IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *John Doe v. Roman Catholic Episcopal Corporation of St. Johns*, 2024 NLSC 16
Date: January 26, 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**

- 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

Date of Hearing: December 13, 2023

Summary:

Following the submission of final written argument, counsel for Guardian raised a concern over the RCEC's position that Guardian was estopped from denying it indemnity because it failed to declare the Policy void *ab initio.* Guardian argued that it was prejudiced because the RCEC failed to plead estoppel by representation. The RCEC subsequently filed an application to plead estoppel by representation.

The Court held it had jurisdiction to hear the application and the discretion to grant the amendment but in so doing it had to consider whether there was any prejudice to Guardian if the amendment were allowed. It allowed the amendment but found there was prejudice to Guardian. To balance the competing principles of ensuring a matter is decided on its merits against the potential of prejudice to one of the parties it held that Guardian was allowed to reopen its case to address the issue of estoppel by representation with costs against the RCEC.

The Court also concluded that it was premature to address the issues of whether Guardian should have declared its position that the Policy was void *ab initio* prior to the start of trial and whether the RCEC has established its claim of estoppel by representation as these were issues that should be addressed in the final judgment.

Appearances:

Chris T.J. Blom and Mark R. Frederick	Appearing on behalf of the RCEC
Philip J. Buckingham, KC and Bridget S. Daley	Appearing on behalf of Guardian Insurance

Authorities Cited:

CASES CONSIDERED: *Butler v. Kloster Cruises Ltd*. (1992), 98 Nfld. & P.E.I.R. 138, 33 A.C.W.S. (3d) 695 (Nfld. S.C.(T.D.)); *Hollett v. St. John's*, 2007 NLTD 210; *Snow v. Kashyap* (1995), 125 Nfld. & P.E.I.R. 182, 53 A.C.W.S. (3d) 53 (Nfld. C.A.); *Bligh v. Gallagher* (1921), 57 D.L.R. 76, [1921] 1 W.W.R. 662 (B.C.C.A.); *Morse v. Hurndall* (1926), 37 B.C.R. 216, 1926 CarswellBC 135 (C.A.); *Krauss v. Jameson* (1951), 1951 CarswellBC 129, 4 W.W.R. (N.S.) 139 (C.A.); *Mines v. Woodworth* (1941), 3 W.W.R. 40, [1941] 4 D.L.R. 101 (B.C.C.A.); *Wilkinson v. British Columbia Electric Railway* (1939), 3 W.W.R. 238, [1939] 3 D.L.R. 623 (B.C.C.A.); *Bushby v. Tanner*, [1924] 4 D.L.R. 582, [1924] 3 W.W.R. 401 (B.C.C.A.); *Musselman v. Kingsway Fiat Ltd.* (1992), 74 B.C.L.R. (2d) 394, 37 A.C.W.S. (3d) 610 (C.A.); *Levi v. MacDougall*, [1941] S.C.J. No. 52, [1941] 4 D.L.R. 340; *Cropper v. Smith* (1884), 26 Ch.D. 700 (C.A.); *Regina Sticks Ltd. v. Saskatchewan Government Insurance* (*Sask CA*) (1993), 106 D.L.R. (4th) 484, [1993] S.J. No. 363 (Sask. C.A.); *Ford v. Kennie*, 2002 NSCA 140; *McNamara Construction v. Balfour Beatty Power Networks Ltd.*, 2007 NLTD 199; *Seascape 2000 Inc. v. Canada (Attorney General)*, 2009 NLTD 195; *Cole v. Aviva Insurance Co. of Canada*, 2007 NLTD 173; *Royal Bank of Canada v. Delayen* (1983), 26 Sask. R. 289, 21 A.C.W.S. (2d) 224 (Sask. K.B.); *Assie v. Saskatchewan Telecommunications* (1978), 90 D.L.R. (3d) 410, [1978] 6 W.W.R. 69 (Sask. C.A.); *Jones v. Shafer*, [1948] S.C.R. 166, [1948] 4 D.L.R. 81; *McKnight v. Rudd Mitchell & Co. Ltd.*, [1945] 62 B.C.R. 75, [1945] 3 W.W.R. 552 (C.A.); *Beemer v. Brownridge*, [1934] 1 W.W.R. 545, [1934] S.J. No. 8 (Sask. C.A.); *McDonald v. Fellows* (1979), 105 D.L.R. (3d) 434, [1979] 6 W.W.R. 544 (Alta. C.A.); *Commercial Life Assurance Co. v. Williamson*, [1943] 2 W.W.R. 103, [1943] A.J. No. 39 (S.C.); *Miller v. Canadian Pacific Railway. Co.*, [1933] 1 D.L.R. 761, [1933] 1 W.W.R. 233 (Alta. S.C. (Appellate Division)); *Steward v. North Metropolitan Tramways Co.* (1886), 16 Q.B.D. 556 (C.A.); *White v. Pellerine* (1988), 84 N.S.R. (2d) 341, 213 A.P.R. 341 (C.A.); *Watt v. Miller*, [1950] 3 D.L.R. 709, [1950] 2 W.W.R. 1144 (B.C.S.C.); *Macdonald v. Macdonald*, [1996] 8 W.W.R. 160, [1996] B.C.J. No. 642 (S.C.); *Hansra v. York Fire & Casualty Insurance Co*. (1982), 138 D.L.R. (3d) 293, [1982] O.J. No. 3415 (Co. Ct.); *Merino v. ING Halifax Insurance Company*, 2017 ONSC 6281; *McNamara Construction Co. v. Newfoundland Transshipment Ltd*. (1999), 172 Nfld. & P.E.I.R. 208, 85 A.C.W.S. (3d) 787 (Nfld. S.C.(T.D.)); *Guardian Insurance Company of Canada v. Roman Catholic Episcopal Corp. of St. John's*, 2013 NLCA 62

STATUTES CONSIDERED: *Judicature Act*, R.S.N.L. 1990, c. J-4*; Water Resources Act*, S.N.L. 2002, c. W-4.01

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

TEXTS CONSIDERED: G. Spencer Bower and A. Turner, *The Law Relating to Estoppel by Representation* (London: Butterworths, 3rd. ed., 1977); Blackwell, *Insurance Law in Canada*, looseleaf edition (Toronto, ON: Carswell, 2009)

REASONS FOR JUDGMENT

BROWNE, J.:

OVERVIEW

[1] Following the conclusion of the *viva voce* evidence and the exchange of post-trial briefs, counsel for Guardian raised a concern over the extent of the pleadings filed and their relationship to the trial evidence.

[2] At trial, Cheryl Robertson ("Ms. Robertson"), Guardian's expert witness, testified that if an insurer was to take the position that a policy was void *ab initio* then the insurer is required to refund the premium paid by the insured.

[3] This opinion was reaffirmed by a fact witness for Guardian, Michael Mallett ("Mr. Mallett") who also testified that if an insurer voids a policy *ab initio*, it is required to refund the premium.

[4] In the Amended Statement of Defence to the Third Party Claim, Guardian pleaded that the Policy was void *ab initio* because of the failure of the RCEC to disclose its prior knowledge of sexual misconduct involving members of its clergy (see para. 6 in action 2009 St. J. No. 4501).

[5] In its post-trial brief the RCEC argued that Guardian failed to refund the premiums it paid over the course of the Policy term. As a result of this failure, Guardian had waived its right to repudiate the Policy and is now estopped from doing so and is legally bound to honour its obligations under the Policy. The equitable doctrine, estoppel by representation, was not pleaded prior to trial so the RCEC now seeks to amend its Reply to the Amended Statement of Defence to the Third Party Claim to plead estoppel by representation in order to make it line up with the trial evidence.

ISSUES

1. Does the Court have the jurisdiction to permit an amendment to the pleadings following the completion of the trial evidence and before judgment?

2. If yes, then would allowing RCEC to do so cause prejudice to Guardian?

3. If yes, then what are the remedies (should they be necessary) available to Guardian?

4. Should I answer Issues #2 and #3 in the affirmative, then is it premature at this stage of the proceeding to consider the argument raised by the RCEC that Guardian abrogated its responsibility to declare its legal position following its discovery of material misrepresentation or non-disclosure by the RCEC in its application for the Policy?

RELEVANT RULE AND JURISPRUDENCE

Section 91(b) of the Judicature Act, R.S.N.L. 1990, c. J-4

Equitable relief

91. If a plaintiff or petitioner claims to be entitled

…

(b) to relief, upon an equitable ground, against a deed, instrument, or contract, or against a right, title or claim asserted by a defendant or respondent.
the court shall give to the plaintiff or petitioner the same relief as ought to have been given in a proceeding in equity for the same or similar purpose before December 31, 1889 , being the day that *The Newfoundland Judicature Act, 1889,* came into force.

Rules of Supreme Court, 1986

Rule 14.03 - Facts, not evidence to be pleaded

14.03 Every pleading shall contain a statement in summary form of the material facts on which the party pleading relies for a claim or defence, but not the evidence by which the facts are to be proved and the statement shall be as brief as the nature of the case admits.

Rule 14.04. Law may be pleaded

14.04 A party by a pleading may raise any point of law.

Rule 15.02-Amending the text of pleadings filed with the Court

15.02(1) If an amendment does not include the addition, deleting, substitution of correction of the name of a party to a proceeding, a party may amend a pleading filed by that party other than an order:

…

(c) at any time with leave of the Court on such terms as it thinks just.

Jurisprudence

[6] Our courts have been permissive in their interpretation of Rule 15.02(c). If there is no prejudice to the opposing party and any inconvenience or potential prejudice can be relieved by an order for costs and/or an adjournment, then the amendment will be permitted.

[7] In *Butler v. Kloster Cruises Ltd*., (1992), 98 Nfld. & P.E.I.R. 138, 33 A.C.W.S. (3d) 695 (Nfld. S.C.(T.D.)), at paragraph 12, Russell, J. set out the test for allowing an amendment of a pleading:

(a) it must not cause injustice to the other side;

(b) it must raise a triable issue;

(c) it must not be embarrassing; and,

(d) it must be pleaded with particularity.

[8] Faour, J. approved this approach in *Hollett v. St. John's*, 2007 NLTD 210, at paragraph 24, where he stated:

> I accept that the real question for me is to consider on the one hand whether the amendments serve the purpose of determining the real questions between the parties, and on the other hand whether in so permitting, an unreasonable injustice would be inflicted on the other party.

[9] In *Snow v. Kashyap* (1995), 125 Nfld. & P.E.I.R. 182, 53 A.C.W.S. (3d) 53 (Nfld. C.A.) at paragraph 87, our Court of Appeal held that even if the amendment complicates the trial, provided it complies with the rules as to pleadings and supplies proper particulars, it will be allowed:

> Having said that, however, so long as injustice to the other parties will not be the result and the proposed amendment complies with the rules as to pleading and supplies proper particulars, the amendment will not be denied just because the amendment will have the result of complicating the trial or adding or substituting

> new causes of action, provided the new cause of action arises out of the same or substantially the same facts as the original cause of action.

POSITION OF THE PARTIES

RCEC

[10] Counsel for the RCEC starts from the position that an amendment to its pleadings is not necessary to allow it to argue the doctrine of estoppel by representation. Should the Court determine otherwise, then as the alternative, it seeks leave to amend its Reply to the Amended Defence filed by Guardian.

[11] The proposed amended pleading alleges that if Guardian were to declare the Policy void *ab initio*, then it would be required to refund the premiums paid by RCEC from 1980 to 1984. Having done neither and having failed to defend or indemnify the RCEC in the main proceeding, Guardian has waived its right to repudiate the Policy and is estopped from doing so. With reference to Canadian jurisprudence, it argues that Guardian should have declared its position prior to the trial rather than abrogating this responsibility to the Court.

Guardian

[12] Counsel for Guardian disputes the factual foundation proposed by the RCEC stating that there is no evidence to establish that at any point in the history of the insurer-insured relationship did Guardian declare the Policy void *ab initio.*

[13] It points to the wording in its Reservation of Rights letter of March 25, 2010 which states that it would provide the RCEC with a Defence to the main proceeding but with the qualification that coverage or indemnification under the Policy **may not** be available to the RCEC should the allegation that it was aware of the sexual misconduct of James Hickey and other clergy at the time of its application for a

Comprehensive General Liability (CGL) policy in 1980 be proven. Guardian then expressed the opinion that such proof would constitute a material misrepresentation/material non-disclosure.

[14] The letter concludes with Guardian taking the position that it was not able to offer indemnity to the RCEC given this knowledge and offered to appoint legal counsel to defend the main proceeding "until such time as it is determined conclusively whether or not RCEC is entitled to indemnity".

[15] It is on this basis that Guardian argues the amendment should not be allowed because there is no evidentiary basis to support the allegation that there was any representation made by Guardian that the policy was void *ab initio.*

APPLICATION OF THE LAW TO THE FINDINGS

Issue #1: Does the Court have the jurisdiction to permit an amendment to the pleadings following the completion of the trial evidence and before final argument?

[16] It is trite law to state that Canadian courts have the discretion to allow amendments to the pleadings even after the trial or hearing is complete: (see *Bligh v. Gallagher* (1921), 57 D.L.R. 76, [1921] 1 W.W.R. 662 (B.C.C.A.); *Morse v. Hurndall* (1926), 37 B.C.R. 216, 1926 CarswellBC 135 (C.A.) at 221-223 per McPhillips, J.A.; *Krauss v. Jameson* (1951), 1951 CarswellBC 129, 4 W.W.R. (N.S.) 139 (C.A.) at 140-141, per O'Halloran, J.A.; *Mines v. Woodworth* (1941), 3 W.W.R. 40, [1941] 4 D.L.R. 101 (B.C.C.A.)). Such amendments have even been allowed by appeal courts to facilitate the determination of the real issue between the parties if the facts necessary have been adduced in evidence: (see *Wilkinson v. British Columbia Electric Railway* (1939), 3 W.W.R. 238, [1939] 3 D.L.R. 623 (B.C.C.A.)*; Bushby v. Tanner,* [1924] 4 D.L.R. 582, [1924] 3 W.W.R. 401 (B.C.C.A.)).

[17] A court's discretion to allow amendments after the close of evidence may be exercised to permit the pleadings to conform to the evidence established at trial. The underlying rationale is an effort to ensure that a court determines the real issues between the parties on their merits (see *Musselman v. Kingsway Fiat Ltd.* (1992), 74 B.C.L.R. (2d) 394, 37 A.C.W.S. (3d) 610 (C.A.)).

[18] In *Levi v. MacDougall*, [1941] S.C.J. No. 52, [1941] 4 D.L.R. 340, the Supreme Court of Canada held that a trial should not have been decided on the insufficiency of pleadings but rather the plaintiff should be given an opportunity to amend.

[19] The potential prejudice to the non-amending party is an overriding concern of the courts regardless of when in the proceedings an amendment is requested. For well over a century the common law approach to amending pleadings has been a broad, liberal approach as demonstrated in the following passage from *Cropper v. Smith* (1884), 26 Ch.D. 700 (C.A.), at pp.710-11, per Bowen, L.J.:

> It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected, if it can be done without injustice, as anything else in the case is a matter of right.

[20] The RCEC, in support of its position that an amendment is not required to plead estoppel by representation, refers the Court to the Saskatchewan Court of Appeal decision in *Regina Sticks Ltd. v. Saskatchewan Government Insurance* (*Sask. CA*) (1993), 106 D.L.R. (4th) 484, [1993] S.J. No. 363 (Sask. C.A.) at paragraph 21, where Wakeling, J. quoted (with support) from G. Spencer Bower and A. Turner, *The Law Relating to Estoppel by Representation* (3rd ed.), as follows:

> Nevertheless, in accordance with the modern view that disputes should be dealt with on the merits, rather than on points of pleading, should it be clearly safe to take this course, the Courts have at times shown reluctance to disallow an estoppel, though it has not been specifically pleaded, in cases in which it is the logical and

> indisputable consequence of facts put forward and proved without objection at the hearing.

[21] However, previously at paragraph 20 in *Regina Sticks*, the Court qualified its view noting that estoppel was not necessarily available in all cases including instances where there is a failure to provide notice in the pleadings of an intention to rely upon the doctrine and a specific prejudice which is later identified.

[22] In addition to this qualification, I determine the position of the RCEC does not square with the wording of section 92 of the *Judicature Act*, R.S.N.L. 1990, c. J-4 and Rule 14.04 of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D, which suggests, when read together, that equitable relief such as estoppel by representation should be set out in the pleadings relied upon by a plaintiff.

[23] Rule 15.02 permits the Court to allow an amendment to a pleading at any point in the proceeding so long as it does not cause an injustice to the other party. The criteria for the exercise of this judicial discretion were enshrined by Russell, J. in *Kloster* (see para. 12).

[24] Guardian's counsel argues that the RCEC application should be denied on the basis that estoppel does not apply in the context of the evidence presented at trial. This is because to plead estoppel by representation a party needs to establish that there was (i) a representation; (ii) reliance; and (iii) action taken to the detriment of that party.

[25] In Guardian's view, the Canadian jurisprudence supports the necessity of these three criteria being present. Yet in this matter, there is no evidence to support any of the criteria (see *Ford v. Kennie*, 2002 NSCA 140, at paras. 37-40). More importantly, it is insufficient for the RCEC to rely on the pleadings filed by Guardian because pleadings do not constitute evidence (see para. 38 of *McNamara Construction v. Balfour Beatty Power Networks Ltd.*, 2007 NLTD 199*;* and para. 19 of *Seascape 2000 Inc. v. Canada (Attorney General)*, 2009 NLTD 195).

[26] In its Amended Defence, Guardian plead that the Policy was void *ab initio*. The RCEC, therefore, cannot rely on a pleading in an Amended Defence as evidence for the purposes of its estoppel argument. Rather, it must lead evidence to prove the application of the doctrine. In the instant case, the RCEC seeks to amend its claim in an evidentiary vacuum because it cannot prove representation. According to Guardian's legal counsel, "the Policy has never been terminated". This is in addition to the absence of any evidence of detriment because Guardian offered to defend the main proceeding, but the RCEC refused its offer.

[27] Based on existing jurisprudence in conjunction with Rule 15.02, I determine this Court has the jurisdiction to grant the RCEC's application to amend its Reply to the Amended Defence filed by Guardian to include the factual and legal basis for a pleading of estoppel by representation.

Issue #2: If yes, then would allowing RCEC to do so cause prejudice to Guardian?

[28] Guardian argues that if this court were to apply the *Butler* criteria to the facts of this case it will be prejudiced because it did not get the opportunity to explore this issue with its two witnesses, Robertson and Mallett. Furthermore, estoppel is a "preclusive argument" so it can only be argued if there was a failure to return the premiums. Guardian's counsel referred the Court to the litigation timeline pointing out that the RCEC only admitted material misrepresentation/material non-disclosure approximately one month out from the trial date when the parties finalized the Agreed Statement of Facts.

[29] I accept Guardian's litigation timeline and the corresponding prejudice caused by the RCEC's late factual admission that it had knowledge of allegations certain members of its clergy had committed sexual abuse on minors at the time it applied for the Policy. In fact, during oral submissions, following a question from the Court, counsel for the RCEC admitted with the utmost of candour that the claim of estoppel by representation was something that only came into consideration following the completion of the trial evidence.

[30] In *Cole v. Aviva Insurance Co. of Canada*, 2007 NLTD 173, the plaintiff sued Aviva when furnace oil leaked from an oil tank onto her property. Aviva took the position that the policy did not cover damage to the plaintiff's property but did cover damage to the property of others. The evidence revealed that there was some contamination of the groundwater under the home. After the evidence was completed and during the preparation of the judgment, Hall, J. raised the question of whether the groundwater under the home was the property of the Provincial Crown under the *Water Resources Act*, S.N.L. 2002, c. W-4.01, and whether this gave rise to any legal liability on the part of the plaintiff to the Crown requiring an amendment of the claim.

[31] Hall, J. concluded that the amendment should be granted as it did not require a great degree of particularity. The plaintiff simply needed to plead that the groundwater that had been contaminated was the property of the Crown; that the contamination gave rise to liability for remediation of the soil and groundwater; and that such obligations constitute legal liability for which indemnity is provided under the policy of insurance.

[32] Applying the *Butler* criteria to the facts of this case, I determine the proposed amendment raises a triable issue – the issue of estoppel by representation. It is not embarrassing and is pleaded with particularity. However, unlike the factual matrix in *Cole*, I conclude that allowing the amendment without providing Guardian with the opportunity to explore this issue further with the witnesses, Mr. Szirt, Ms. Robertson and Mr. Mallett, would potentially cause them prejudice.

Issue #3: If yes, then what are the remedies (should they be necessary) available to Guardian?

[33] At paragraph 67 of its Memorandum of Fact and Law, Guardian counsel argues that in the absence of advance warning that estoppel by representation would be raised at trial it was denied the opportunity to address the matter with proper pre-trial preparation, discoveries, cross-examination, the provision of additional documentation or the calling of additional witnesses at trial. Consequently, the application to amend should be denied.

[34] In support of its position, Guardian refers the Court to *Royal Bank of Canada v. Delayen* (1983), 26 Sask. R. 289, 21 A.C.W.S. (2d) 224 (Sask. K.B.), where the Saskatchewan Court of Queen's Bench, following completion of the trial evidence but before judgment, denied *Delayen's* request to amend the pleadings to add estoppel as a defence.

[35] In *Delayan,* Walker, J. referred to *Assie v. Saskatchewan Telecommunications* (1978), 90 D.L.R. (3d) 410, [1978] 6 W.W.R. 69 (Sask. C.A.) at paragraph 72, which held that an amendment to the pleadings setting up an alternative cause of action should not be allowed after all the evidence has been heard, unless the court is satisfied that all the evidence possible on the new issue has been submitted (see *Jones v. Shafer*, [1948] S.C.R. 166, [1948] 4 D.L.R. 81); and there is no prejudice to the other side (see *McKnight v. Rudd Mitchell & Co. Ltd.*, [1945] 62 B.C.R. 75, [1945] 3 W.W.R. 552 (C.A.) at 553; and *Beemer v. Brownridge,* [1934] 1 W.W.R. 545, [1934] S.J. No. 8 (Sask. C.A.)).

[36] When evidence has been completed and the case has been conducted without reference to an issue not raised by the pleadings, prejudice will be virtually inevitable (see *McDonald v. Fellows* (1979), 105 D.L.R. (3d) 434, [1979] 6 W.W.R. 544 (Alta. C.A.), at para. 10).

[37] In *Commercial Life Assurance Co. v. Williamson*, [1943] 2 W.W.R. 103, [1943] A.J. No. 39 (S.C.), the defendant applied to amend his statement of defence by pleading estoppel after the trial had completed but before judgment was given. The court found that to determine whether the plaintiff would be prejudiced by the amendment, it had to consider if it would have changed the course of the trial had it been plead earlier. It found the plaintiff would not have substantially changed his case and where it may have been affected the court stated the following (at para. 13):

> ….The plaintiff could have examined Williamson for discovery on the question of estoppel and may still do so. If the plaintiff wishes to adduce evidence in answer to the plea of estoppel the plaintiff will have an opportunity to do so .... Any disadvantage the plaintiff may be under can be compensated in costs.

[38] A review of the jurisprudence in this area suggests that some courts appear to believe such prejudice may be prevented by allowing the non-amending party to adduce more evidence (see *Miller v. Canadian Pacific Railway. Co.*, [1933] 1 D.L.R. 761, [1933] 1 W.W.R. 233 (Alta. S.C. (Appellate Division)), at p. 235. Other courts suggest that, to prevent prejudice, the closing of evidence at trial is the cut-off for allowing amendments that will require new evidence to be adduced (*Steward v. North Metropolitan Tramways Co.* (1886), 16 Q.B.D. 556 (C.A.).

[39] Reference to the approach of allowing the introduction of more evidence was considered in *White v. Pellerine* (1988), 84 N.S.R. (2d) 341, 213 A.P.R. 341 (C.A.). There, the trial court decision to allow a post-trial amendment was upheld. The court stated (at page 342) that:

> While we cannot condone the fact that the appellants' solicitor failed to request the amendment much earlier, we are of the opinion that the parties here would not have conducted the proceeding in any manner different than was done to date, nor is it now necessary for either party to adduce further evidence. Granting the amendment will only entail the submission of further briefs. That does not create an injustice.

[40] In *Assie*, the Court, at paragraph 73, stated the following:

> On the facts of this case, it is difficult to escape the feeling that the defendant suffered some prejudice when judgment was founded upon a basis which was not pleaded, on which not opportunity to adduce evidence was afforded and on which no argument of counsel was heard.

[41] This approach was explored in *Watt v. Miller*, [1950] 3 D.L.R. 709, [1950] 2 W.W.R. 1144 (B.C.S.C.), at paragraphs 1 to 5, where the defendant sought to amend his statement of defence after the close of the plaintiff's case, but before the end of the trial. In allowing the amendment, Wilson, J. concluded that the defence had taken the plaintiff by surprise and decided to (i) allow the amendment asked but with an order for the costs of the amendment; (ii) the right to have a new examination for discovery at the cost of the defendant; (iii) at the call of the plaintiffs, there be a further hearing at which there would be a right to recall such further evidence as is relevant and admissible, including recalling any witnesses already heard; (iv) recall

for cross-examination any of the defendant's witnesses; and (v) the costs of such a further hearing will, whatever the result of the trial, be costs to the plaintiff.

[42] What has arisen here is an instance where, if the amendment sought by the RCEC as proposed (estoppel by representation) is not allowed, then a principal issue between the parties will not be addressed. A fair opportunity to have the pleadings amended should be given to ensure a hearing on the merits of the case (see *Macdonald v. Macdonald*, [1996] 8 W.W.R. 160, [1996] B.C.J. No. 642 (S.C.); *Musselman*, supra.)

[43] Inconvenience, expense and delay will be the inevitable result of allowing such an amendment. Guardian objects strenuously to the amendment saying that there is a change in their defence if the amendment is allowed after all the evidence is in. I agree and will fashion a remedy similar to the Court in *Watt v. Miller* with Guardian being compensated in costs concerning those aspects of its defence.

Issue #4: Should I answer Issues #2 and #3 in the affirmative, then is it premature at this stage of the proceeding to consider the argument raised by the RCEC that Guardian abrogated its responsibility to declare its legal position following its discovery of material misrepresentation or non-disclosure by the RCEC in its application for the Policy?

Position of the RCEC

[44] At paragraphs 2 to 17 of its Memorandum of Fact and Law dated December 24, 2023, the RCEC challenges Guardian's argument that it has not voided the Policy. It alleges this is a straw man strategy to avoid having this Court find that by not having refunded the Policy premiums to the RCEC this would end its ability to contest the RCEC's demand for coverage.

[45] It argues Guardian is seeking a "declaration" from this Court that the Policy is void *ab initio* despite its pleading that it considers the Policy void. In response,

the RCEC cites the decision in *Hansra v. York Fire & Casualty Insurance Co*. (1982), 138 D.L.R. (3d) 293, [1982] O.J. No. 3415 (Co. Ct.), at paragraph 27, which states an insurer may follow one of three courses when it learns of a misrepresentation by the insured:

> (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.

[46] The RCEC also refers to *Merino v. ING Halifax Insurance Company*, 2017 ONSC 6281 in which the court, on a motion for summary judgment, confirmed the *Hansra* approach adding that an insurer purporting to rescind a contract of insurance must declare its election to do so, on notice to the insured. On the facts in *Merino,* ING did this, by directing registered mail to the insured addressed to their common residence.

[47] It contends that Guardian cannot "sit on the fence" and await a decision of this Court to determine if the policy is void. Allowing such an ambiguous path would grant licence to insurers to take either an unclear position or no position at all; in effect, allowing them the full benefit of hindsight regarding its decisions on coverage rather than foresight. Such an endorsement by the courts would run contrary to the fundamental nature of insurance which is a contract of good faith and fair dealing, part of which is that the insurer is to declare its position immediately when coverage is in issue.

[48] In this case, Guardian took the position that the Policy was void *ab initio* at paragraphs 6 and 7 of its amended statement of defence and did not resile from this position at the outset of trial. Citing *McNamara Construction Co. v. Newfoundland Transshipment Ltd*. (1999), 172 Nfld. & P.E.I.R. 208, 85 A.C.W.S. (3d) 787 (Nfld. S.C.(T.D.)), at paragraph 14, the RCEC asserts that one of the primary purposes of pleadings is to enable the responding party to understand the case that is to be met;

namely the essential allegations of fact and the legal claims asserted based on such facts.

Position of Guardian

[49] Guardian responds by asserting that RCEC's position is without jurisprudential support as it is an anathema to the legal process developed to address civil disputes and runs contrary to a fundamental right that allows parties access to an independent adjudicative process.

[50] In fact, it states there is support for its position expressed by our Court of Appeal in previous litigation between the parties. In the decision *Guardian Insurance Company of Canada v. Roman Catholic Episcopal Corp. of St. John's*, 2013 NLCA 62 ("*Guardian 2013*"), Green, C. J., at paragraph 153, when dismissing the RCEC's claim of an abuse of process, found that Guardian's access to the court to determine its obligations *vis-a-vis* RCEC is not an abuse of process but rather is an affirmation that litigants are entitled to have matters in dispute determined by a court of competent jurisdiction.

[51] Guardian maintains that it was prepared to defend the RCEC in the main action while at the same time reserving any obligation to indemnify it until the truth and materiality of the allegations made by the Plaintiff (Doe) were finally determined, thus making the essential issue before this Court the materiality of the non-disclosure by the RCEC and whether it would render the Policy void *ab initio.*

[52] At paragraph 135 of *Guardian 2013*, Green, C.J. observed that it would be unjust to not allow Guardian the opportunity to relitigate its obligations to defend or indemnify the RCEC considering the emergence of new evidence that the RCEC knew of Hickey's abusive behaviour. To determine otherwise would run counter to public policy that cases should be determined on their merits.

[53] In the current matter as part of the Agreed Statement of Facts filed prior to the start of this trial the RCEC acknowledged it had knowledge of the sexual abuses committed by Hickey at the time of its initial application to Guardian for CGL coverage and did not disclose this information. As an interesting aside, I also note that Green, C.J. previously commented at paragraph 94 that should the claimant be successful against RCEC on this point then Guardian will have to indemnify RCEC (subject to other possible defences) against the claim in a situation where the establishment of that very fact of knowledge would under normal circumstances enable Guardian to avoid an obligation to indemnify.

[54] At paragraph 136 of *Guardian 2013*, while addressing the dissenting opinion of Welsh, J. on the issue of *res judicata*, Green, C.J. refers to Blackwell, *Insurance Law in Canada*, looseleaf edition (Toronto, ON: Carswell, 2009), at page 5-6, paragraph 5.2, concerning the legal obligation of an insurer once it becomes aware of information materially affecting the risk and possibly justifying the insurer voiding the coverage obligation. The Blackwell text notes that there is an obligation on the insurer to act in such a way as not to mislead or prejudice the insured and, if necessary, to take steps promptly to void the policy. Depending on the circumstances, failure by the insurer to act may indicate an election to affirm the contract.

[55] Given the above comments of the Court of Appeal, I am of the view that the issue of whether Guardian should have declared the position it considered the Policy void *ab initio* is not a matter to be considered at this stage of the trial. Rather, it is an issue that this Court should consider as part of its final analysis. Likewise, Guardian's preemptive argument that there was no evidence tendered by the RCEC to support the argument there was estoppel by representation is also premature and should also be reserved for consideration in the final decision on the merits.

DISPOSITION

1. The application by the RCEC to amend its Reply to include the pleading of estoppel by representation in action St. J. No. 2009 4501, and all related actions, is granted.

2. Guardian shall have its costs on a Column III basis for this amendment.

3. Guardian shall have the right to have a new examination for discovery on this issue at the cost of the RCEC.

4. Guardian shall have leave to determine whether there will be a further trial hearing at which time there would be a right to recall such further evidence as is relevant and admissible concerning the amendment. This right shall (a) include the recalling of any witnesses already heard; (b) recall for cross-examination any of the RCEC's witnesses; and (c) the costs of such a further hearing will, whatever the result of the trial, be costs to the Plaintiff.

5. The issues of whether Guardian should have declared its position the Policy was void *ab initio* prior to the start of trial, and whether the RCEC has established its claim of estoppel by representation, will be issues addressed in the Court's final judgment.

6. The parties have leave to schedule the resumption of the trial for the purposes of addressing the issues arising from my interlocutory decision and the subsequent steps flowing from it.

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PETER N. BROWNE
Justice