John Doe v. Roman Catholic Episcopal Corporation of St. John's, 2024 NLSC 182 (CanLII)

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *John Doe v. Roman Catholic Episcopal Corporation of St. John's*, 2024 NLSC 182
Date: December 20, 2024
Docket: 200901T4501

2009 St. J. No. 4501

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**

- and -

2009 01T 2235

BETWEEN:

JOHN DOE (a "pseudonym")	**PLAINTIFF**
AND:	
JACK DOE (a "pseudonym")	**FIRST DEFENDANT**
AND:	
ROMAN CATHOLIC EPISCOPAL CORPORATION OF ST. JOHN'S	**SECOND DEFENDANT**
AND:	
INSURANCE CORPORATION OF NEWFOUNDLAND	**FIRST THIRD PARTY**
AND:	
GUARDIAN INSURANCE COMPANY OF CANADA	**SECOND THIRD PARTY**

- and -

2010 01 T 2027

BETWEEN:

TODD BOLAND	**PLAINTIFF**
AND: RAYMOND LAHEY	**FIRST DEFENDANT**
AND: ROMAN CATHOLIC EPISCOPAL CORPORATION OF ST. JOHN'S	**SECOND DEFENDANT**
AND: GUARDIAN INSURANCE COMPANY OF CANADA	**THIRD PARTY**

- and -

2014 01G 7895

BETWEEN:

	JOHN DOE – GBS#11	**PLAINTIFF**
AND:	**ROMAN CATHOLIC EPISCOPAL CORPORATION OF ST. JOHN'S**	**DEFENDANT**
AND:	**GUARDIAN INSURANCE COMPANY OF CANADA**	**THIRD PARTY**

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- and -

2014 01G 6795

BETWEEN:

	JOHN DOE – GBS#9	**PLAINTIFF**
AND:	**ROMAN CATHOLIC EPISCOPAL CORPORATION OF ST. JOHN'S**	**DEFENDANT**
AND:	**GUARDIAN INSURANCE COMPANY OF CANADA**	**THIRD PARTY**

Before: Justice Peter N. Browne

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

Dates of Hearing: November 3, 6-9, 2023; December 8, 13, 2023; October 28-29, 2024

Summary:

The Defendant in proceeding 2009 St. J. No. 4501, Roman Catholic Episcopal Corporation of St. John's, issued a third party proceeding against Guardian Insurance Company of Canada seeking indemnity under its Commercial General Liability policy for any damage claims arising from the victims of sexual abuse at the hands of its clergy. Guardian

defended the proceeding claiming material nondisclosure and fraudulent misrepresentation.

The policy period in question was from 1980 to 1985. On the eve of trial, the Roman Catholic Episcopal Corporation of St. John's admitted having knowledge of the abuse and not disclosing this knowledge, either at the time of the original policy or afterwards on subsequent renewals. It alleges it did not consider the information to be a material fact disclosable on an application for insurance.

The Court held that Guardian had established its burden of proving that the non-disclosure of the allegations of sexual abuse constituted a material non-disclosure and a moral hazard that rose to the level of civil fraud, thereby relieving Guardian of any obligation to return the premiums paid by Roman Catholic Episcopal Corporation of St. John's during the policy period.

Appearances:

Chris T.J. Blom and Mark R. Frederick	Appearing on behalf of the Roman Catholic Episcopal Corporation of St. John's
Philip J. Buckingham, KC and Bridget S. Daley	Appearing on behalf of Guardian Insurance

Authorities Cited:

CASES CONSIDERED: *Plaza Fiberglass Manufacturing Ltd. v. Cardinal Insurance Co.* (1994), 1994 CanLII 653 (ON CA), 22 CCLI (2d) 161, 18 O.R. (3d) 663 (C.A.); *Carter v. Boehm* (1766), 97 E.R. 1162 (K.B.); *Mutual Life Insurance Company of New York v. Ontario Metal Products Company Ltd.*, 1923 CanLII 8 (SCC), [1924] S.C.R. 35, aff'd 1924 CanLII 336 (UK JCPC), [1925] 1 D.L.R. 583, [1925] AC 344 (SCC); *Henwood v. Prudential Insurance Co. of America*, 1967 CanLII 17 (SCC), [1967] S.C.R. 720; *Progressive Homes Ltd. v. Lombard General Insurance Co.*, 2010 SCC 33; *Arsenault v. Dominion of Canada General Insurance Co.* (1979), 1979 CanLII 3261 (NB KB), 60 A.P.R. 568, [1979] N.B.J. No. 260 (Q.B.); *Sagl v. Cosburn, Griffiths & Brandham Insurance*

Brokers Ltd., 2009 ONCA 388; *Keats v. Munn's Insurance Ltd.* (1993), 1993 CanLII 8312 (NL SC), 112 Nfld. & P.E.I.R. 106, 1993 CarswellNfld 44 (S.C.(T.D.)); *Moscarelli v. Aetna Life Insurance Co. of Canada* (1995), 1995 CanLII 7076 (ON SC), 24 O.R. (3d) 383, 1995 CarswellOnt 1232 (G.D.), aff'd (1995), 87 OAC 314 (Div. Ct.); *L'Eveque Catholique Romain de Bathurst v. Aviva Insurance Co. of Canada,* 2016 NBQB 174; *Bay Bulls Sea Products Ltd. v. Insurance Corp. of Newfoundland Ltd.*, 2003 NLSCTD 164; *Barrett v. The Ship "Arcadia"* (1977), 1977 CanLII 1728 (BC SC), 76 D.L.R. (3d) 535, [1977] B.C.J. No. 1198 (S.C.); *R. v. Villasenor,* 2022 ONCJ 578; *Dworkin v. Globe Indemnity Co.* (1921), 1921 CanLII 462 (ON SC), 67 D.L.R. 404, 51 OLR 159 (S.C.); *Murphy v. Sun Life Assurance Co. of Canada* (1964), 1964 CanLII 823 (AB CA), 49 D.L.R. (2d) 412, 50 W.W.R. 581 (ABCA); *Nagy v. BCAA Insurance Corporation*, 2020 BCCA 270; *Hansra v. York Fire & Casualty Insurance Co.* (1982), 1982 CanLII 2005 (ON SC), 138 D.L.R. (3d) 293, [1982] O.J. No. 3415 (Co. Ct.); *Tulloch v. Peopleplus Insurance Co.* (2001), 103 A.C.W.S. (3d) 1042, [2001] O.J. No. 752 (Sup. Ct. J.); *Merino v. ING Insurance Company of Canada*, 2007 ONSC 6281; *Feise v. Partkinson* (1812), 4 Taunt 640, 128 E.R. 482; *Venner v. Sun Life Insurance Co.* (1890), 1890 CanLII 48 (SCC), 17 S.C.R. 394; *Clarkson v. Canada Accident Assurance Co.* (1932), 1932 CanLII 97 (ON CA), 3 D.L.R. 188, [1932] O.R. 405 (C.A.); *Walsh v. Unum Provident*, 2013 NSCA 124; *Derry v. Peek* (1889), 14 App. Cas. 337, [1889] UKHL 1; *Brophy v. North American Life Assurance Co.* (1902), 1902 CanLII 9 (SCC), 32 S.C.R. 261; *Intermunicipal Realty & Development Corp. v. Gore Mutual Insurance Co.* (1980), 1980 CanLII 4252 (FC), [1981] 1 F.C. 151; 112 D.L.R. (3d) 432; *Bruno Appliance and Furniture, Inc. v. Hryniak,* 2014 SCC 8; *Paulus v. Fleury*, 2018 ONCA 1072; *Soil Engineers Ltd. v. Anthony Upper*, 2020 ONSC 7495; *Battrum v. MacKenzie Estate*, 2010 BCSC 1285; *Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd.*, 2017 ABCA 378; *Midland Resources Holding Ltd. v. Shtaif*, 2017 ONCA 320; *NEP Canada ULC v. MEC OP LLC*, 2021 ABQB 180; *John Doe v. Bennett* (2000), 2000 CanLII 28766 (NL SC), 190 Nfld. & P.E.I.R. 277, 2000 N.J. No. 203; *John Doe v. Bennett*, 2002 NFCA 47; *John Doe v. Bennett*, 2004 SCC 17; *W.K. v. Pornbacher* (1997), 1997 CanLII 12565 (BC SC), 68 A.C.W.S. (3d) 569, [1997] B.C.J. No. 57 (S.C.); *T. (M.) v. P. (R.)*, 1995 CarswellOnt 1903, [1994] O.J. No. 1046 (Ct. J. (Gen. Div.)); *Rana v. Ramzan*, 2023 ONSC 5792

STATUTES CONSIDERED: *Child Welfare Act*, 1972, S.N. 1972, c. 37

TEXTS CONSIDERED: Craig Brown, *Insurance Law in Canada*, (Toronto: Carswell, 2015); Barbara Billingsley, *General Principles of Canadian Insurance Law*, (Toronto: LexisNexis Canada, 2020); *The Report of the Archdiocesan Commission of Enquiry into the Sexual Abuse of Children by Members of the Clergy*, (St. John's: the Archdiocese of St. John's, 1990); *Report of Royal Commission of Inquiry into the Response of the Newfoundland Criminal Justice System to Complaints* (St. John's: The Commission, 1991)

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REASONS FOR JUDGMENT

BROWNE, J.:

OVERVIEW

[1] The main action in this proceeding involves the consolidation of several actions for sexual abuse against the Defendant, the Roman Catholic Episcopal Corporation of St. John's ("RCEC").

[2] The issue in this matter, however, concerns the narrower aspect of the RCEC's third-party claims against Guardian Insurance Company of Canada ("Guardian") for indemnification under its General Liability Policy ("the Policy") for damages arising out of the main action.

[3] Prior to the outset of the trial, the parties provided the Court with an Agreed Statement of Facts ("Agreed Statement of Facts"). As part of this Agreed Statement of Facts, RCEC admitted it did not disclose its knowledge that certain of its clerics were alleged to have committed acts of sexual abuse prior to obtaining the Policy in October 1980, or when it renewed the Policy each year up to and including 1985.

[4] The parties also led *viva voce* evidence, including expert opinion evidence, concerning what constitutes material nondisclosure, material misrepresentation, moral hazard, utmost good faith, and the general principles of interpretation for contracts of insurance.

[5] For the reasons that follow, I find that Guardian has proven its Defence of material non-disclosure and fraudulent misrepresentation/civil fraud.

THE AGREED STATEMENT OF FACTS

[6] Guardian issued RCEC Policy number 4153395 for the period of October 1, 1980, to October 1, 1981. The Policy was then renewed for subsequent yearly periods up until October 1, 1985. They were issued through Marsh & McLennan Limited ("Marsh"), an insurance broker.

[7] The Policy was occurrence-based and contained provisions that provided Comprehensive General Liability coverage, including Bodily Injury Liability. The Policy limits were $5,000,000 from October 1, 1980, to October 1, 1982; and $10,000,000 from October 1, 1982, to October 1, 1985.

[8] RCEC subsequently received claims on behalf of persons allegedly abused by its priest or priests, from October 1, 1980, to October 1, 1985. It submitted a request for a defence and indemnification for these claims to Intact Insurance Company ("Intact"), the corporate successor of Guardian. In a letter dated March 25, 2010, it alleges Intact denied the claims for indemnification under the Policy.

[9] Action 2009 St. J. No 4501 alleges RCEC was specifically aware of the sexual misconduct of James Hickey as well as other clergy assigned to the Archdiocese of St. John's.

[10] According to Guardian, if these allegations were found to be true, RCEC did not disclose this knowledge and the associated risk to the insurer at the time of entering the policies. The failure to disclose its knowledge of sexual misconduct by clergy members to the insurer was a material non-disclosure that rose to the level of material misrepresentation/civil fraud and voided coverage for any claim of indemnity.

[11] As part of its position on material non-disclosure and fraudulent misrepresentation, Guardian also asserts that prior to October 1, 1985, the RCEC, through the offices of the Archbishop, the Vicar General, the Chancellor, or by any manner, did not notify or report in accordance with section 49(1) of the *Child Welfare Act*, 1972, SN 1972, c. 37 that it was aware of the physical ill-treatment or need for protection of a child or children.

ISSUES

Issue 1(a): Was RCEC required to report its knowledge of the existence of allegations of sexual abuse by member(s) of the clergy to Guardian at the time of obtaining its CGL policy or on its subsequent renewals?

Issue 1(b): Was this knowledge a "material fact"?

Issue 2: If the answer is no, then is Guardian obliged to honour its obligations under the Policy to the RCEC and compensate persons who have or will bring forward claims against the RCEC for claims of sexual abuse by its clergy?

Issue 3: If the answer is yes, then between 1980-85, would the fact of such sexual abuse having occurred be material to the consideration:

(i) of a reasonable insurer in the issuance and renewal of a comprehensive general liability insurance policy; and,

(ii) of Guardian in the issuance and renewal of the Policy?

Issue 4: If the answer is no, then does RCEC's knowledge of the claims of sexual abuse constitute a moral hazard or a moral issue?

Issue 5: If the answer to Issues 3 and 4 is yes then is Guardian entitled to declare the Policy void *ab initio*?

Issue 6: If the answer to Issue 5 is yes, then is Guardian entitled to keep the premiums paid by RCEC?

RELEVANT INSURANCE POLICY PROVISIONS (SEE GUARDIAN GENERAL LIABILITY POLICY BEARING POLICY NUMBER 4153395 (AND LATER RENEWALS)

The Coverage

Coverage A – Bodily Injury Liability

To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury.

"bodily injury" means bodily injury, sickness or disease sustained by any person which occurs during the policy period, including death at any time resulting therefrom.

The Exclusions

The Policy carries the following exclusions:

This insurance does not apply to:

(g) bodily injury caused by or at the direction of the Insured.

(p) bodily injury…due to the rendering or failure to render:

(1) medical, surgical, dental, x-ray or nursing service or treatment, or the furnishing of food or beverages in connection therewith; or

(2) any service or treatment conducive to health or of a professional nature.

RELEVANT LEGAL PRINCIPLES AND JURISPRUDENCE

a) General Principles for the Interpretation of Insurance Contracts

[12] The following principles of interpretation for insurance contracts are settled in Canadian law:

(a) The court must search for an interpretation from the whole of the contract and any relevant surrounding circumstances that promotes the true intent and reasonable expectations of the parties at the time of entry into the contract.

(b) Where words are capable of two or more meanings, the meaning that is more reasonable in promoting the intention of the parties will be selected.

(c) Ambiguities will be construed against the insurer having regard to the reasonable expectations of the parties.

(d) An interpretation that will result in either a windfall to the insurer or an unanticipated recovery to the insured is to be avoided.

(e) Coverage provisions are to be construed broadly, while exclusion clauses are to be construed narrowly.

(f) The contract of insurance should be interpreted to promote a reasonable commercial result; and

(g) A clause should not be given effect if to do so would nullify the coverage provided by the policy.

(see *MacDonald v. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842 (OCA) at para. 66).

b) The Duty of Good Faith: *Uberrima fides*

[13] *Uberrima fides* of necessity speaks to a higher level of transparency between insurer and insured. A higher duty is exacted from parties to an

insurance contract than from parties to most other contracts to ensure the disclosure of all material facts so that the contract may accurately reflect the actual risk being undertaken.

[14] The fact that a contract is one of utmost good faith does not however mean that it gives rise to a general fiduciary relationship. The insurer-insured relationship is contractual; the parties are parties to an arm's-length agreement.

[15] The principle of *uberrima fides* does not affect the arm's-length nature of the agreement and cannot be used to find a general fiduciary relationship. Before fiduciary obligations can be imported there must be specific circumstances in the relationship that call for their imposition (see *Plaza Fiberglass Manufacturing Ltd. v. Cardinal Insurance Co*. (1994), 1994 CanLII 653 (ON CA), 22 CCLI (2d) 161, 18 O.R. (3d) 663 (C.A.), at para. 14).

c) The Duty to Disclose

[16] The principles underlying this rule were stated by Lord Mansfield in the leading and often quoted case of *Carter v. Boehm* (1766), 97 E.R. 1162 (K.B.), at p. 1164, 3 Burr. 1905:

> Insurance is a contract of 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 circumstances in his knowledge, to mislead the under-writer into a belief that the circumstance does not exist. ... Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain from his ignorance of that fact, and his believing the contrary (see, generally, Parkington, ed., MacGillivray and Parkington on Insurance Law, 8th ed. (1988), para. 544; Brown and Menezes, Insurance Law in Canada, 2nd ed. (1991), pp. 8-9; and 25 Halsbury's Laws of England, 4th ed., para. 365 et seq. (see para 14 of *Plaza Fiberglass*).

d) Material Fact

[17] The Canadian common law concept of materiality in the context of a potential insured's duty to disclose is found in the decision of *Mutual Life Insurance Company of New York v. Ontario Metal Products Company, Ltd.*, 1923 CanLII 8 (SCC), [1924] S.C.R. 35, aff'd 1924 CanLII 336 (UK JCPC), [1925] 1 D.L.R. 583, [1925] A.C. 344 (SCC), as approved in *Henwood v. Prudential Insurance Co. of America*, 1967 CanLII 17 (SCC), [1967] SCR 720, at paragraph 19:

> Whether certain "information concealed" is material is a question of fact. *Mutual Life* formulated the following test for materiality, using the language of the "reasonable insurer":
>
> ...it is a question of fact in each case whether if the matters concealed or misrepresented had been truly disclosed, they would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk or to have stipulated for a higher premium.

e) Moral Hazard

[18] According to the International Risk Management Institute:

> Moral hazard is an increase in the probable frequency or severity of loss due to an insured peril that arises from the character or circumstances of the insured…Moral hazard is measured by the character of the insured and the circumstances surrounding the subject of the insurance, especially the extent of potential loss or gain to the insured in case of loss. (see Insurance Definitions, "Moral Hazard," International Risk Management Institute, online: <www.irmi.com/term/ insurance-definitions/moral-hazard)
>
> Where an insured fails to inform the insurer about information that is material and the insurance company misses the opportunity to investigate whether the insured has an increased probability of loss from an insured peril then these considerations may affect the moral hazard and throw light on the physical hazard (see *Dworkin v. Globe Indemnity Co.* (1921), 1921 CanLII 462 (ON SC), 51 OLR 159 (SC)), at p. 409)

f) Burden of Proof

[19] The burden of proving that the exclusions apply rests with the insurer (see *Progressive Homes Ltd. v. Lombard General Insurance Co.*, 2010 SCC 33, at para. 51).

g) Misrepresentation Onus of Proof

[20] The onus of proving misrepresentation and its materiality is upon the insurer (see *Arsenault v. Dominion of Canada General Insurance Co.* (1979), 1979 CanLII 3261 (NB KB), 60 A.P.R. 568, [1979] N.B.J. No. 260 (Q.B.), at para. 15).

h) Misrepresentations or Omissions in the Application

[21] The issue of misrepresentation or omission with respect to an application for insurance was canvassed by Mr. Justice G.J. Epstein in *Sagl v. Cosburn, Griffiths & Brandham Insurance Brokers Ltd.,* 2009 ONCA 388, at paragraph 52:

> 52. The duty to disclose all material facts applies even in the absence of questions from the insurer, although the absence of questions may be evidence that the insurer does not consider a fact to be material: Gregory v. Jolley (2001), 2001 CanLII 4324 (ON CA), 54 O.R. (3d) 481 (C.A.), at paras. 31-32 and 37, and W.H. Stuart Mutuals Ltd. v. London Guarantee Insurance Co. (2004), 2004 CanLII 48650 (ON CA), 16 C.C.L.I. (4th) 192 (Ont. C.A.), at para. 11, leave to appeal refused, [2005] S.C.C.A. No. 86. The consequence of non-disclosure or misrepresentation of a material fact by the insured is that the insurer is entitled to void the insurance contract ab initio: see Lloyd's London, Non-Marine Underwriters v. National Armoured Ltd., (1996) 1996 CanLII 8104 (ON SC), 142 D.L.R. (4th) 506 (Ont. Gen. Div.), affirmed by [2000] I.L.R. I-3751 (Ont. C.A.).

i) The Legal Consequences of Non-disclosure, Misrepresentation and Fraudulent Misrepresentation - Void *ab initio*

[22] Absent fraud there is an obligation on the insurer to refund the premium to the insured in instances of non-disclosure or misrepresentation as outlined in the following passage from Craig Brown, *Insurance Law in Canada*, (Toronto: Carswell, 2015), Chapter 5:2, The Customer's Duty, Page 2, which provides as follows:

> The consequence of non-disclosure or misrepresentation by the customer is loss of coverage because the insurer is entitled to render the contract "void". **Unless there has been fraud**, this usually means that **the customer is entitled to a refund of premiums**.

[23] In *General Principles of Canadian Insurance Law*, (Toronto: LexisNexis Canada, 2020), Chapter 2, C.4, Effects and Consequences of the Insured's Breach, Page 1, the author, Barbara Billingsley, sets forth the approach an insurer must take when relying on non-disclosure or misrepresentation:

> In order to properly repudiate the contract, the insurer must advise the insured of its decision to repudiate and must refund the premiums paid by the insured from the date of the breach. If the insurer fails to do these things or otherwise misleads the insured into believing that the contract is in effect notwithstanding the breach, the insured may successfully argue that the insurer waived its right to repudiate the contract or that the insurer is estopped from doing so.

[24] In this jurisdiction an insurer who voids a contract of insurance on the grounds of a material misrepresentation must refund the full premium before being relieved of the policy obligation (see *Keats v. Munn's Insurance Ltd.* (1993), 1993 CanLII 8312 (NL SC), 112 Nfld. & P.E.I.R. 106, 43 A.C.W.S. (3d) 639 (Nfld. S.C.(T.D.)), at para. 10).

[25] This requirement is in contradistinction to circumstances where a policy is found or declared void *ab initio* for a fraudulent failure to disclose. In the case of fraudulent misrepresentation, the insurer is under no obligation to

return the premium to the insured (see *Moscarelli v. Aetna Life Insurance Co. of Canada* (1995), 1995 CanLII 7076 (ON SC), 24 O.R. (3d) 383, 1995 CarswellOnt 1232 (G.D.), aff'd (1995), 87 OAC 314 (Div. Ct.)).

RELEVANT LEGISLATION

Child Welfare Act, SN 1972, c. 37, s. 49(1) ("the Act")

49.(1) Every person having information of the abandonment, desertion, physical ill-treatment or need for protection of a child shall report the information to the Director or a welfare officer.

Application of the law to the findings of fact

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Issue 1(a): Was RCEC required to report its knowledge surrounding the existence of allegations of sexual abuse by member(s) of the clergy to Guardian at the time of obtaining its CGL policy or on its subsequent renewals?

Issue 1(b): Was this knowledge a "material fact"?

RCEC's Position

[26] RCEC acknowledged in the Agreed Statement of Facts that it was aware of the sexual misconduct by its clergy at the time the Policy was issued in September 1980. As the result of this admission, however, it adopted the position at trial that Guardian had the onus of proving that RCEC representatives knew that the sexual misconduct was material to the underwriting of the Policy and withheld such disclosure for the purpose of committing civil fraud.

[27] It argues that the evidence confirms that throughout the 1980's when the Policy was in effect, and up to and including 1999, the law in Canada did not hold religious institutions liable for sexual abuse committed by their clergy. This is because such assaults were not part of any clergy employment duties or obligations applied by the courts using the Salmond Test.

[28] The legal landscape changed in 1999 when the Supreme Court of Canada expanded the scope of the vicarious liability of an employer for acts of sexual abuse committed by employees in instances where the risk of an employee sexually abusing a child may be materially enhanced by giving an employee an opportunity to commit the abuse.

Guardian's Position

[29] Also relying on the Agreed Statement of Facts, Guardian says that as early as 1975 RCEC had direct knowledge of its priests sexually abusing children and did not follow the mandatory reporting requirements of section 49(1) of the *Act*; and admits to not disclosing this knowledge prior to the issuance of the Policy.

[30] Despite the legal landscape that existed at the time of the execution and renewal of the Policies, and despite Guardian not explicitly excluding sexual abuse or vicarious liability, RCEC nonetheless had an obligation to inform Guardian of its prior knowledge of this sexual misconduct when it applied for the Policy, and again at the time of the subsequent renewals.

ANALYSIS

The Factual Matrix

[31] In addition to the Agreed Statement of Facts, the Court heard testimony from Archbishop Peter Joseph Hundt. Archbishop Hundt acknowledged he was testifying as the current office holder and the successor of earlier Archbishops that held the office during relevant time periods in the 1970's and 1980's.

[32] Through Archbishop Hundt, the following evidence was entered on an uncontested basis.

[33] In 1974 Father Ron MacIntyre was told by a student ("T.C.") that Father Jim Hickey had sexually abused him. MacIntrye advised Vicar General Monsignor Morrissey of the student's allegations.

[34] In 1975 Father Philip Lewis arranged a meeting between Vicar General Monsignor Morrissey and T.C. T.C. gave Monsignor Morrissey the details of the sexual abuse he suffered at the hands of Hickey. The Vicar General did not report the incident to civil authorities as per section 49(1) of the *Act*. The Vicar General did, however, inform Hickey of the information received from T.C. Hickey confronted T.C.

[35] No action was taken by the Vicar General to prevent further abuses by Hickey. Hickey continued to abuse children over the following 14 years as he moved from parish to parish within the Archdiocese.

[36] In May 1980 a seminarian, Randall Barnes, told Archbishop Penney that Hickey and another seminarian were abusing boys at the parochial house, Parish of Rushoon. Hickey was the parish priest at Rushoon.

[37] Archbishop Penney did not report this information to civil authorities as per section 49(1) of the *Act*, nor was the information disclosed to Guardian.

[38] The Policy was issued on October 1, 1980, and renewed each year thereafter to October 1, 1985. The Clergy Endorsement at Page 12 of the Policy included all clergy as "insureds" and offered each priest coverage under the Policy.

[39] Before the Policy issuance in 1980, at least six (6) priests under RCEC control were aware of Hickey's sexual predation: Monsignor Morrissey, Archbishop Penney, and Fathers McIntyre, Lewis, McGee, and Barnes.

[40] Hickey's pattern of abuse continued from at least 1974 (i.e. before the Policy), and after the Policy's expiration in October 1985. In 1988 Hickey was convicted on nine (9) charges for offences that occurred pre-Policy, and eleven (11) charges for offences that occurred during the Policy term (1980-1985); with five (5) of the convictions for abuses during the Policy term involving abuse that continued post-1985.

[41] Hickey's convictions included abuses that took place during his time in Rushoon. Archbishop Penney was informed of these incidents in May 1980, before the Policy was placed.

[42] Other members of the RCEC clergy, namely Fathers Bennett and Corrigan, were convicted of six (6) sexual abuse offences occurring during the Policy term, and two (2) convictions after the Policy term.

[43] During cross-examination, Archbishop Hundt was shown a diagram of several RCEC Committees which no longer exist. One of these Committees was the Insurance Committee whose activities would be included in a report provided to the Vatican called the Quinquennial Report (see Exhibit PJH #2).

[44] The report for the period January 1, 1983, to December 31, 1987, noted the Insurance Committee was created in 1979 and was comprised of four lay persons working in the insurance industry, and two member of the Archdiocese's Board of Administration which included the Vicar General and the Chancellor. Under the church's structure, the Vicar General served as the judicial officer.

[45] When asked about the RCEC's position on the revelation of sexual abuse allegations in 1975, Archbishop Hundt responded that he was not able to speak to the mindset of the then Vicar General Monsignor David Morrisey or other members of the Diocesan hierarchy.

[46] He was then asked about his knowledge regarding Commissioner Gordon Winter's *Report of the Archdiocesan Commission of Enquiry into the Sexual Abuse of Children by Members of the Clergy*, (St. John's: the Archdiocese of St. John's, 1990), ("the Winter Report"), and testified that he had not read the Winter Report's findings or recommendations. But despite not having read the document, he agreed with the following suggestions from Guardian's counsel which were taken directly from the Winter Report:

> … that the victims were Catholic children who resided in the Archdiocese.
>
> … that the Archbishops (Skinner and Penney) did not act vigorously on complaints (see page 108 of the Report).
>
> … that Skinner and Penney as the representatives of the Catholic church were ineffective (see page 112 and 140 of the Report).

[47] He accepted the Winter Report's Conclusion and Recommendations.

THE EXPERT EVIDENCE

Frank Szirt - RCEC

Qualifications

[48] RCEC called Frank Szirt ("Szirt"). Szirt was qualified as an expert in insurance underwriting and spoke to underwriting practices from 1980 to 1985. His evidence included the question of whether an insurer from 1980 to 1985, without specific underwriting inquiries, would have expected the RCEC to disclose incidents of alleged sexual activity between its priests and minors under their care if it had knowledge of those activities.

[49] Szirt was born on September 18, 1938, and is 85 years of age. He has been qualified as an expert in several actions in Ontario and New Brunswick, including *L'Eveque Catholique Romain de Bathurst v. Aviva Insurance Co. of Canada,* 2016 NBQB 174.

[50] Szirt has been employed in the insurance industry since graduation from university in 1965. Szirt 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.

[51] During his time at Crum & Forster 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.

[52] From 1986 to 1988 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.

[53] 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.

Evidence

[54] During examination-in-chief, Szirt testified that sexual abuse was not an underwriting factor until the late 1980s and early 1990s, as religious institutions were considered a "generally low hazard" and "very desirable" (see Consent Exhibit 5, Tab 2, Exhibit A, Page 2). As such, an insurer would have no such expectation until the 1990's when exclusions for such conduct became commonplace.

[55] He acknowledged that when RCEC applied for the Policy in 1980 it was bound to disclose all material facts related to the underwriting of the Policy; but from 1980 to 1984, an insurer would not have anticipated that acts of sexual abuse would result in insurance claims.

[56] Szirt's definition of material fact was generally consistent with existing case law in that it was "... a fact that would, if known, affect the minds of reasonable, prudent, and experienced insurers in deciding: (a) the acceptance of the risk (b) the amount to be charged and (c) the conditions applicable to accepting the risk" (see Consent Exhibit #5 – report of Frank Szirt, p. 3, referencing General Insurance Essentials, Published by the Insurance Institute of Canada, 1998, Study 2, p. 16).

[57] He testified that sexual abuse became a material fact within the insurance industry as the result of two factors: (1) the appearance of and the increase in the number of lawsuits against religious institutions; and (2) the later lawsuits against the insurers of these institutions (see page 12 of the Transcript).

[58] Szirt confirmed that the materiality analysis contained in his report did not distinguish between the concept of direct liability and vicarious liability. Rather, he considered the definition of material risk in its entirety as part of the submission process and concluded that during the period of 1980 to 1985 it was an unknown exposure to insurers (i.e. there were no known claims for sexual abuse (see pages 18-19 and pages 41-44 of the Transcript)).

[59] Szirt acknowledged during cross-examination that the disclosure of sexual abuse could be considered a management issue and that some underwriters could have accepted it as a risk, while others would have declined; but ultimately it was a matter of individual judgment (see page 32 of the Transcript).

[60] Putting individual judgment aside, the failure to report the incidents of sexual abuse between 1975 to 1980 would have been information a reasonable and prudent insurer would consider when deciding whether to issue a policy of insurance, even though it was not necessarily material (see pages 81-84 of the Transcript).

[61] Despite this opinion, Szirt was clear during cross-examination that from his personal perspective, as a reasonable and prudent underwriter, he would not have accepted the risk and issued a CGL policy to RCEC had it disclosed the existence of sexual abuse of children by clergy between 1975 and 1980 (see pages 28, page 30 and 32 of the Transcript). He acknowledged that while not material information it still went to the character of the individual seeking coverage, and therefore would go to the decision as to whether to provide a policy of insurance (see pages 95-96 of the Transcript).

[62] Towards the end of his cross-examination, Szirt was asked by counsel for Guardian whether it was his evidence that a reasonable and prudent underwriter, advised of the history of sexual abuse at the time of the submission by Marsh in September 1980, would still have issued a GCL policy. He affirmed this summary by Guardian's counsel but noted that it could have been issued without the endorsement extending coverage to employees, thus making the Policy different than what a reasonable and prudent insurer possessed of this knowledge would have issued (see page 108 of the Transcript).

Cheryl Robertson - Guardian

Qualifications

[63] Cheryl Robertson ("Robertson") was the expert witness called by Guardian to testify as to what an insurer would have considered a material fact in whether a claim may be made against an insurance policy.

[64] Prior to Robertson's testimony, RCEC's counsel made an interlocutory application to limit the extent of her qualifications to express expert opinion on the issues before the Court.

[65] In my oral decision on this application on November 8, 2023, I held that Robertson's educational training and work experience during the relevant period of 1980 to 1985 showed she was not involved in the underwriting of CGL policies. To this point in her career, her only relevant experience during that time frame was in relation to professional liability policies for lawyers practicing in Boston, Massachusetts.

Evidence

[66] Her evidence showed that she had no experience or knowledge to offer the Court on CGL policies during the relevant coverage period. On this basis, I allowed her to opine as to her experience from 1979 to 1985 with certain types of policies which included underwriting life insurance policies and other areas conceded by RCEC counsel.

[67] Robertson conceded that prior to 1986, there had been no claims against the Policy for sexual abuse. The way an insurer could find if something is material is for the insurer to ask the insured about it in the application process. At this stage, the broker plays a critical role in counselling the insured on what risks existed. The issue of sexual abuse would not have been raised in the application process or the renewal process by the broker or the underwriter because it was not on the industry's radar during this period. Had representatives for the RCEC accurately answered the questions of the broker in the preparation of the submission, then they fulfilled the duty to act in good faith.

[68] Robertson also testified that another way in which an insurer can decide if something is material is to use an exclusion clause in relation to the potential claim arising from the risk. Exclusions for sexual abuse were not used by Guardian from 1980 to 1985 because as Robertson confirmed, sexual abuse by clergy was not known in the underwriting industry. It was not until the late 1980s that there was a sea change in the way insurers responded to sexual abuse.

[69] Finally, Robertson testified that when she voided a policy, she would refund the premium.

Relevant Fact Witness

Michael Mallett-Guardian

[70] Michael Mallett ("Mallett") is a retired underwriter who worked at Guardian from 1981 to 1985. He confirmed Robertson's evidence that an insurer must refund the insured's premium when policies were voided *ab initio*. Indeed, it was his practice to do so while at Guardian.

Evidence

[71] On the facts as presented, Mallett's understanding was that the Policy was issued through Marsh & McLennan Limited ("Marsh"), an insurance broker. According to his recollection, application forms were non-existent at the time the Policy was underwritten. Instead, it was more likely that a representative of Marsh would have communicated with a representative of the Archdiocese to prepare a submission to be sent to Guardian. The submission, prepared by Marsh, would have had a description of the risk, the operations and claims history, the type of coverage, the proposed policy limits, and deductibles.

[72] In the period from 1980 to 1985, Marsh was one of the largest and most sophisticated insurance brokers in Canada. It had a duty to go over the RCEC's exposures, operations, and claims history. Mallett testified that he would have expected Marsh to understand the existing market and do a thorough job of this process. He acknowledged that brokers were not asking religious institutions in the early 1980s about allegations or claims of sexual abuse. Rather, he expected a broker would ask an insured if they are aware of any incidents or occurrences that could give rise to a possible claim, and to confirm their present claims history.

[73] During this period, claims at a religious institution would have included fires, thefts, slip and fall claims and clergy using their own vehicles on church business. By way of example, Mallett agreed that if a priest saw someone slip and fall and break their leg, that should be reported to the broker; even if an action had not been started, because the representative of the Archdiocese would know that, historically, a slip and fall which caused an injury can lead to a claim.

ANALYSIS

Issue 1(a): Was RCEC required to report its knowledge of the existence of allegations of sexual abuse by member(s) of the clergy to Guardian at the time of obtaining its CGL policy or on its subsequent renewals?

[74] When I examine the totality of the factual evidence adduced at trial, I conclude that RCEC had knowledge of allegations of sexual abuse by a member or members of its clergy at the time of the first submission for insurance and did not disclose this information to Guardian. Further, I find that they were under a common law and statutory duty to report these allegations to civil authorities.

Issue 1(b): Did this knowledge constitute a "material fact"?

[75] To answer Issue 1(b), I must decide the following: (i) was this information considered a material fact or a relevant consideration and, if so; (ii) was RCEC obligated to bring this information to the attention of its broker, Marsh?

What is a material fact?

[76] Citing the Ontario Court of Appeal in *Sagl*, RCEC counsel argues that where an insurer fails to ask about a matter, the court may draw an inference that the insurer did not consider the matter to be relevant or material. However, as noted above, the Court's analysis at paragraphs 51 to 52 held that the duty to disclose all material facts applies even in the absence of questions from the insurer.

Was RCEC obligated to bring its knowledge of allegations of sexual abuse to the attention of Guardian?

[77] The collective weight of the expert opinion adduced by both parties was that despite the absence of questions from Marsh, a reasonably prudent insurer during the period of 1980 to 1985 would have considered RCEC's knowledge of allegations of sexual abuse to be a material fact, or at the very least, an important and relevant consideration before issuing the Policy; and

therefore, RCEC had an obligation of full disclosure under the doctrine of *uberrima fides*.

[78] I make this finding primarily based on the evidence of RCEC's expert Szirt. Of the two expert witnesses who testified (Szirt and Robertson), Szirt was more qualified; and when his expert evidence is contextualized with the factual evidence of the former adjuster for Guardian (Mallett), I conclude that Szirt was the most qualified and experienced person to guide the Court as to the expectations of a reasonable and prudent insurer issuing CGL policies between 1980 and 1985.

[79] It is on this basis that I accept Szirt's evidence on cross-examination that he personally, as a reasonable and prudent insurer, would not have issued the Policy to RCEC.

Issue #2: If the answer is no, then is Guardian obliged to honour its obligations under the Policy to the RCEC and compensate persons who have or will bring forward claims against the RCEC for claims of sexual abuse by its clergy?

[80] Given that I found that RCEC was bound to disclose the information about the allegations of sexual abuse at the time of applying for and after renewing its Policy, it is not necessary to answer this question, and I shall continue to answer Issue 3.

Issue #3: If the answer is yes, then between 1980 and 1985, would the fact of such sexual abuse having occurred be material to the consideration:

(i) of a reasonable insurer in the issuance and renewal of a comprehensive general liability insurance policy; and,

(ii) of Guardian in the issuance and renewal of the Policy.

[81] As noted above in *Henwood*, the test to be applied when deciding whether Guardian would have issued and renewed the Policy is the materiality test.

[82] The materiality test was adopted in this jurisdiction by Adams, J. in *Bay Bulls Sea Products Ltd. v. Insurance Corp. of Newfoundland Ltd.*, 2003 NLSCTD 164 at paragraph 136 ("Bay Bulls"). It is a two-step common-law test that examines (i) whether a prudent insurer would be influenced by the information and (ii) whether it would have influenced Guardian.

Step One: The Prudent Insurer

[83] To address this step from the perspective of the prudent insurer, the Court must consider what information would have influenced underwriters in the period 1980 to 1985.

[84] As explained by RCEC's expert Szirt, a material fact is one that would, if known, affect the minds of reasonable, prudent, and experienced insurers in deciding whether to decline or to accept a risk; and, if accepting, the premium to be charged and the terms and conditions that would apply to the policy.

[85] In the 1970s and through to 1985, Szirt testified that when he wrote policies for religious institutions, they were treated like any other business enterprise, where the risk-related factors that an underwriter would consider included: (i) the condition of the property; (ii) the nature of the operation; (iii) the products produced; and (iv) any construction projects undertaken. The main liability concerns in relation to religious institutions at the time were exposure risks associated with the premises (i.e. the safety of people going in and out of the premises).

[86] From 1980 to 1985 insurers did not consider sexual abuse as material to the risk of church institutions. Szirt confirmed that sexual abuse was not something discussed from 1980 to 1985 in the underwriting world because it was "not on the radar screen."

[87] An equally important consideration during this period was the social and legal climate in relation to claims for sexual abuse. There were no claims against religious institutions for direct liability or vicarious liability arising from sexual abuse. In fact, to this point in time there was only one case which alleged vicarious liability on the part of an employer for sexual abuse by an employee.

In that case, the employer was held not to be vicariously liable (see *Barrett v. The Ship "Arcadia"* (1977), 1977 CanLII 1728 (BC SC), 76 D.L.R. (3d) 535, [1977] B.C.J. No. 1198 (S.C.), Consent Exhibit 5, Tab 2, Exhibit A, page 2).

[88] Szirt's expert report indicated that during the period of 1980 to 1985, churches were a "generally low hazard". His *viva voce* evidence distinguished this designation by indicating that a reasonable and prudent underwriter, advised of a history of sexual abuse between 1975 and 1980, could still have issued the Policy, although without the endorsement extending coverage to employees; however, he advised that he personally would not have issued the Policy.

[89] Therefore, as part of my analysis of what a prudent underwriter would have done in these factual circumstances, I must consider the changes which took place both in terms of the societal view of sexual abuse and the way insurers considered sexual abuse from the early 1980s to the late 1980s.

[90] Two witnesses aided the Court with evidence on this point.

Marilyn Temple

[91] Marilyn Temple ("Temple") was a social worker employed with Child Welfare in the early 1980's. She testified that during this period, the academic world did not provide any specialized study on issues of child sexual abuse, nor was there an office within the department dedicated to the investigation of child sexual abuse. This did not occur until 1989 when the provincial government opened an office which specialized in child sexual abuse that subsequently corresponded with enormous growth in staff to undertake investigations and assessments.

[92] During her career from 1978 to 2006, Temple testified there had been a sea change in both the knowledge of how sexual abuse affected people and how sexual abuse cases were managed. It was not until the late 1980s that the disclosure of sexual abuse matters began occurring publicly.

[93] She agreed that the public findings of the Hughes Inquiry and the Winter Commission led to the phenomenon of sexual abuse becoming more widely known. Temple was shown portions of Commissioner Winter's Report that addressed the evolution of the reporting and understanding of sexual abuse in the Province and agreed with the Report's conclusions (see Consent Exhibit 6, Chapter One: Introduction, page 1, at para. 1; and Chapter Two: Events in the Archdiocese, page 25, at para. 1).

[94] Specifically, Temple agreed with the passage from Commissioner Winter's Report that held the view that more than one factor contributed to the long delay in public disclosure by victims.

[95] One of those factors was the societal context and sensitivity changes towards child sexual abuse that occurred in the late 1980's whereas in 1975 when knowledge about the prevalence of child sexual abuse was limited including the awareness about the dynamics of child sexual abuse, the impact that it has on victims, and appropriate management strategies (see Consent Exhibit 6, Chapter Three: The Causes of Child Sexual Abuse, page 29, at para. 1).

[96] Temple agreed that the problem of child sexual abuse was so new that Commissioner Winter had to define the terms which surrounded it, and this lack of awareness was a hallmark of the era prior to the two inquiries in 1989.

[97] In similar fashion the *Act* changed. In 1977 it was amended to define "neglected child" and in 1981 it was further amended to define a "child in need of protection." With the changes to the *Act*, Temple and her staff made presentations in the community to educate people in institutions to report incidents of child abuse, although she could not say that any were made to the Christian Churches in Newfoundland and Labrador.

[98] When asked about the mandatory reporting provision in section 49 of the *Act*, Temple testified that she was not aware of any cases which dealt with the section from 1980 to 1985. In her view, the department's approach was to encourage people to report voluntarily.

Michael Mallett

[99] Mallett confirmed that he did not ask questions of insureds about sexual abuse because it was not on the underwriting radar screen i.e.: that sexual abuse was going on in religious institutions; that sexual abuse could lead to a claim; and, that one should ask about claims of sexual abuse. This was consistent with his understanding of what was going on in the industry at large in Canada.

[100] When a submission arrived at Guardian, Mallett testified he would review it and would be guided by the Insurance Advisory Organization ("IAO") guide, and Guardian underwriting memos and guidelines. There were no specific directives in the IAO guide or the Guardian documents with respect to religious institutions.

[101] From 1981 to 1985, Mallett dealt with the renewal of four policies with four different religious institutions: the United Church; the Anglican Church; the Presbyterian Church; and the Jesuit Fathers. Sixty days before the renewal he asked the broker to update the information on file. In particular, he asked the broker to update the claims history and reviewed the history of claims in the Claims Department of Guardian.

[102] As part of his review, he conceded he did not inquire of the broker to ask the insured if there were any allegations of sexual abuse made against any of the employees of the institution. Toward the end of the 1980s, however, he adjusted his practice in response to the change in the understanding of sexual abuse in the world of underwriting and a corresponding change in the way the underwriting world dealt with the issue.

Analysis

[103] When the evidence of these two witnesses is viewed in its entirety, I am left with the following observations: (a) societal understanding of sexual abuse in the early 1980s was limited; (b) there was no understanding of its impact from an underwriting perspective; (c) in the late 1980s there was a sea change in both societal understanding and the way insurance underwriting responded to it; and (d) there were no civil claims for sexual abuse in which an employer was held liable in negligence or vicariously liable prior to 1986 (or indeed, much later). It was not an exposure which existed in the insurance industry from 1980 to 1985.

[104] Despite this milieu, Guardian argues these considerations must be weighed against the undisputed evidence that by 1980, RCEC was aware of the sexual abuse of children by members of its clergy. When coupled with the evidence of Ms. Temple that: (i) sexual abuse of children was on the radar for social workers across the country, and (ii) a majority of provincial governments had taken the extraordinary step of enacting legislation requiring mandatory reporting (without exemption) where children were suspected to be in need of protection; then it leads this Court to the inevitable conclusion that irrespective of the general societal understanding at that time, RCEC was under a common law duty and a moral duty to disclose this information to Guardian.

[105] I accept this argument because this was information that went to the very nature of the character and integrity of a potential insured, which, according to Szirt, would have been sufficient for him to decline issuance of the Policy (see *Report of Royal Commission of Inquiry into the Response of the Newfoundland Criminal Justice System to Complaints* (St. John's: The Commission, 1991), at page 218). I will analyze this point later under the heading Moral Hazard.

[106] RCEC counters Guardian's argument by saying Guardian has the burden of showing that the knowledge it had at the time of the 1980 submission by Marsh was material to the context of obtaining its CGL policy.

[107] It argues the evidence does not support the conclusion that its knowledge was material. Instead, the expert testimony proves that during the relevant time an insurer would not have expected to be advised of this information because a criminal allegation of this nature was not the subject of insurance claims. Relying on this aspect of the evidence, RCEC would not have been expected to view it as a material fact to be considered by an insurer. Simply said, RCEC argues that sexual abuse was unheard of in the underwriting world. When it was, insurers responded by changing policy language and/or adding exclusions, just as an exclusion was added for sexual abuse in the 1990s.

[108] As I concluded in answering Issues 1a and 1b, had RCEC disclosed its knowledge of sexual abuse allegations during the application and renewal process from 1980 to 1985, I find that a reasonable and prudent insurer would not have issued a CGL policy because of RCEC's failure to act on information it had from 1975 to 1980.

Step Two - Guardian

[109] The second part of the materiality test requires the Court to consider whether RCEC's disclosure of allegations of sexual abuse during the Policy period of 1980 to 1985 would be material to Guardian's consideration to issue and renew the Policy.

[110] As noted above in *Arsenault*, the burden of proof rests with Guardian. It did not call as a witness the underwriter who wrote the Policy, nor did it produce the underwriting file. Considering these evidentiary deficiencies, RCEC argues that the Court should draw an adverse inference that the evidence cannot support the termination of the Policy.

[111] Guardian did call Mallett who testified as to what he would have done while working for Guardian during the relevant period. Mallet was a fact, not expert, witness so he was not qualified to testify as to what the underwriter responsible for the RCEC file would have done.

[112] Nevertheless, according to Mallett, it was his practice when a submission arrived in the Underwriting Department that he, as the underwriter, would have reviewed it to decide if the risk were acceptable. He would have relied on the IAO guidelines as well as Guardian memos and guidelines, neither of which raised any concerns about sexual abuse.

[113] Next, he would have reviewed the claims history noted in the submission and from the information in the Claims Department. There was no evidence led by Guardian to suggest that there were any claims related to sexual abuse. Mallett did not discuss the issue of sexual abuse with other underwriters because it was not on the industry radar. Axiomatically, I find that it was not on the radar for the underwriter who wrote the Policy.

[114] Mallett was questioned during examination-in-chief about what he would have done if he had received information on a policy renewal that RCEC was aware of sexual abuse at the hands of its priests. At page 47 of the Transcript, he testified that he considered this to be "a new material fact" because it was not just relevant going forward but also back to the inception of the policy (see pages 41-48 of the Transcript).

[115] He described RCEC's knowledge as a material change because as potentially criminal acts it raised the question of whether they could underwrite the risk in the first place. Guardian would not have renewed the Policy and would have declared it void *ab initio* because a prudent underwriter would not take on the risk of something impossible to quantify. This would be due to unknowns such as where these claims are coming from, how many, how serious, the cost of the potential claims and associated legal costs (see pages 49-52 of the Transcript).

[116] The evidence discloses that RCEC's original submission and later renewals came from Marsh. Mallett confirmed that the relationship with the broker is a key factor in underwriting, and the Policy would have been seen as a large property account. I note in passing that Szirt added that the underwriter may have felt pressure to accept the risk because of the support from the broker. Another factor was the extent of the coverage as this influenced the size of the premium. Here, the number of parishes increased (42), as did the limits of the Policy ($5.0 million in 1980 to $10.0 million in 1982).

[117] Mallett opined that, if he were the underwriter and advised of the history of sexual abuse, he would not have written the Policy. RCEC's counsel advanced the position that Mallett's evidence on this point was informed by the passage of time as he used the lens of today to comment on what he would have done in the early 1980s. While perhaps the case, this argument completely ignores the concession by their own expert Szirt that he would not have issued the Policy had he been provided with the information about the history of sexual abuse by RCEC's clergy.

[118] I disagree with RCEC's position on this point. I find Guardian has proven that it was more probable than not that the underwriter(s) who approved and renewed the Policy would not have issued a CGL policy to RCEC. I make this conclusion based on Szirt's expert evidence, as supplemented by the factual evidence provided by Mallett, that the most likely scenario would have been that had the information been disclosed to the underwriter it would have been viewed as potential criminal conduct that went to the core of the insured's the moral fiber.

[119] As such, I find that it would have been considered a material risk that would prevent the issuance of the Policy or the introduction of exclusions for

individual clergy members and for any direct liability by RCEC for future claims for sexual abuse.

The *Stare Decisis* of *L'Eveque Catholique Romain De Bathurst*

Materiality Analysis

[120] RCEC argues Guardian's position on materiality ignores the precedent value of *L'Eveque Catholique Romain de Bathurst v. Aviva Insurance Co. of Canada*, where Mr. Szirt's expert evidence was relied upon by the New Brunswick's Queen's Bench to dismiss an insurer's denial of indemnity.

[121] In *L'Eveque,* MacNally, J. held that the insurer Aviva's claim that the Catholic Diocese of Bathurst had not disclosed material information, namely its knowledge of sexual abuse by its clergy, was not proven. In doing so, he focused on Aviva's failure to lead the necessary evidence to prove materiality. Specifically, he found that Aviva called no evidence, expert or otherwise, to sustain its position that Bathurst's failure to disclose the ongoing abuse was material.

[122] Guardian's legal counsel argues that *L'Eveque* is in contradistinction to the trial evidence before this Court. He points to the evidence of Szirt and Mallet who testified that had this information been disclosed, the Policy would not have been issued.

[123] In *L'Eveque* neither party addressed Aviva's potential exposure for the direct liability of the Bathurst Diocese for failing its duty to protect children of the Diocese. Specifically, they failed to focus on the following arguments: (i) the potential liability from its "error in judgment" in allowing its priests to continue to commit criminal sexual abuse between 1975 and 1980; and (ii) the

existence of a moral hazard or the existence of a morality issue in providing coverage for such known criminal acts.

[124] In support of this position, Guardian's legal counsel refers to the following passage from MacNally, J.'s decision at paragraph 134:

> [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.

[125] Later at paragraph 139, MacNally, J. opined (*in dicta*) as to the hypothetical necessities needed to prove the evidentiary burden placed on an insurer in a similar situation:

> (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
>
> (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) Opinion from 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.

[126] I find McNally, J.'s analysis of the evidentiary necessities for materiality to be instructive and conclude that Guardian has met the evidentiary threshold needed, namely that the collective evidence of Szirt and Mallett addressed items (a), (d) and (e). Item (b) was addressed in the Joint Book of Documents, Consent Exhibit #2, which contained the Policy wording and the clergy endorsement wording. This evidence was supplemented by Mallett's testimony about Guardian's underwriting policies (Transcript, p. 50). Item (c) could not be addressed as there was no record of the submission to Guardian by Marsh on behalf of RCEC.

[127] Assuming I am incorrect in my conclusion that this information formed a material risk, then I must decide whether a reasonable and prudent underwriter would not have issued a CGL policy in 1980 because of the moral risks that flowed from RCEC's knowledge of sexual abuse.

Issue 4: Does Moral Hazard play a role if the evidence does not support that the non-disclosure of sexual abuse constituted a material risk?

What is a Moral Hazard?

[128] As noted earlier in this decision, the International Risk Management Institute defines moral hazard as "an increase in the probable frequency or severity of loss due to an insured peril that arises from the character or circumstances of the insured". In other words, a moral hazard arises when one of the parties to an agreement does not act in good faith. Specifically, a moral hazard comes about when a party takes advantage of agreements that shield them from risk (see *R. v. Villasenor,* 2022 ONCJ 578, at para. 47).

[129] This can be measured by assessing the character of the insured and the circumstances surrounding the subject of the insurance. I will now apply this definition to the facts of this case (see *Dworkin v. Globe Indemnity Co.* (1921), 1921 CanLII 462 (ON SC), 67 D.L.R. 404, 51 OLR 159 (S.C.)).

Did RCEC's knowledge of sexual abuse and its failure to disclose this information constitute a moral hazard?

[130] RCEC's admission it did nothing to prevent the continued sexual abuse of children presented a moral hazard, or as described by Szirt "a morality issue", such that a reasonable insurer would not offer coverage under a CGL policy. Szirt made this acknowledgement during his cross-examination (see page 29 of the Transcript) when he testified that an insurer has an obligation to know the moral fiber or character of the insured.

[131] This is understandable because insurers want to know who they are insuring. No insurer wants to accept the risk presented by an individual who, by its nature or character, is prepared to engage in activities that increase the likelihood for exposure while at the same time secure in the knowledge that there is insurance available to satisfy any claim.

[132] The knowledge of ongoing sexual abuse and its toleration by RCEC raised an issue of character. Regardless of the existence of a statutory requirement to report this information to civil authorities, the fact still remains that by 1980 RCEC knew of unlawful acts being performed by members of its clergy and this knowledge had permanently damaged its moral fiber. In placing its own interests ahead of the obligation to be honest and truthful with the insurer it violated the obligation of utmost good faith or *uberrima fides*.

[133] This finding is supported by Mallett's evidence when he testified that the failure to disclose demonstrated a lack of truthfulness, a misrepresentation of the risk, and an acceptance of potential criminal acts; all of which were sufficient to put the "whole question of acceptability of writing the risk in the first place in the open" so as to decline to issue a policy, refuse to renew, or "consider whether the policy should have been void *ab initio*".

[134] Having previously found that RCEC was aware of allegations of sexual abuse of children since 1975, I conclude that despite this knowledge it chose to obtain a CGL policy from Guardian that would cover future direct liability arising from these criminal acts, bringing it within the definition of moral hazard.

Issue 5: If the answer to Issues 3 and 4 is yes, is Guardian entitled to treat the Policy void *ab initio*?

[135] As Lord Mansfield put it in *Carter*, at 1164:

> First. 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 of the risque run is really different from the risque understood and intended to be run, at the time of the agreement.

[136] Guardian has no other burden to discharge apart from proving that the non-disclosure was material or a relevant consideration to an individual underwriter and, if disclosed, a reasonable insurer would decline to underwrite the policy (see *Murphy v. Sun Life Assurance Co. of Canada* (1964), 1964 CanLII 823 (AB CA), 49 D.L.R. (2d) 412, 50 W.W.R. 581 (ABCA)).

[137] Whether RCEC intentionally withheld or innocently omitted the information that was relevant to underwriting is not a consideration. As the insured, RCEC's obligation was to disclose all information that is material.

[138] In *Nagy v. BCAA Insurance Corporation,* 2020 BCCA 270, the British Columbia Court of Appeal, citing *Carter*, drew the following succinct conclusion at paragraph 28:

> **28** Accordingly, whether material facts were misrepresented or omitted, the policy was considered void at common law whether or not there was any actual fraudulent intent.

[139] Based on the statements of the law referenced above, I conclude that a reasonable and prudent insurer underwriting CGL policies from 1980 to 1985 would have considered the non-disclosure of knowledge regarding sexual abuse to be a material non-disclosure and would not have issued the Policy. Based on this finding, Guardian is entitled to void the Policy at common law.

Issue 6: Is Guardian required to return the premiums paid by RCEC if it voids the Policy *ab initio*?

[140] Having found that Guardian was entitled to void the Policy at common law, then I would be compelled to analyze whether its failure to refund the premium disentitles it from voiding the Policy *ab initio* at this stage of the proceeding.

Guardian's Position

[141] Guardian takes the position that had it voided the Policy (which it claims it has not), then the admitted non-disclosure of knowledge of sexual abuse disentitles RCEC to a return of its premium because the non-disclosure amounts to fraudulent misrepresentation or fraudulent concealment.

RCEC's Position

[142] RCEC takes the position that Guardian was compelled at common law to declare the Policy void *ab initio* and that it did so in its statement of defence. It cannot ask the Court to make such a declaration and refers the Court to the decisions in *Hansra v. York Fire & Casualty Insurance Co.* (1982), 1982 CanLII 2005 (ON SC), 138 D.L.R. (3d) 293, [1982] O.J. No. 3415 (Co. Ct.) ("*Hansra*"); *Tulloch v. Peopleplus Insurance Co.* (2001), 103 A.C.W.S. (3d) 1042, [2001] O.J. No. 752 (Sup. Ct. J.) ("*Tulloch*"); and *Merino v. ING Insurance Company of Canada*, 2007 ONSC 6281 ("*Merino*").

Analysis

[143] In *Hansra* the plaintiff's car was damaged in an accident. The insurer refused to pay for the damage and cancelled the policy based on a misrepresentation in the application process and refunded the premium. On the question of what the insurer was entitled to do when it learned of the misrepresentation, Weiler, J. said as follows:

> On learning of a misrepresentation in an application for insurance, the insurer has three courses open to it. It may:
>
> (a) treat the policy as void *ab initio* and refund the premiums, in which case the insurer must declare it.
>
> (b) return the premium and treat the policy as valid and subsisting; or
>
> (c) treat the policy as valid but cancel it unilaterally in accordance with the statutory conditions for unilateral termination.

[144] A similar approach was followed by the Court in *Merino* where it dealt with a motion on behalf of a judgment creditor who sought to enforce a judgment against a policy of automobile insurance. ING argued that the policy was void *ab initio*. ING took the position that as a matter of law, upon its discovery of a material misrepresentation or non-disclosure made in an application for insurance, an insurer may choose to do one of three options outlined in *Hansra*, but added the following comment about the obligations of an insurer who seeks to rescind a contract of insurance:

> … an insurer purporting to rescind a contract of insurance must declare its election to do so, on notice to the insured. ING did so, by directing registered mail to Abou-Khalil and Klue addressed to their common residence, as disclosed on the application (see para. 176).

[145] RCEC maintains that if an insurer is allowed to take an ambiguous position and wait for a Court to declare which of the three courses it is bound to take, then this would effectively grant a license to insurers to take an unclear position or no position and would be contrary to the nature of the contract of good faith and fair dealing. It argues that part of the good faith obligation of the insurer under the contract of insurance is to declare its position when coverage is in issue and return the consideration (premium) that it had received in return for its policy commitment.

[146] In response, Guardian argues that it outlined its position to RCEC in its Reservation of Rights correspondence of March 25, 2010, so the *Hansra* pathways do not apply in the instance case because of the litigation strategy employed by RCEC.

[147] Up to the beginning of trial and the submission of the Agreed Statement of Facts, RCEC maintained its denial of any knowledge surrounding sexual abuse by its clergy. As such, Guardian argues that had it declared the Policy void *ab initio* prior to this point then it would have opened itself to an argument of bad faith because it previously informed RCEC that it would defend the main action but would reserve its right to indemnify "until such time as it was determined conclusively whether RCEC was entitled to indemnity".

Void *ab initio* - Material misrepresentation versus Fraudulent Misrepresentation

Material Misrepresentation

[148] To properly repudiate the contract, an insurer must advise the insured of its decision to repudiate and must refund the premiums paid by the insured from

the date of the breach. If the insurer fails to do these things or otherwise misleads the insured into believing that the contract is in effect notwithstanding the breach, the insured may successfully argue that the insurer waived its right to repudiate the contract or that the insurer is estopped from doing so (see *Insurance Law in Canada*, C. Brown, Chapter 5:2 The Customer's Duty, page 2).

[149] In *Keats v. Munn's Insurance Ltd.*, the insurer voided automobile policy *ab initio* on the grounds of a material misrepresentation as to the ownership of the vehicle. In doing so, the insurer refunded the full premium and was relieved of the policy obligation (see para. 10).

Fraudulent Misrepresentation

[150] Under English law, a policy of insurance is void *ab initio* when an insured obtains a policy through a fraud or a deceit, thereby disentitling them to a return of the premium (see *Feise v. Partkinson* (1812), 4 Taunt 640, 128 E.R. 482). This approach was later adopted by Canadian courts in *Moscarelli*, at paragraphs 17 to 22, where Pitt, J. held that when a policy of insurance is voided for fraudulent misrepresentation a claim for the return of premium must fail (see also *Venner v. Sun Life Insurance Co.* (1890), 1890 CanLII 48 (SCC), 17 S.C.R. 394 ; and *Clarkson v. Canada Accident Assurance Co.* (1932), 1932 CanLII 97 (ON CA), 3 D.L.R. 188, [1932] O.R. 405 (C.A.)).

[151] Material misrepresentation is not enough to void a policy of insurance with no obligation to return the premium. Instead, an insurer is required to go further and establish that the representation was fraudulent. This can only be achieved by the insurer proving that there was a false representation, made knowingly, without belief in its truth; or recklessly, without care whether it is true or false (see *Walsh v. Unum Provident*, 2013 NSCA 124, at para. 15, citing Lord Herschell in *Derry v. Peek* (1889), 14 App. Cas. 337, [1889] UKHL 1).

[152] In *Moscarelli,* Pitt, J. noted at paragraph 25 there were no Canadian cases where an insured, having made a fraudulent representation in an insurance application, was successful in suing for the return of premiums. In support of this position, he referenced the Supreme Court of Canada case of *Brophy v. North American Life Assurance Co.* (1902), 1902 CanLII 9 (SCC), 32 S.C.R. 261, where Taschereau, J., at paragraph 16, said:

> ... An interference, in the name of equity, to alleviate the offender's punishment by ordering the return of the premiums into his guilty hands would seem to me an inconsistency. The insured is not in a position to ask the assistance of the court, nor to invoke rules of equity the sole effect of which would be then to benefit the sole culprit. He has received no consideration from the company for the moneys he has paid, it is true, but he owes his loss to his own turpitude, and the court should have no pity upon him and no mercy for him, under any circumstances. I would apply to him the rule that he who has committed iniquity cannot claim equity.

[153] In summary, an insurer cannot keep the premium in the context of innocent misrepresentation (see *Intermunicipal Realty & Development Corp. v. Gore Mutual Insurance Co.* (1980), 1980 CanLII 4252 (FC), [1981] 1 F.C. 151; 112 D.L.R. (3d) 432, at para. 162). The insurer can, however, retain the premium in the context of fraudulent misrepresentation (see para. 164).

What constitutes fraud in the insurance context?

[154] Both parties accept the legal propositions set out in *Hansra* and *Merino* as the current state of the law on the steps to be followed by an insurer following a declaration that an insurance policy is void *ab initio*.

[155] The parties differ, however, on how this Court should apply this law to the facts of this case. In short, the issue I must decide is whether Guardian has established that RCEC's knowledge of sexual abuse and its subsequent failure to disclose this information to Guardian during the submission and renewal process constitutes fraudulent misrepresentation/concealment.

What is Guardian required to prove to establish fraudulent misrepresentation/concealment?

[156] The required elements of the intentional torts of civil fraud and deceit were outlined by the Supreme Court of Canada in *Bruno Appliance and Furniture, Inc. v. Hryniak,* 2014 SCC 8 as: (1) a false representation made by the defendant; (2) some level of knowledge of the falsehood by the defendant or recklessness in making the representation; (3) the false representation caused

the plaintiff to act; and (4) the plaintiff's actions resulted in a loss: (*Hryniak*, at para. 21).

[157] The academic literature and jurisprudence after *Hryniak* suggest that deceit, fraud, and fraudulent misrepresentation are interchangeable and that the constituent elements of these intentional torts are the same as set out in that decision: see *Derry v. Peek*; *Paulus v. Fleury*, 2018 ONCA 1072, at para. 8; *Soil Engineers Ltd. v. Anthony Upper*, 2020 ONSC 7495, at para. 8; *Battrum v. MacKenzie Estate*, 2010 BCSC 1285, at para. 33.

[158] Post-*Hryniak,* there has been some controversy as to whether proof of intent on the part of the defendant is a necessary requirement to make out a case in civil fraud (see *Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd.*, 2017 ABCA 378, at paras. 29-30).

[159] In *Paulus*, the trial judge used the four-part list of constituent elements of the intentional tort of fraud from *Hryniak*. However, Pardu, J.A., for the court, adopted the test established by Brown, J.A. in *Midland Resources Holding Ltd. v. Shtaif*, 2017 ONCA 320, and stated the following at paragraphs 8 and 9 of *Paulus*:

> 8 As the defendant's allegation of civil fraud was central to the motion judge's decision, I begin by noting that courts have used the same test for civil fraud as they have for the torts of deceit and fraudulent misrepresentation: see e.g. *Deposit Insurance Corp. of Ontario v. Malette*, 2014 ONSC 2845(Ont. S.C.J.), at para. 19; *Amertek Inc. v. Canadian Commercial Corp.* (2005), 2005 CanLII 23220 (ON CA), 76 O.R. (3d) 241 (Ont. C.A.), at para. 63, leave to appeal refused, [2005] S.C.C.A. No. 439 (S.C.C.); and *Midland Resources Holding Ltd. v. Shtaif*, 2017 ONCA 320, 135 O.R. (3d) 481 (Ont. C.A.), at para. 162, leave to appeal refused, [2017] S.C.C.A. No. 246 (S.C.C.).
>
> 9 For the purposes of this appeal, I adopt Brown J.A.'s articulation of this test in *Midland Resources Holding Ltd.*, at para. 162. The five elements of the test are as follows:
>
> (i) a false representation of fact by the defendant to the plaintiff; (ii) knowledge the representation was false, absence

> of belief in its truth, or recklessness as to its truth; (iii) an intention the plaintiff act in reliance on the representation; (iv) the plaintiff acts on the representation; and (v) the plaintiff suffers a loss in doing so. [Citations omitted.]

[160] Pardu, J.A. expressly concluded that intent was a required element of the tort of civil fraud, although this was not expressly stated in *Hryniak*. Therefore, the test established in *Hryniak* implicitly includes a requirement that the plaintiff prove intent on the part of the defendant making the false statement or representation, as was accepted by the Court of Appeal in *Midland Resources*, at paragraph 162 (see also: *NEP Canada ULC v. MEC OP LLC*, 2021 ABQB 180, at para. 783).

[161] As its starting position, Guardian argues that throughout the entirety of the litigation it never declared the Policy void *ab initio* because it was not in the position to determine whether RCEC [was] entitled to indemnity prior to trial. Once the Agreed Statement of Facts was filed, then RCEC's acceptance of its knowledge of allegations of sexual abuse made it a disclosable material fact.

[162] In addition to the position outlined in the Agreed Statement of Facts, Guardian's legal counsel points to the *viva voce* evidence of Archbishop Hundt where he accepted the findings of the Winter Report that the Archdiocese chose to deny the abuses and discount the victims' disclosures of criminal activity leaving children at risk. Rather than reporting the allegations to civil authorities, the Archdiocesan administration chose to accept repeated denials of the allegations and allowed the abuses to continue (see Consent Exhibit #6 - Partial Copy of the Winter Report, Chapter 5, at pages 112-113, and *Conclusions and Recommendations* at page 16).

[163] In making its argument of deceit/fraudulent misrepresentation/fraudulent concealment, Guardian points to three key decisions on the principle of direct liability arising from a religious institution's failure to discharge its duty to protect children from being abused (see *John Doe v. Bennett* (2000), 2000 CanLII 28766 (NL SC), 190 Nfld. & P.E.I.R. 277, 2000 N.J. No. 203 (S.C. (T.D.)); *John Doe v. Bennett*, 2002 NFCA 47; *John Doe v. Bennett*, 2004 SCC 17; *W.K. v. Pornbacher* (1997), 1997 CanLII 12565 (BC SC), 68 A.C.W.S. (3d) 569, [1997] B.C.J. No. 57 (S.C.), para 45; and *T.(M.) v. P.(R.)*, 1995 CarswellOnt 1903, [1994] O.J. No. 1046 (Ct. J. (Gen. Div.)).

[164] In *Bennett*, all levels of Court held that the actions of the Church's administration in failing to take action to stop the sexual assaults by its priests, and to take steps to prevent them from continuing, constituted negligence making it directly liable for the crimes of its clergy.

[165] In rendering the decision of our Court of Appeal in *Bennett*, Marshall, J.A. held that liability of the Episcopal Corporation of St. Georges was predicated on the ordinary common law duty owed by the religious corporation to its parishioners and its subsequent breach in failing to effectively deal with the crimes of its clergy. As a result of this negligent error of judgment, it became a party to these atrocious acts by virtue of the principle of direct liability (see paras. 55-66 and 69).

[166] In *Pornbacher,* the Court spoke to the question of foreseeability holding that existing knowledge of sexual assaults (from the mid 1960's until 1980) meant the church knew that sexual abuse of children, whether by priests or others, was unacceptable behavior as it was contrary to the criminal law, the canon law, and the teachings of the Church (see paras. 81-85 of *Bennett*).

Application of the *Hryniak* Analysis

1) A false representation made by the insured.

[167] The collective weight of the Agreed Statement of Facts, the Consent Exhibits, and the *viva* voce evidence of the fact witnesses, in particular Archbishop Hundt, demonstrated that the RCEC and the Archbishops who served during the period of 1975 to 1985 chose to deny the abuses and discount the victims' disclosures of criminal activity. Rather than reporting to civil authorities such as the police or social services, the Archdiocesan administration chose a path of accepting the repeated denials made by former clergy members Hickey, Bennett and Corrigan and allowed the abuses to continue. This conclusion is consistent with the findings of the Winter Commission and meets the definition of a material fact.

2) Some level of knowledge of the falsehood by the insured or recklessness in making the representation.

[168] I find this information was intentionally concealed or misrepresented by the Archdiocese and had it been disclosed it would, on a fair consideration of the evidence, have influenced a reasonable insurer to decline the risk.

[169] The evidence further supports the finding that by the 1980s, the RCEC had adopted a practice that has been described in some parlance as "a cover-up". As noted in *Bennett*, the motivation behind this practice was not to protect the offender but rather to shield the parishioners who remained faithful to the Catholic Church.

[170] I conclude this non-disclosure by RCEC to be a reckless dismissal of the truth of these allegations and demonstrates an intentional failure to discharge its duty to protect the children of its parishes. RCEC knowingly risked exposure to provable civil claims and placed itself directly liable to the children who were sexually abused.

3) The false representation caused the insurer to act.

[171] Insurance is designed to protect the insured from potential losses both foreseen and unforeseen. Consequently, the potential for RCEC to be held accountable for not reporting the allegations of sexual abuse of children to civil authorities would form a foreseeable exposure. The non-disclosure by the Archdiocese caused Guardian to issue and subsequently renew a full coverage CGL policy to RCEC without any exclusions.

4) The insured actions resulted in or will result in a loss to the insurer.

[172] The evidence establishes that since the outset of the litigation, Guardian defended and indemnified 14 claims arising from the sexual abuses committed by members of the Archdiocese's clergy. Its position changed with the March 25, 2010, Reservation of Rights letter when it advised RCEC that it would reserve any decision on indemnification.

[173] The actions of the Archdiocese resulted in the payment of claims in some of the earliest proceedings brought by victims and constitutes a loss to Guardian. To extend the obligation of indemnification to the remaining claims would result in further losses to Guardian.

[174] When this factual matrix is placed in the context of the non-disclosure of information surrounding the abuse at the time of the original application for a CGL policy in 1980, I conclude that Guardian has met its burden of establishing that RCEC and its legal representatives intentionally and recklessly withheld knowledge of past and ongoing sexual abuse by its clergy and is not required to return the premiums paid by RCEC during the time of the Policy (see *Rana v. Ramzan*, 2023 ONSC 5792).

CONCLUSION

[175] In view of my reasons above, I draw the following conclusions.

[176] RCEC had knowledge of allegations of sexual abuse by a member or members of its clergy at the time of the first submission for insurance and did not disclose this information to Guardian, despite being under a common law and statutory duty to report these allegations to civil authorities.

[177] The collective weight of the expert opinion adduced by both parties was that despite the absence of questions from Marsh, a reasonably prudent insurer during the period of 1980 to 1985 would have considered RCEC's knowledge of allegations of sexual abuse to be a material fact, or at the very least, an important and relevant consideration before issuing the Policy; and therefore, RCEC had an obligation of full disclosure under the doctrine of *uberrima fides*.

[178] Guardian has proven that it was more probable than not that the underwriter(s) who approved and renewed the Policy would not have issued a CGL policy to RCEC. The expert evidence as supplemented by the factual evidence supports the finding that the most likely scenario would have been that had the information been disclosed to the underwriter, it would have been

viewed as potential criminal conduct that went to the core of the insured's moral fiber. As such it would have been considered a material risk or, at the very least, a moral hazard that would prevent the issuance of the Policy or the introduction of exclusions for individual clergy members and direct liability by RCEC for any future claims for sexual abuse.

[179] This conclusion is supported by factual evidence that the failure to disclose demonstrated a lack of truthfulness, a misrepresentation of the risk, and an acceptance of potential criminal acts so as to make a reasonable and prudent insurer decide to decline to issue a policy.

[180] In the result, Guardian has met its burden of establishing that RCEC and its legal representatives intentionally and recklessly withheld knowledge of past and ongoing sexual abuse by its clergy and is not required to return the premiums paid by RCEC during the time of the Policy.

DISPOSITION

[181] Guardian has established its evidentiary and legal burden to show that RCEC's failure to disclose its knowledge of sexual abuse by members of its clergy constituted a material risk and a moral hazard. This evidence also meets the threshold of deceit/fraudulent misrepresentation/fraudulent concealment, thereby triggering Guardian's right to void the Policy *ab initio* and relieves them of any obligation to return the premiums paid by RCEC.

[182] RCEC's claim for indemnity is dismissed.

COSTS

[183] In view of the result, Guardian is entitled to its costs on a Column III basis.

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PETER N. BROWNE

Justice