation to disclose to its insurer every material fact within its knowledge and this obligation applies both at the time the contract was made as well as when any changes arose during the contract period. It further submits that the Diocese's failure to disclose material facts (the multiple instances of sexual abuse against children by Father Noel, its decisions not to prevent such conduct and to transfer him from parish to parish effectively facilitating the continuation of the abuse) renders the policy null and void. Aviva also invokes the provisions of conditions 1 and 4 of section 127 of the *Insurance Act.*

(130) The wording of conditions 1 and 4, confirms that the disclosure of material facts is important to enable the insurer to judge or assess the risk being undertaken or to continue to be undertaken. It is common ground that a risk is "material" if a reasonable insurer would have declined to issue the policy or charged a higher premium if the fact in question had been disclosed – *Henwood v. Prudential Insurance Co. of America*, [1967] S.C.R. 720 (S.C.C.).

(131) The Diocese acknowledges that it was obliged not to misrepresent or fraudulently omit to advise the insurers of all material facts relating to the risk being undertaken and to notify them of any changes material to the risk. There is also no issue that the Diocese,

despite its knowledge, never advised its insurers of any events relating to Father Noel's sexual abuse of boys during the period from the early 1960s to the 1980s, until the year 2008.

(132) The Diocese's position with respect to both the material fact and change material to the risk issues, is that it was not obliged to give its insurers notice of Father Noel committing sexual assaults on young boys because sexual assault claims were not advanced by victims at the time and were generally not recognized or known to be made during the periods in question. In such circumstances it argues that it was not obliged to disclose these facts because such facts (instances of sexual abuse committed by priests or employees) were not "material" until the Supreme Court of Canada decision in *Bazley v. Curry*, [1999] 2 S.C.R. 534 where for the first time, the court held an employer vicariously liable for acts of sexual abuse committed by an employee. The Diocese argues that this decision was a change in the law and that prior to that, the Diocese would have had no obligation to advise an insurer, and an insurer would not expect the Diocese to advise it, that one of its priests was sexually abusing a parishioner as such a fact would not have been "material".

(133) Indeed, in paragraph 1 of its Pre-Trial Brief, the Diocese says: "The fundamental issue in the case turns on the change in the law in 1999, as it relates to the vicarious liability of the plaintiff for the acts of its clergy who committed the abuse, and the obligation of the insurer to respond to claims of vicarious liability under the policies of insurance".

(134) It seems counter-intuitive, if not totally contrary to common sense in this day and age, to consider that instances of sexual abuse of young boys committed by a priest of the Diocese might not constitute material facts from the perspective of an insurer in determining whether to issue or renew a public liability insurance policy or to set premiums to cover the risk insured. Nevertheless, the issue must be analyzed in light of the evidence presented, the context of the times, the applicable law and the insurance principles engaged.

(135) Turning first to the applicable law and insurance principles engaged, the common law duty of disclosure of material facts begins with *Carter v. Boehm* (1766), 97 E.R. 1162 (K.B.), where Lord Mansfield explained the principle as follows:

> Insurance is a contract upon speculation.
>
> The special facts, upon which the contingent chance is to be computed, lie most commonly in the knowledge of the insured only: the under-writer trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist, and to induce him to estimate the risque, as if it did not exist.
>
> The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention; yet still the under-writer is deceived, and the policy is void; because the risque run is really different from the risque understood and intended to be run, at the time of agreement . . .
>
> . . .
>
> The reason for the rule which obliges parties to disclose, is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract; which one privately knows, and the other is ignorant of, and has no reason to suspect.
>
> The question therefore must always be whether there was, under all the circumstances at the time the policy was under-written, a fair representation; or a concealment; fraudulent if designed; or, though not designed, varying materially the object of the policy, and changing the risque understood to be run.

(136) In her text *General Principles of Canadian Insurance Law*, 3rd edition, Professor Billingsley notes at pages 85 to 87 that the Canadian common law definition of a material fact was set down by the Judicial Committee of the Privy Council in *Manual Life Ins. Co., N.Y. v. Ontario Metal Products Co.*, [1925] 1 D.L.R. 583 (J.C.P.C.) and rejected the suggestion that a material fact should be determined by what a reasonable insured would have considered material, or by what the actual insured or a prudent insured would have considered material. The court decided that a material fact is one which would have

adversely affected a **reasonable insurer's** decision to underwrite the risk at the stated premium. At page 87, the author further explained:

> This "reasonable insurer" test, more recently described by the House of Lords as the "decisive influence test", attempts to provide an objective standard for a court to apply in determining whether an undisclosed fact is material or relevant to the formation of the insurance contract. The objectivity is provided by two facts. First, the test requires a court to view the non-disclosure through the eyes of a reasonable or prudent insurer rather than through the eyes of the actual insurer or the actual insured involved in the case. Second, the test provides clear criteria for determining whether the non-disclosure was critical to the formation of the contract. The undisclosed information must be such that, if disclosed, coverage could have reasonably been refused or a higher premium could have reasonably been charged. Undisclosed information is not material if it would have: (1) lowered the premium; (2) had no effect on the premium and the decision to provide coverage; or (3) merely delayed the formation of the contract. The criteria of an increased premium or a denial of coverage also make clear that the time for assessing the material of an undisclosed fact is at the time of the formation of the contract. The concept of materiality is directed solely at the relevance of the undisclosed information to the formation of the contract. Accordingly, at common law, the relationship between the undisclosed information and the cause of the loss claimed under the contract is not important. An undisclosed fact may be material even if it has no bearing on the loss actually suffered by the insured, provided that it impacts on the reasonable insurer's decision to enter into the contract for the specified premium.

(137) On the issue of the burden of proof in relation to an insured's breach of its obligation to disclose material facts, Professor Billingsley opines that as "it is generally presumed that the insured has complied with its disclosure obligation unless proven otherwise . . . the insurer has the burden of proving, on a balance of probabilities, that the insured breached the duty of disclosure" (page 109) and since the test for materiality is an objective one "the best evidence for an insurer to lead in order to establish materiality is that of an objective source who can testify as to standard insurance industry practices" (page 114). She also notes, however, that Canadian courts may accept the uncontradicted subjective evidence of the insurer itself as being reflective of reasonable insurance practice, referring to the Judicial Committee of the Privy Council's decision in *Ontario Metal Products* and the Supreme Court of Canada decision in *Henwood*. In the latter case, the majority decision held at page 727:

> If the matters here concealed had been truly disclosed they would undoubtedly have influenced the respondent company in stipulating for a higher premium and as there is no evidence to suggest that this was unreasonable or that other insurance companies would have followed a different course, I am satisfied that, on the evidence before us, it has been shown affirmatively that untrue answers respecting the medical advisers consulted by the insured were material to the risk. This is enough to void the policy.

(138) Turning now to the application of these principles to the facts of this case. Aviva alleges that the Diocese failed to disclose material facts to its insurers and that this non-disclosure should result in the policies being treated as void. Further, there is no issue that the Diocese did not disclose its knowledge of the several incidents of sexual contact and/or abuse committed by Father Noel towards his young victims. As already indicated, I find that the Diocese, through the Bishops, was well aware of Father Noel's inappropriate sexual conduct with young boys in the Diocese albeit perhaps not the full extent of it.

(139) In support of its position on materiality, for which it bears the burden of proof on the balance of probabilities, Aviva has led no evidence on the issue through:

(a) Any witness or witnesses with any knowledge of the underwriting policies of the insurers involved during the relevant time periods (late 1950's – early 1980's);

(b) Any records, documents, underwriting policies or manuals of the insurers for those same periods as they were apparently all destroyed sometime prior to Aviva ever becoming aware of any potential claims in this action;

(c) Any applications or copies of applications in relation to the policies issued or the renewals thereof;

(d) Any witness or representative of Aviva or its predecessors with actual knowledge who could say that either of the insurers would have considered the undisclosed information as material facts; and

(e) Of an objective source, an expert, in the field of underwriting who could testify as to the standard insurance industry practices at the relevant periods of time and as to whether or not a reasonable insurer would have considered the non-disclosed information as material facts with respect to its decisions relating to issuing the policy, defining the scope of coverage or setting a higher premium to be charged.

(140) In contrast, and with regards to this last point, the Diocese presented Mr. Frank Szirt who was qualified as an expert in the field of underwriting. Mr. Szirt has been employed in the insurance industry since his graduation from university in 1965. He originally worked as an underwriter with a major insurer from 1965 to 1975, when he took on the role of a reinsurance broker for a period of approximately twelve months before joining Crum & Forster of Canada Ltd., where he worked until late 1986. During his time at Crum & Foster he occupied various roles including the position of Casualty Manager for Canada, Excess & Special Risk Manager for Canada, Underwriting Manager for Canada, Vice President of Underwriting, Director, and Chief Agent for United States Fire Insurance Company.

(141) From 1986 to 1988, Mr. Szirt was the Vice President of Underwriting for the Simcoe Erie Group and from 1988 to the present he has been a consultant in the insurance industry. Within that time, he has also served as Senior Vice President of Operations and then President and Chief Executive Officer of Old Republic Insurance Company of Canada from 1993 to 1998. In addition he has served as a member of the Liability Committee of the Insurance Bureau of Canada and as an instructor in various programs offered within the industry. He is a member of the Chartered Insurance Professionals Association and a former member of the Chartered Insurance Broker (CIB) Examination Committee, Insurance Brokers Association of Canada.

(142) Mr. Szirt was qualified and authorized to provide opinion evidence with respect to the following questions and areas of expertise:

a) What underwriters consider material to underwriting risk;

b) Whether in the period from 1950 to 1985, insurers considered sexual abuse as material to the risk;

c) Whether during that same period, an insurer would have considered vicarious liability for sexual abuse as material to the risk; and

d) Whether again during that same period, based upon the practices and policies in the industry of the day, a general liability insurer at the time would have considered the Diocese as having a duty to disclose knowledge of sexual abuse to its insurers.

(143) Mr. Szirt opined that:

(a) A material fact is one which, if known, would affect the mind of the reasonably prudent and experienced underwriter in deciding:

(i) To accept the risk (the liability of the Diocese);
(ii) The premium to be charged;
(iii) The policy language (coverage and exclusions).

(b) Sexual abuse was virtually unheard of until the mid-1980s. Incidents of abuse were not in the public domain. Employers, including non-profit charitable organizations such as a church were not vicariously liable for sexual abuse committed by an employee. As a result:

(i) An underwriter would not ask questions of an employer about the risk of sexual abuse at the hands of an employee;
(ii) If an insured employer was aware that an employee committed sexual abuse on the premises of the job, that is not something an underwriter would expect to be informed about;
(iii) An insured employer would not be expected to understand that they were to disclose incidents of sexual abuse to an underwriter.

(c) In the mid-1980s questions were being asked about sexual abuse;

(i) The Excess Liability Underwriting Manual in 1986 rated churches as a low hazard (4/10);
(ii) Best's Underwriting Manual in 1987 was the first that cautioned the underwriter may wish to exclude coverage for sexual and physical abuse.

(d) Vicarious liability was not imposed on employers for acts of sexual abuse committed by employees until 1999 (*Bazley v. Curry*):

(i) Before *Bazley* an underwriter would not consider vicarious liability for sexual abuse as part of the risk (the liability of the Diocese);
(ii) After *Bazley*, an underwriter would consider vicarious liability for sexual abuse as part of the risk and would conduct an inquiry, which may include questions about past incidents.

(e) From an insurer's perspective at the time, the Diocese would not have a duty to disclose knowledge of sexual abuse to its insurer from 1950 to 1985:

(i) The insured is required to disclose material facts;
(ii) The Diocese would not be expected to know what was material to the underwriting of the general liability policy.

(144) Diane Gaulin, a Senior Casualty Specialist with Aviva, was called to testify on behalf of the defendant. Ms. Gaulin began her career with Commercial Union Assurance as an underwriter in 1974. Over the years she held various underwriting positions including an underwriter supervisor position at Commercial Union Assurance up to 1994 when she joined another large insurer in 2001 as an underwriter. She began her position with Aviva in 2001 where she has been employed since and has moved up to Senior Casualty Specialist. One of her duties is to advise underwriters when they are defining risks to be covered.

(145) Although very experienced in the field, Ms. Gaulin was not offered as an expert for the purpose of providing opinion evidence in the underwriting practices in the industry at the time. Through no fault of her own, she was also unable to advise of the specific underwriting practices in the industry or at Aviva's predecessor companies during the period from the 1950s to the 1980s. She confirmed Aviva's inability to locate its specific underwriting manuals and policies during the time period.

(146) In her testimony, Ms. Gaulin did agree, however, that underwriters did not ask insureds about abuse in the 1950s because there were no such claims and they were not even considered from an insurer's perspective. She also agreed that to her knowledge people generally did not make claims for sexual abuse until the 1990s and that

underwriters learned of sexual abuse claims in the 1990s. She also confirmed that Aviva only developed exclusionary language and classifications in its policies to deal with claims and risks relating to sexual abuse beginning in the year 2000.

(147) In short, the evidence presented in this case, confirms that sexual abuse claims against the Diocese for the actions of its priests between the 1950s and 1980s were not foreseen by either the Diocese or its insurers or that the Diocese might be liable for the unauthorized acts of sexual abuse committed by its priests, either through direct liability or vicarious liability. The uncontradicted evidence of Mr. Szirt was that in such circumstances, the issue of sexual abuse of clerics would not have been "material" to the risk and therefore disclosure of any such conduct would not have been either expected or required by an insurer.

(148) Aviva bears the burden of proving materiality and a breach of the Diocese's duty to disclose its knowledge of the actions of Father Noel and his sexual abuse of young boys from the Diocese. Aviva has presented no expert opinion on the issue of materiality from the perspective of an objective source. Nor has it been able to lead evidence with respect to Aviva's actual underwriting practices at the relevant times other than to confirm its position that sexual abuse was not a covered peril as it is an intentional or criminal act for which coverage would have been excluded under the terms of the policy. That position is in fact supportive of the proposition that it would likely not have been material to Aviva's predecessors at the relevant times. In my view, Aviva has not met the burden of establishing that the Diocese failed to disclose material facts relating to the risk that would warrant concluding that the policies and coverage are thereby voided for these claims.

Damages

(149) This was a bifurcated action where the issue of coverage and damages sought in relation to the claims advanced by the Diocese as incurred through the Conciliation Process were addressed initially. The Diocese was unsuccessful in establishing coverage for the compensatory damages it paid to the victims through the Conciliation Process and

the expenses and costs related to it. The Diocese's claim for damages with respect to that aspect of the action must fail and is therefore dismissed. The portion of the Diocese's claims related to its expenses incurred in defending, resolving and/or paying judgments in relation to claims brought against it outside of the Conciliation Process are yet to be determined.

Limits of Coverage

(150) In this bifurcated process the parties also sought a determination of the limits of coverage provided to the Diocese under the various policies over the years and whether the stated limits constituted the limits payable by the insurer per occurrence or in the aggregate. Having reviewed the policy documents, the evidence presented and the submissions of counsel I am not satisfied that I am in a position to do so at this stage. I wish to hear further submissions on the issue from counsel with respect to the actual wording of the policies, the stated amounts of the limits, any specific interpretative principles that ought to be considered as well as any relevant jurisprudence on the issue before coming to a final decision in regards to it. As other issues remain to be determined in this action in subsequent proceedings I will hear counsel on the limits issues at that same time.

Punitive Damages

(151) The Diocese is also seeking punitive damages from Aviva for wrongful denial of insurance coverage. It submits that punitive damages are awarded against insurers who wrongfully deny coverage and they are awarded to help preserve the respect for the *uberrimae fidei* nature of insurance contracts and obligations it imposes on insurers. They are awarded in exceptional cases for malicious, oppressive and high-handed misconduct that offends the court's sense of decency. The objectives are punishment, deterrence and denunciation.

(152) Considering the particular circumstances with which Aviva was presented in this case, I have not been satisfied that it acted either maliciously or in an oppressive or high-

handed manner. In my view, Aviva adopted a *bona fide* and legitimate position in coming to its decision to deny coverage, albeit one that may not have totally carried the day. Claims for sexual assault, being occasioned by intentionally inflicted injury, are presumptively not covered by the terms of the policy by virtue of the exclusion clause. There certainly would not have been coverage for Father Noel.

(153) Further, it was reasonable in the circumstances for Aviva to defend the claim even though ultimately it may not have succeeded in all aspects and on all points. This case raised an extremely unique set of circumstances and legal issues, many of which I believe have never been previously addressed by the courts. The determination of the payments made to victims through a mediation or conciliation process has not been addressed previously at least to my knowledge. Neither has the determination of the application of the intentional acts exclusion to a similar set of circumstances.

(154) Aviva's position with respect to the issue of the Diocese's purported intention to cause injury in light of the knowledge it would have had of Father's Noel's proclivities was also not doomed to certain failure in light of the facts of the case and the jurisprudence relied upon by Aviva in support of its position. There is no doubt that Aviva took a hard line and pulled no punches in calling out the Bishops' conduct as being intentional and even criminal. Although I have not ultimately concurred with those assertions, I cannot conclude that Aviva was unjustified in advancing those positions or that such assertions were being scandalously made in light of the troubling evidence of the actions or inactions of the Bishops of the time in failing to adequately address and deal with the problem of Father Noel.

(155) The suggestion that Aviva should be estopped from denying coverage, or be found to have acted in bad faith in denying coverage, on the basis that it contributed with two other insurers and the Diocese in 2003, to resolve a claim brought against the Diocese and Father Picot, is not warranted. Although no one spoke to the issue with first-hand knowledge I am prepared to give Ms. Gaulin and Aviva the benefit of the doubt and conclude that it was likely a decision made more for economic reasons than as an acknowledgement of coverage for the event. If there had been a strong belief in coverage

being available by virtue of any one insurer's policy, I suspect that the two other participating insurers, as well as the Diocese, would have declined to participate in the settlement. I also note that at the time of settlement Aviva would not have been fully apprised of the extent of Father Noel's abusive conduct and more importantly, the Diocese's knowledge of his abusive conduct.

(156) No evidence was presented to suggest that prior to or at the time the case was settled that any of the Diocese's personnel files of Father Noel had been disclosed to it and consequently it would not have had any information provided to it by the Diocese to alert them to his prior abuses or the magnitude of his abuses. It was not until 2008 when Aviva was advised by the Diocese when it was seeking an assurance of coverage that it learned of the several allegations and potential claims it might face as a result of Father Noel's prior abuse. It was only then that Aviva would have become aware of the extent of the abuse, the Diocese's knowledge of the abuse, the potential magnitude of the amount of the claims and the fact that those potential claims or events that had never been previously disclosed by the Diocese.

(157) The claim for punitive damages is denied.

Costs

(158) This case is not completed and there are still issues to deal with in the next phase. Subject to any further order or direction, the issue of costs will be deferred until the completion of the trial on all issues.

STEPHEN J. MCNALLY
Judge of the Court of Queen's Bench of
New Brunswick