# Court of Queen's Bench of Alberta

**Citation: VLM v Dominey, 2022 ABQB 299**

**Date:** 20220425
**Docket:** 1703 18813
**Registry:** Edmonton

Between:

**VLM**

Plaintiff

- and -

**Estate of Gordon William Dominey,**
**the Synod of the Diocese of Edmonton and**
**Her Majesty the Queen In Right of Alberta**

Defendants

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**Reasons for Decision**
**of the**
**Honourable Mr. Justice John T. Henderson**

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## I. Overview

[1] The Plaintiff VLM (the Plaintiff or VLM) seeks to have this action certified as a class proceeding under the *Class Proceedings Act*, SA 2003, c C-16.5 (the *Act*).

[2] The 5th Amended Statement of Claim alleges that the Plaintiff and several other young persons were sexually assaulted by Gordon William Dominey (Dominey) at various times during the years 1985 to 1989 while they were detained at the Edmonton Youth Development Centre

(EYDC), a correctional facility for young persons operated by Her Majesty the Queen in Right of Alberta (Alberta).

[3] The Plaintiff alleges that Dominey was an Anglican priest who was employed by the Synod of the Diocese of Edmonton (the Synod), a representative body of the Anglican Church in Edmonton and the surrounding area. As part of his work for the Synod, Dominey provided chaplaincy, spiritual, and other services to young persons detained at the EYDC during the relevant time.

[4] It is alleged that while working with young persons at EYDC, Dominey was in a position of authority and control over the Plaintiff and other prospective class members and that his work required that he meet with them in small group or individual settings, often unsupervised. The Plaintiff alleges that he and other prospective class members were highly vulnerable persons. He alleges that Dominey used this position of authority to perpetrate the sexual abuse complained of.

[5] The Plaintiff claims that Alberta and the Synod owed a duty of care to those persons detained at the EYDC and that both Alberta and the Synod breached that duty of care by failing to provide a safe and secure environment, free from sexual abuse. The duty of care was also alleged to have been breached by Alberta and the Synod when they failed to investigate and screen Dominey before he was placed at the EYDC and before he had any contact with young persons at the facility. The Plaintiff further alleges that Alberta and the Synod failed to adequately supervise Dominey and failed to establish, implement, or enforce adequate policies, practices, or procedures to protect against sexual abuse by Dominey while he worked at EYDC.

[6] The Plaintiff alleges that both Alberta and the Synod are vicariously liable for the assaultive behaviour perpetrated by Dominey. It is also alleged that both Alberta and the Synod have direct liability to the Plaintiff and other prospective class members.

[7] It is alleged that, because of the conduct of the Defendants, the Plaintiff and other prospective class members have suffered loss and damage including physical and psychological trauma and financial loss and damage.

[8] Dominey died after being served with the Statement of Claim in this action. He did not defend the action. The Plaintiff amended the Statement of Claim to name the "Estate of Gordon William Dominey" as a defendant in this action. The Plaintiff seeks to note this defendant in default.

[9] Alberta and the Synod deny any vicarious or other liability to the Plaintiff or any prospective class members.

[10] Alberta and the Synod oppose the application for certification, primarily on the basis that the requirement for the identification of common issues has not been met and that, in the circumstances of this case, a class proceeding does not provide a preferable procedure for the fair and efficient resolution of any common issues that do exist.

## II. Certification of Class Proceeding

### a) Test for Certification

[11] The test for certification of a class proceeding was recently discussed by the Court of Appeal in ***Spring v Goodyear Canada Inc,*** 2021 ABCA 182 [***Spring***] where the Court explained

that the Plaintiff has the onus to establish all five of the preconditions to certification found in s 5 of the *Class Proceedings Act*. This onus can be met if the Plaintiff shows "some basis in fact" for each of the certification preconditions, other than the cause of action requirement in s 5(1)(a), which is decided based on the pleadings alone: ***Bruno v Samson Cree Nation***, 2021 ABCA 381 at paras 63-64 [***Bruno***]; ***Hollick v Metropolitan Toronto (City of),*** 2001 SCC 68 at para 25 [***Hollick***]. If those five preconditions are met, the action must be certified; if they are not met, the application for certification must be dismissed: ***Spring*** at para 17.

[12] The Court in ***Spring*** also emphasized that the certification process plays a screening role, but it is limited in scope: at para 18. At the certification stage, the judge is ruling on a purely procedural question. The judge must not deal with the merits of the case, as they are to be considered only after the application for certification has been granted: ***Spring*** at para 18; ***Hollick*** at para 16.

[13] The proper approach was confirmed in ***Pro-Sys Consultants v Microsoft Corporation***, 2013 SCC 57 [***Microsoft***] at para 105:

> Finally, I would note that Canadian courts have resisted the U.S. approach of engaging in a robust analysis of the merits at the certification stage. Consequently, the outcome of a certification application will not be predictive of the success of the action at the trial of the common issues. I think it important to emphasize that the Canadian approach at the certification stage does not allow for an extensive assessment of the complexities and challenges that a plaintiff may face in establishing its case at trial. After an action has been certified, additional information may come to light calling into question whether the requirements of s. 4(1) continue to be met. It is for this reason that enshrined in the *CPA* is the power of the court to decertify the action if at any time it is found that the conditions for certification are no longer met (s. 10(1)).

[14] Similar guidance was also provided by the Supreme Court in ***AIC Ltd v Fischer***, 2013 SCC 69 at paras 42-43 [**AIC Ltd**].

**b) Relevant Legislative Provisions**

[15] The important sections of the *Class Proceedings Act* that must be considered in the context of this application for certification are the following:

> 5(1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;

> (e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,
>
> > (i) will fairly and adequately represent the interests of the class,
> >
> > (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> >
> > (iii) does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the Court may consider any matter that the Court considers relevant to making that determination, but in making that determination the Court must consider at least the following:
>
> > (a) whether questions of fact or law common to the prospective class members predominate over any questions affecting only individual prospective class members;
> >
> > (b) whether a significant number of the prospective class members have a valid interest in individually controlling the prosecution of separate actions;
> >
> > (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
> >
> > (d) whether other means of resolving the claims are less practical or less efficient;
> >
> > (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.
>
> (3) Where the Court is satisfied as to each of the matters referred to in subsection (1)(a) to (e), the Court is to certify the proceeding as a class proceeding.

[16] When deciding whether this action can be certified as a class proceeding, it will be necessary to determine whether the Plaintiff has met the onus of proof in relation to each of the pre-conditions to certification set out in s 5(1).

### c) Pleadings Disclose Cause of Action – s 5(1)(a)

[17] The requirements of s 5(1)(a) are similar to those used on an application to strike an action. A court will only refuse to certify the action on this ground if it is plain and obvious that the Plaintiff's claim is bound to fail, assuming the facts alleged in the pleadings are true: ***Bruno*** at para 65; ***Microsoft*** at para 63; ***Atlantic Lottery Corp Inc v Babstock***, 2020 SCC 19 at para 19.

[18] The claim "must be read generously to allow for inadequacies due to drafting frailties and the plaintiff's lack of access to key documents and discovery information", and unsettled points

of law must be permitted to proceed: ***Krishnan v Jamieson Laboratories Inc***, 2021 BCSC 1396 at para 45, citing ***Cannon v Funds for Canada Foundation***, 2012 ONSC 399 at paras 136-38. Courts are to consider the claims as they are, or as they may be amended: ***Sharp v Royal Mutual Funds Inc***, 2020 BCSC 1781 at para 22.

[19] The requirements of s 5(1)(a) set a very low bar: ***Bruno*** at para 67, note 135.

[20] The Synod concedes that the requirements of s 5(1)(a) have been met.

[21] Alberta concedes that the requirements have been met in relation to all causes of action other than the claims based on the *Occupiers' Liability Act*, RSA 2000, c O-4 and the claims based on an alleged breach of fiduciary duty.

[22] With respect to the claims based on the *Occupiers' Liability Act*, Alberta argues that some instances of alleged abuse did not take place at the EYDC facility but instead in Dominey's motor vehicle or at his residence. Alleged misconduct that occurred at the premises other than EYDC (which is the premises pleaded in the 5th Amended Statement of Claim) cannot succeed on the basis of the *Occupiers' Liability Act* and thus the certification to the extent that it relates to claims based on the *Occupiers' Liability Act* must be restricted to alleged sexual abuse that took place at EYDC.

[23] Alberta argues that the allegations of breach of fiduciary duty made in the 5th Amended Statement of Claim are "bare pleadings" that simply allege that Alberta operated and controlled the EYDC and was responsible for providing a safe and secure environment free from sexual abuse and that Alberta has discretion and power over the members of the proposed class, who were vulnerable.

[24] Alberta submits that the claims of breach of fiduciary duty will not succeed because the facts alleged in the 5th Amended Statement of Claim do not meet the requirements prescribed by the Supreme Court of Canada in ***Elder Advocates of Alberta Society v Alberta***, 2011 SCC 24 at para 36 [***Elder Advocates***]:

> In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

[25] Moreover, Alberta argues that, as a matter of law, a jailer owes no fiduciary duty to persons who are being held in custody: ***Squires v Canada (AG),*** 2002 NBQB 309; ***Phaneuf v Ontario***, 2010 ONCA 901. However, as Alberta concedes, those authorities expressly deal with adults who are held in custody, and there is no authority that has considered the existence of a fiduciary duty owed by the Crown to a youth who has been taken into custody by the State and placed in a detention centre. I also note that in at least two cases, Courts have certified issues relating to breaches of fiduciary duties that were alleged to have taken place at a young offender center: ***JK v Ontario***, 2018 ONSC 7545; ***Jane Doe (#7) v Newfoundland and Labrador***, 2019 NLSC 170.

[26] I am not satisfied that it is plain and obvious that the criteria in ***Elder Advocates*** cannot be met in this case. It is not plain and obvious that when children are removed from their families and taken into custody that no fiduciary duty is owed. That is particularly so where, as here, it is alleged that Alberta assumed responsibility for the spiritual and educational needs of the children in custody. The claim of breach of fiduciary duty may be a novel claim. The claim may or may not succeed. However, at this stage it is not appropriate to undertake any critical analysis of the merit of the cause of action. The cause of action has been pleaded with sufficient particularity. I am satisfied that the pleading meets the low threshold to satisfy the requirements of s 5(1)(a): see ***Bruno*** at para 70.

[27] As a result, the first precondition to certification is met with one qualification. The claims in relation to those instances of sexual abuse that are alleged to have taken place at locations other than at the EYDC are bound to fail to the extent that they are based on the *Occupiers' Liability Act*. Thus, only those claims based on the *Occupiers' Liability Act* that are alleged to have occurred at the EYDC can be certified.

**d) Identifiable Class of 2 or More – s 5(1)(b)**

[28] Section 5(1)(b) of the *Act* requires that there be an identifiable class of two or more persons. The Supreme Court of Canada, in ***Western Canadian Shopping Centres v Dutton***, 2001 SCC 46 [***Dutton***], describes the requirement for an identifiable class as follows:

> ... First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria...

[29] Thus, the class must be based on objective criteria and bear a rational connection to the claims, causes of action, and common issues. It must not be overly broad: ***Bruno*** at para 86, citing ***Warner v Smith & Nephew Inc***, 2016 ABCA 223, leave to appeal refused, 37229 (February 2, 2017).

[30] Alberta and the Synod concede that the requirements of s 5(1)(b) have been met. However, Alberta seeks to restrict the class definition to those persons who were sexually assaulted while they were in the "maximum security" unit or the "secured unit" at EYDC.

[31] There is no evidence before me that there was actually a "maximum security" unit or a "secured unit" at EYDC during the relevant time. As a result, it would be inappropriate to restrict the class definition on this basis.

[32] Alberta also seeks to refine the class definition by eliminating those persons who may have had a claim but who are now dead or may die before trial. Alberta argues that while the estates of these persons may continue to have a claim, the damages will be limited to "actual financial loss".

[33] I conclude that the class definition cannot be restricted on this basis. As I will explain later in these reasons, issues regarding damages cannot form part of the common issues in this case. Thus, any common issues will be equally applicable to those prospective class members who are alive and to those who are no longer living.

[34] I conclude that the requirement for an identifiable class is met on the basis of a class definition proposed by the Plaintiff:

> All persons who were incarcerated at the EYDC from 1985 to 1990 and claim to have been sexually assaulted by Gordon William Dominey while imprisoned at the EYDC.

[35] The requirements of s 5(1)(b) have been met on this basis.

### e) Claims Raise Common Issues – s 5(1)(c)

#### i. General Principles

[36] To satisfy s 5(1)(c) of the Act, the Plaintiff must show some basis in fact that "the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members".

[37] In ***Microsoft***, the Court reaffirmed the principles set out in its earlier decision in ***Dutton***, by explaining that "the underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis". The Court summarized the principles at para 108:

(1) The commonality question should be approached purposively.

(2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.

(3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.

(4) It is not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.

(5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[38] The Court clarified in ***Vivendi Canada Inc v Dell'Aniello***, 2014 SCC 1 that success for one class member on a common issue need not necessarily mean success for all, but success for one member must not mean failure for another (at paras 45-46).

[39] Therefore, the onus is on the Plaintiff to adduce some basis in fact that (a) the common issue actually exists; and (b) the proposed issue can be answered in common across the class: ***Doucet v Royal Winnipeg Ballet***, 2018 ONSC 4008 at para 90; ***Simpson v Facebook***, 2021 ONSC 968 at para 43; ***Mancinelli v Royal Bank of Canada***, 2020 ONSC 1646 at para 120; ***Charlton v Abbott Laboratories Ltd***, 2015 BCCA 26 at para 85.

[40] The requirement to show "some basis in fact" for one or more common issues can be satisfied by meeting a low standard. This standard is lower than the balance of probabilities threshold applicable in civil cases: ***Microsoft*** at para 102. The standard is low because a certification hearing is not "a determination of the merits of the proceeding". Nevertheless, certification is an important screening device requiring "more than symbolic scrutiny": ***Microsoft*** at para 103; ***Spring*** at para 34.

**ii. Noting In Default**

[41] Dominey failed to file a defence before his death. His Litigation Representative has also refused to file a defence and has advised the Plaintiff that the Estate of Dominey should be noted in default. The Plaintiff seeks the leave of the Court to note the Estate in default.

[42] No defence has been filed despite service of the pleadings. I am satisfied that the Estate of Dominey has no intention to file a defence. The Litigation Representative is an experienced civil litigation lawyer who is fully aware of the consequences of failing to file a defence. He did not appear on this certification application and has never asked the Court for additional time to defend. In these circumstances, the Plaintiff is granted leave to note the Estate of Dominey in default.

[43] The Plaintiff argues that by noting the Estate in default, it is deemed to have admitted the allegations against Dominey, including the allegations of sexual abuse. Quite properly, the Plaintiff acknowledges that deemed admissions arising from the noting in default of Dominey cannot be used to make a finding of liability against Alberta or the Synod. However, the Plaintiff argues that the deemed admissions against Dominey are relevant from a procedural standpoint "to identify common issues regarding the breach of any legal duties that are found to exist in this matter on a class basis". This position is further articulated at para 292 of the Plaintiff's Written Submissions:

> ... The certification application identifies several common issues that concern a breach of the various duties pled in this action and are based on the presumption that Dominey sexually abused the class members. However, at this stage, and if Dominey is noted in default, this is no longer a presumption but rather a factual finding based on a deemed admission. As such, questions regarding breach of the duties the Defendants are alleged to owe the class members can be answered on a class wide basis.

[44] Noting the Estate in default means that the factual allegations in the claim against Dominey are deemed admitted by the Estate: ***Robinson v Fiesta Hotel Group Resorts***, 2008 ABQB 311; ***Toerper v Hoard***, 2011 ABQB 85. But the deemed admissions are not absolute. Despite the deemed admissions, in any hearing to assess damages, the Court retains a residual discretion to direct a further hearing where the Court is not satisfied that the Plaintiff has a cause of action: ***Dyck v Wilkinson***, 2004 ABQB 731; ***Spiller v Brown,*** [1973] 6 WWR 663 (ABCA).

[45] It is important to recognize that the deemed admission arising from a noting in default is only an admission as against the party who has been noted in default. It is not an admission made by, or which can be used against, another defendant who has properly filed a statement of defence. As a result, to establish liability against Alberta or the Synod, or both, the Plaintiff will still need to prove on a balance of probabilities that he was sexually abused by Dominey. The sexual abuse represents an element of virtually all the causes of action pleaded against Alberta

and the Synod. To succeed in the action, the Plaintiff must prove those elements. If this action is certified, all prospective class members will have a similar burden. The noting the Estate in default offers no assistance to the Plaintiff or the prospective class members in this regard.

[46] Even from a procedural perspective, the noting in default does not demonstrate "some basis in fact" as against Alberta or the Synod that the Plaintiff was sexually abused or that any of the prospective class members were sexually abused. The noting in default cannot be used as a springboard to engage common issues related to alleged breaches of duty by these defendants. As I will explain later in these reasons, breaches of duty by Alberta and the Synod arising from any sexual abuse are unique to each prospective class member and must be assessed individually. They are not appropriately dealt with in a common issues trial.

[47] The primary significance of the noting in default is that the Plaintiff may proceed to trial against the Estate of Dominey without notice, and, because of the presumptive admissions, the only issue to be resolved at that trial is the quantum of damages that can be awarded. In this case, the Plaintiff has elected to not follow that path, presumably for the reasons made clear at para 60 of the Plaintiff's Reply Submissions – it is unlikely that the Estate would be able to satisfy any judgments.

[48] I conclude that the noting the Estate of Dominey in default does not assist the Plaintiff on this certification application.

### iii. Transcripts from the Preliminary Inquiry

[49] Dominey was criminally charged on an Information that alleged multiple counts of sexual assault involving the Plaintiff and many of the prospective class members. Dominey retained counsel who appeared for him to defend the criminal litigation. As part of that process, a lengthy Preliminary Hearing was conducted in the Provincial Court of Alberta over many days during the period January 2017 to May 2017. The Plaintiff and many other prospective class members testified that they had been detained at the EYDC during the relevant time period and that they were sexually abused by Dominey. These individuals were cross-examined by Dominey's counsel.

[50] At the conclusion of the Preliminary Hearing on May 15, 2017, Dominey was committed to stand trial on all the sexual abuse counts because, as the presiding Judge explained, the evidence satisfied her that "a reasonable jury, properly instructed, could return a verdict of guilty on each of those charges".

[51] The Plaintiff relies on the transcript from the Preliminary Inquiry, in part, to establish the common issues and preferable procedure components of the test for certification. At its core, the Plaintiff seeks to use the transcript to demonstrate that there is some basis in fact that multiple young persons were detained at the EYDC during the relevant time period, that they encountered Dominey who worked at the EYDC as a Chaplin and spiritual advisor, and that the young persons were sexually abused by Dominey. He argues that this gives rise to multiple common issues.

[52] Alberta and the Synod argue that the transcript from the Preliminary Inquiry is inadmissible hearsay and that it cannot be used to assist the Plaintiff in attempting to establish the common issues requirement. These Defendants note that the Plaintiff is the only person who has sworn an affidavit to attempt to demonstrate that he was sexually abused by Dominey at the EYDC. Because no other prospective class members swore an affidavit in support of the

certification application, Alberta and the Synod have not had an opportunity to test the issue of whether other prospective class members may have been sexually abused by Dominey. Thus, Alberta and the Synod argue that the only admissible evidence regarding sexual abuse is that which was perpetrated on the Plaintiff. For this reason, Alberta and the Synod argue that there is no evidence of commonality that can support certification.

[53] Alberta and the Synod also argue that the Plaintiff's affidavit evidence and the cross-examination on that affidavit are inconsistent with the evidence he gave under oath at the Preliminary Inquiry. They argue that this demonstrates the unreliability of the Plaintiff's evidence. For example, at paras 9 and 10 of the Brief filed on behalf of the Synod, it is asserted that:

> There is no basis to determine which version of the stories [the Plaintiff] has told might be true, if any of them are. He has expressly denied the reliability of the evidence he gave at the preliminary inquiry, claiming he was confused and even that he said that he was anally penetrated when the record does not reflect that.
>
> The fact that there is no version of the Plaintiff's story that is trustworthy provides a striking demonstration of the unreliability of hearsay evidence and a justification for cautions against relying on such evidence for any point that is significant or possibly contentious...

[54] Alberta and the Synod argue that the demonstrated unreliability of the Plaintiff's evidence "demonstrate[s] the unreliability of the preliminary hearing transcripts" (Alberta Brief at para 165).

[55] When arguing that the preliminary hearing transcripts are unreliable, Alberta and the Synod fail to distinguish between "threshold reliability", which is important in the context of an admissibility assessment and "ultimate reliability", which is a concept that determines the extent to which the trier of fact can use the evidence to support the truth of the content of the statement (see ***R v Bradshaw***, 2017 SCC 35). The arguments of Alberta and the Synod address ultimate reliability. But that type of assessment cannot be undertaken on a certification application and can only be determined at trial. A certification procedure is not meant to assess the merits of an action: ***Bruno*** at para 66; ***Spring*** at para 18.

[56] The transcripts from the Preliminary Inquiry are properly before me. The transcripts were the subject of an application on April 23, 2019, at which the Plaintiff sought a ruling that the transcripts were admissible on the certification application. On that application, I concluded that whether the transcripts were admissible would depend on the purpose for which the transcripts were tendered. The Plaintiff, the Synod, and Alberta all agreed that the transcripts could not be used to establish the truth of the contents of the evidence given at the Preliminary Inquiry, but the transcript was potentially admissible for other purposes, particularly in the context of an application with a low evidentiary burden. They submitted that the focus of the analysis was the purpose for which the evidence was tendered and the weight that could be given to the transcript.

[57] I conclude that the transcripts from the Preliminary Inquiry are not hearsay evidence. Hearsay is an out of court statement that is tendered for the truth of the contents. The transcript is not hearsay because the Plaintiff does not tender the transcript to prove the truth of the contents. He does not tender the transcript to prove that Dominey sexually abused young

persons at the EYDC. He has no obligation to prove sexual abuse at the certification stage. Instead, he need only establish that there is "some basis in fact" which can be used to identify common issues.

[58] It is a fact that the Preliminary Hearing took place. It is a fact that multiple witnesses testified at the Preliminary Hearing. It is a fact that those witnesses testified that they were sexually abused by Dominey while they were at EYDC. It is a fact that the evidence was recorded and transcribed by an official court transcriber who has certified the transcript. Alberta and the Synod do not dispute these facts.

[59] The transcript does not prove that any sexual abuse took place. But it does prove that multiple witnesses testified under oath that they were sexually abused by Dominey.

[60] I conclude that there is a high degree of procedural reliability associated with the transcripts from the Preliminary Inquiry. The evidence was given under oath before a Provincial Court Judge. The witnesses were cross-examined (although not by Alberta or the Synod) and the transcript was prepared by a qualified court transcriber.

[61] This is not a case similar to ***TL v Alberta (Director of Child Welfare),*** 2006 ABQB 104 [***TL***], where Slatter J (as he then was) concluded that: "... things that third parties had disclosed to Mr. Lee, and that Mr. Lee had then passed on to Ms. Stewart, who then swore that she verily believed them to be true" amounted to double hearsay that was of so little probative value as to be of no use to the Court.

[62] The procedural reliability of the transcripts from the Preliminary Inquiry is sufficient to render them admissible on this certification application. The transcripts do not prove the truth of the contents of the transcripts. The transcripts do not prove that sexual abuse took place. But the transcripts may be used to prove that multiple witnesses testified under oath that they were detained at the EYDC during the relevant period and were sexually abused by Dominey. This provides a basis in fact that can be used by the Plaintiff to attempt to establish the common issues.

### iv. Affidavit of Devyn Ens

[63] Devyn Ens is paralegal at Nanda and Company, counsel for the Plaintiff. Ms. Ens swore an affidavit on June 28, 2021, in support of the certification application. The affidavit contains a summary of interviews of two persons who allege that they were sexually assaulted by Dominey. One of those individuals also testified at the Preliminary Inquiry and one did not. The affidavit also contains 3 pages of a Prince George RCMP investigative report and approximately 135 pages from a 308-page Edmonton Police Service report.

[64] The affidavit is sworn on information and belief and is therefore hearsay. On a certification application such an affidavit is permissible: ***Harrison v XL Foods Inc,*** 2014 ABQB 720 at para 18; ***Cardinal v Alberta***, 2020 ABQB 528 at paras 21-22. However, when assessing the evidence in the affidavit it is necessary to consider the extent to which the evidence has any probative value and the extent to which the evidence can be of assistance to the court: ***TL***.

[65] The interviews with the two prospective class members are admissible and have some probative value. Ms. Ens is a paralegal and works under the supervision of counsel. She had a duty to accurately record the information she obtained during the interviews with the two individuals. She is aware of her obligations when swearing the affidavit which was commissioned by Mr. Nanda. The content of the affidavit that describes the interviews is not

hearsay because, like the transcripts, the evidence is not tendered to prove the truth of the contents of the interviews, but only to demonstrate what the witnesses told Ms. Ens. This portion of the affidavit can be used to provide some basis in fact to establish common issues.

[66] The portion of the affidavit that attaches police reports from the RCMP in Prince George and the Edmonton Police Service raises a more significant concern. I am satisfied that they are genuine reports prepared by the police agencies. However, the reports consist primarily of double and triple hearsay to such an extent that the probative value is so slight as to be virtually meaningless even on a certification application where the test is low.

[67] I attach no weight to the portion of the affidavit that attaches the police reports.

### v. The Proposed Common Issues

[68] The Plaintiff proposes a total of 54 common issues that span the breath and depth of each of the causes of action that have been raised in the pleadings. The proposed common issues range from general and systemic issues to issues relating to breach of duty, negligence, breach of fiduciary duties, vicarious liability, and issues arising from the *Charter of Rights and Freedoms*, as well as remedies and damages.

[69] Alberta and the Synod argue that the nature of the sexual abuse allegations cover a broad range of circumstances. Some are alleged to have occurred during spiritual counselling, some in Dominey's car, some in his home, some in a swimming pool, and some during strip searches. Alberta and the Synod argue that any liability determination in relation to a specific class member will be dependent upon an assessment of the individual circumstances in which the abuse took place. This will require a case-by-case analysis. Alberta and the Synod argue that only after undertaking this type of analysis will the Court be able to assess whether there has been a breach of the duty of care owed to the individual class member or whether any vicarious liability arose. Similarly, any claims based upon an alleged breach of fiduciary duty, if such a duty is found to exist, must be assessed on an individual basis since there is no strict liability arising from such a duty: ***EDG v Hammer***, [2003] 2 SCR 459 at paras 24-25, ***H(SG) v Gorsline***, 2001 ABQB 163 at paras 119-20.

[70] Moreover, Alberta argues that many of the factual common issues that the Plaintiff has proposed are framed by the caveat of "if it is established that Dominey sexually abused" the class member. Alberta argues that this is a circular issue. They assert that the Court will not be able to fairly come to conclusion on these common issues in a vacuum by simply assuming that the sexual abuse took place.

[71] Alberta and the Synod argue that the common issues proposed by the Plaintiff cannot be assessed in the broad context. They argue that these issues present only an appearance of commonality, but they are not in fact common. For these reasons, Alberta and the Synod argue that this case does not lend itself to common issues.

[72] The transcripts from the Preliminary Inquiry do provide some basis in fact that the Plaintiff and many potential class members were detained at the EYDC, and that Dominey was employed at the facility as a Chaplin and spiritual advisor, and that he sexually abused many of the potential class members. This provides at least some foundation for potential factual common issues.

[73] The Plaintiff argues that there is evidence that Alberta and the Synod were aware or ought to have been aware of Dominey's abuse of the prospective class members at the EYDC.

He argues that this informs many of the proposed common issues. I conclude that there is no basis in fact that Alberta or the Synod knew or ought to have known of Dominey's abusive behaviour. The evidence proffered to support that proposition is based on records that are incomplete and that contain multiple layers of hearsay and have no evidentiary value even in a certification application where the threshold is very low.

[74] At a minimum, common issues can be identified with respect to various aspects of the claims that relate to all prospective class members. Those common issues can include such things as the layout of the EYDC, the conditions of confinement within the EYDC at the relevant times, the circumstances in which Dominey came to be working at EYDC, the relationship among Dominey, the EYDC, Alberta, and the Synod, and the supervision and oversight of Dominey at EYDC.

[75] The Plaintiff argues that further common issues arising from the policies, practices, and procedures that were put in place by EYDC, Alberta, and the Synod should be included. Alberta objects to common issues framed in this fashion, arguing that any generalized finding based on the policies, practices, and systems as a whole would be "so abstract as to be of little practical utility": ***TL*** at para 103. I conclude that the concerns expressed in ***TL*** can be addressed by ensuring that the common issues relating to policies and practices be drafted in such a way that they would apply specifically to the issue of preventing sexual abuse of those young persons detained at the EYDC. With these modifications the common issues can advance the action.

[76] In addition to the factual common issues, some common legal issues can be identified. These include whether the Synod or Alberta owed fiduciary duties to the persons detained at the EYDC. They also include whether the Synod or Alberta owed a duty of care in relation to the prevention of sexual abuse to persons detained at the EYDC and, if so, what was the standard of care that they owed. However, some legal issues raised by the Plaintiff would not advance the action if they were included as common issues. For example, issues relating to the *Occupiers' Liability Act* add very little, if anything, to the action since the legislation does nothing other than assimilate an occupier's duty with the modern duty of care in tort. It does not impose a higher standard of care on occupiers: ***McAllister v Calgary (City of),*** 2019 ABCA 214 at para 29; ***Doucet v Royal Winnipeg Ballet*** at paras 102-03.

[77] Similarly, issues relating to alleged breaches of the *Charter* and issues relating to the *Proceeding Against the Crown Act* are dependent upon the individual circumstances of the specific proposed class members and therefore are not amenable to common issues.

[78] The Plaintiff has proposed multiple common issues relating to alleged breaches of duty by the Synod and Alberta, all of which have as their foundation the sexual abuse. The transcripts from the Preliminary Inquiry do provide a basis in fact that potentially supports common issues relating to sexual abuse. But if common issues are identified on this basis, they would only have an appearance of commonality but would not be truly common. This is because each instance of sexual assault is unique. These assaults occurred at different times in different places over the span of many years and the nature of the sexual assaults varies considerably from one claimant to the next.

[79] To establish a breach of duty, each individual prospective class member will need to testify as to his experiences at the EYDC and, more specifically, with respect to any sexual abuse that was perpetrated by Dominey and the circumstances of the assaults. Whether these assaults occurred and, if they did, whether the circumstances of the assaults gave rise to a breach of duty

can only be determined after specific findings are made in relation to the individual assaults. In relation to any alleged breach of duty, the Court would be required to examine the conduct of Alberta and the Synod in the context of the specific assaults to determine whether one or both Defendants had taken reasonable steps to protect the specific claimant and whether their actions or lack of action gave rise to a breach of duty.

[80] Simply establishing a basis in fact that sexual abuse occurred does not, on its own, permit common issues that are dependent upon the proof of individual instances of sexual abuse. I conclude that no common issues exist with respect to alleged breaches of duty by Alberta and the Synod.

[81] Vicarious liability is also dependent upon the circumstances of the individual assaults and is not amenable to common issues. For example, the issue of vicarious liability in relation to a sexual assault that took place during a private spiritual or counselling session may be determined quite differently than an assault that took place during a strip search. In the first case the Synod could potentially have some vicarious liability but not Alberta, whereas in the second instance Alberta may have vicarious liability but not the Synod.

[82] The Plaintiff correctly notes that some class actions have been certified in relation to institutional sexual abuse claims involving children. The Plaintiff cites ***Rumley v British Columbia***, 2001 SCC 69 [***Rumley***] as an example. However, as was noted by Justice Slatter in ***TL*** at paras 108-09:

> It is instructive to note that the experience in the ***Rumley*** action was not entirely happy. An application was subsequently brought to decertify the action: ***Rumley v. British Columbia (#2)***, 2003 BCSC 234, 12, B.C.L.R. (4th) 121. As the case progressed, it became apparent that the attempt to determine negligence at a systemic level was actually turning into a trial of many different individual instances of abuse: see paras. 64 to 69. As the Court stated at para. 60:
>
> > The question then remains whether any general finding that can be made in such a class proceeding can be of any assistance to the members of the plaintiff class who must then prove on an individual basis that they suffered damage and that the systemic breach was an effective cause of their injury.
>
> The chambers judge went on to conclude that "the difficulty is that all of this must have been known by the Court of Appeal when they decided it was possible to certify a common issue", but I would note that the *Act* specifically provides for decertification just because it is impossible for the court to predict exactly how a class action will unfold. ***Rumley*** shows that an attempt to prove systemic negligence by proving many individual examples of negligence is unworkable. A careful reading of ***Rumley (#2)*** is instructive, because it is clear that if the chambers judge was deciding the matter afresh, she would not have certified systemic negligence as a common issue. While the case management judge felt that the class action could continue through "aggressive case management", and some refinement of the common issues, she did conclude at para. 91 that the action had "reached a precarious balance between a potentially workable class proceeding and unmanageable confusion".

[83] In my view the caution of Justice Slatter is instructive. Identifying common issues when they are directly tied to, and dependent upon, the determination of individual issues will not advance the litigation and can be counter productive. As a result, many of the common issues relating to liability issues that are proposed by the Plaintiff are simply not workable.

[84] The same can be said with respect to issues relating to quantum of damages. The Plaintiff seeks to raise common issues relating to a minimum set of general damages on an aggregate basis as well as for punitive damages "particularly if it is established that Dominey sexually abused the Class Members at the EYDC in his role as chaplain".

[85] Including common issues that relate to damages for personal injuries is usually not appropriate because determining causation for the injuries may be complex and will be subject to numerous variables which would not impact each prospective claimant uniformly: ***Nette v Styles***, 2010 ABQB 14 at paras 86-95. The conclusions in ***Nette*** are equally applicable with respect to damages arising from sexual abuse. The allegations of sexual assault by some prospective class members consist of very serious and intrusive sexual violence. Other instances of sexual abuse are alleged to be at the lower end of the scale of seriousness. The impact that any sexual abuse has had on each individual prospective class member is vastly different. Some will have experienced very significant consequences. Others may have not had these experiences. Attempting to frame damages as common issues is simply not workable in these circumstances.

[86] The Plaintiff has proposed 5 common issues that relate to the liability of the Estate of Dominey. Since the Estate will be noted in default and will be deemed to have made admissions regarding the allegations of misconduct by Dominey, these common issues need not be included.

[87] I conclude that the Plaintiff has demonstrated some basis in fact for many common issues. Where I consider it appropriate, I have used the language proposed by the Plaintiff, but for many of the common issues I have modified the language proposed by the Plaintiff. The following common issues can be identified:

1. What was the nature of Dominey's employment relationship, if any, with Alberta when he worked at EYDC as a Chaplain?
2. What was the nature of Dominey's employment relationship, if any, with the Synod when he worked at the EYDC as a Chaplain?
3. What degree of oversight, if any, did Alberta have over Dominey and the work he performed at the EYDC?
4. What degree of direction, if any, did Alberta have over Dominey and the work he performed at the EYDC?
5. What degree of oversight, if any, did the Synod have over Dominey and the work he performed at the EYDC?
6. What degree of direction, if any, did the Synod have over Dominey and the work he performed at the EYDC?
7. What were the general conditions of confinement for prisoners at the EYDC during the relevant time?

8. What was the layout of the EYDC, including the location of the pool, change rooms, meeting room, and Chaplaincy room during the relevant time?
9. What, if any, screening and vetting policies and procedures did Alberta have for hiring and appointment of Chaplains at the EYDC during the relevant time?
10. What, if any, screening and vetting policies and procedures did the Synod have for hiring and appointment of Chaplains at the EYDC during the relevant time?
11. What, if any, polices, practices, and procedures did Alberta have in relation to avoidance of instances of sexual abuse by Chaplains working at EYDC during the relevant time?
12. What, if any, policies, practices, and procedures did the Synod have in relation to avoidance of instances of sexual abuse by its priests working at juvenile correctional facilities such as EYDC during the relevant time?
13. What safeguards and checks, if any, were implemented by Alberta to ensure that its policies, practices, and procedures relating to the avoidance of instances of sexual abuse by Chaplains at the EYDC were followed during the relevant time?
14. What safeguards and checks, if any, were implemented by the Synod to ensure that its policies, practices, and procedures relating to the avoidance of instances of sexual abuse by Chaplains at the EYDC were followed during the relevant time?
15. Did the Synod owe a duty of care to young persons detained at the EYDC during the relevant time, specifically in relation to the avoidance of instances of sexual abuse?
16. If the Synod owed such a duty of care, what was the standard of care?
17. Did the Synod owe a fiduciary duty to young persons who were detained at the EYDC during the relevant time?
18. Did Alberta owe a duty of care to young persons detained at the EYDC during the relevant time, specifically in relation to the avoidance of instances of sexual abuse?
19. If Alberta owed such a duty of care, what was the standard of care?
20. Did Alberta owe a fiduciary duty to young persons who were detained at the EYDC during the relevant time?

[88] The remaining common issues proposed by the Plaintiff are either not truly common issues or will not advance the action in a material way.

**f) Is a Class Action the Preferable Procedure?**

[89] Subsection 5(1)(d) of the *Class Proceedings Act* requires that the Plaintiff demonstrate some basis in fact that a class proceeding is the preferable procedure for the fair and efficient

resolution of the common issues. The factors listed in s 5(2) are not exhaustive but must be considered in assessing whether the class proceeding is preferable. The analysis of the factors in s 5(2) must be undertaken though the lens of the three policy goals of class actions: judicial economy, access to justice, and behaviour modification: ***AIC Ltd*** at para 22.

[90] The Supreme Court in ***Hollick*** at para 30 explained that:

> The question of preferability, then, must take into account the importance of the common issues in relation to the claims as a whole. It is true, of course, that the Act contemplates that class actions will be allowable even where there are substantial individual issues: see s. 5. It is also true that the drafters rejected a requirement, such as is contained in the American federal class action rule, that the common issues "predominate" over the individual issues: see *Federal Rules of Civil Procedure*, Rule 23(b)(3) (stating that class action maintainable only if "questions of law or fact common to the members of the class predominate over any questions affecting only individual members"); see also *British Columbia Class Proceedings Act*, s. 4(2)(a) (stating that, in determining whether a class action is the preferable procedures, the court must consider "whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members"). I cannot conclude, however, that the drafters intended the preferability analysis to take place in a vacuum. There must be a consideration of the common issues in context. As the Chair of the Attorney General's Advisory Committee put it, the preferability requirement asks that the class representative "demonstrate that, given all of the circumstances of the particular claim, [a class action] would be preferable to other methods of resolving these claims and, in particular, that it would be preferable to the use of individual proceedings" (emphasis added): M. G. Cochrane, *Class Actions: A Guide to the Class Proceedings Act, 1992* (1993), at p. 27.

[91] The Plaintiff argues that the determination of the factual and legal common issues will streamline the claims of the prospective class members, significantly advancing the claims while conserving the limited resources of the court and the parties. He therefore submits that the action should be certified as a class proceeding.

[92] Alberta and the Synod argue that the benefits of certification in relation to these proceedings would be very limited primarily because, even after a common issues trial, each prospective class member will be required to proceed with individual trials for the purpose of proving that he was sexually abused and, if so, whether Alberta or the Synod, or both, are liable for the resulting damage. Alberta and the Synod acknowledge that s 8(a) of the *Class Proceedings Act* would not permit refusal of certification on the basis that individual damages assessments would be required after the determination of the common issues. These Defendants argue that much more than damages needs to be addressed after any common issues trial and, in these circumstances, a determination of any common issues will not significantly advance the action but will only delay the outcome of the individual actions.

### i. Do Common Issues Predominate Over Individual Issues?

[93] Determination of the common issues at a common issues trial would advance the action. For example, a common issues trial would resolve all issues relating to the relationship that Dominey had with Alberta and the Synod while at EYDC and the scope of the responsibilities

and obligations that these Defendants may have had in relation to Dominey. A common issues trial would also identify the duty and standard of care and would provide some factual findings that would also be of assistance in each of the individual trials.

[94] While numerous common issues have been identified, it seems likely that many of those issues will not be the subject of contested evidence. Based on the submissions of counsel it appears that there is agreement that Dominey was providing Chaplaincy and spiritual services at EYDC during the relevant years. There appears to be no dispute that he was an Anglican priest and employed by the Synod. There appears to be no real dispute that Alberta contracted with the Synod for Dominey's services. Many of these factual issues will likely be resolved through agreement or through questioning of Alberta and the Synod. This is particularly so since these claims are historical in nature and there are likely very few witnesses who can testify to the actual events.

[95] However, the most fundamental issues that will need to be resolved before a prospective claimant can ultimately be successful is whether he was sexually abused by Dominey, the circumstances of that sexual abuse, and whether Alberta and the Synod breached any duty owed to the claimant in relation to that specific abuse. These are the dominant issues in relation to the claims of each of the individual prospective class members. They cannot be dealt with in a common issues trial. These issues can only be dealt with in the individual trials.

[96] I conclude that the common issues do not predominate over the individual issues. This factor suggests that the class proceeding may not be the preferable procedure.

### ii. Valid Interest in Controlling Own Proceedings

[97] The number of prospective class members in this case is small. There are 14 prospective class members who have come forward and 9 of those have had some regular contact with counsel for the Plaintiff. One prospective class member has retained his own counsel and will decide how he will proceed once a ruling on certification is made.

[98] It appears that at least 9 of the prospective class members have little interest in controlling their own proceeding since they are actively liaising with counsel for the Plaintiff. It appears that their preference is to proceed by way of a class action and permit the Plaintiff to control the litigation.

[99] This factor suggests that the class proceeding would be the preferable procedure.

### iii. Other Proceedings Relating to Same Issues

[100] In addition to the present action, one claimant has commenced an individual action to assert his claim that he was sexually abused by Dominey at EYDC. Counsel for that plaintiff has been monitoring the case management of the present litigation but did not appear to observe the certification application. He will decide how he will proceed once he knows the outcome of this certification application.

[101] This factor suggests that a class proceeding may be a preferable procedure.

### iv. Are Other Means of Resolving Claims Less Practical and Efficient?

[102] The Plaintiff argues a class proceeding is the most practical and efficient means of resolving the claims because the only other means of doing so is through a series of individual actions. The Plaintiff argues that a class proceeding is preferable because it would avoid the

need to re-litigate the common issues, which would become necessary if individual actions are commenced. This could potentially result in inconsistent findings on the same common factual and legal issues. He also argues that this would undermine judicial economy.

[103] More significantly, the Plaintiff observes that the personal circumstances of some of the individual prospective class members is such that they will simply not be able to advance individual claims. For example, one prospective class member, DM, has spent most of his life in and out of jail and has limited resources and has unstable life circumstances. These circumstances present a major barrier that may prevent him from pursuing an individual claim. Another prospective class member, MH, lives with a substance use disorder that he attributes to the sexual abuse inflicted by Dominey. He also has been incarcerated for most of his life and has no financial resources. It is unlikely that he would be able to commence and maintain an individual action to recover the damages that he believes he has suffered because of the sexual abuse.

[104] I accept that there is a basis in fact to demonstrate that many of the prospective class members have extremely difficult personal circumstances, and this may present significant challenges in relation to the prosecution of individual actions. The vulnerability of some class members will be a factor that assists in determining whether a class proceeding is the preferable procedure. This is because social and psychological barriers can be a legitimate impediment to bringing an individual action: ***AIC Ltd*** at para 27; ***Rumley*** at para 21.

[105] However, it is important to recognize that whether the action is certified or not, each individual prospective class member will be required to participate in an individual trial. This is because the common issues will not determine whether either Alberta or the Synod have liability to any one or more of the class members. In these circumstances, a litigant's individual trial following a common issues trial will look and feel very much like a separate individual action. Both procedures would require that the litigant participate in questioning and appear at trial to seek to prove that he was sexually abused at the hands of Dominey and that the circumstances of that abuse give rise to liability against Alberta and the Synod. Under both procedures, each claimant will also need to provide evidence as to the effects that the sexual abuse has had on him and the damages that flow from the sexual abuse. Certification of the class action will not avoid the need for this.

[106] Viewed most favourably from the perspective of the prospective class members, certification may serve to overcome some of the social and psychological barriers faced by some of members of the group and, in this way, may serve to improve access to justice for these prospective litigants. However, I conclude that certification will only create an illusion of access to justice, because these benefits will be restricted to the common issues trial. Thereafter, vulnerable prospective class members will face the very same social and psychological barriers in seeking to pursue the individual trials following the common issues trial.

[107] For vulnerable prospective class members, neither individual actions nor a class proceeding will be easy. Neither is a preferable procedure.

[108] For those prospective class members who are capable of coming forward to pursue the litigation after the common issues trial, certification may be more efficient than individual actions, because there will be no need to relitigate the common issues.

[109] As a result, certification as a class proceeding would be more efficient and practical for some but not all of the prospective class members.

### v. Would Certification Create Greater Difficulty?

[110] A common issues trial would not be complex or lengthy. However, the results of any common issues trial will not address the issue of the liability of Alberta and the Synod. For this reason, the results of the common issues trial will not provide any foundation that would facilitate resolution of any of the claims of the prospective class members.

[111] Certification and the conduct of a common issues trial will however give rise to significant delay. Any assessment of the liability of Alberta and the Synod would only be considered in individual trials after the common issues trial is complete. This would ultimately result in more delays in the final resolution of the claims of each prospective class member.

[112] Thus, certification would not create difficulty but would result in delay. I conclude that the delay argues against certification being the preferable procedure.

### vi. Conclusion – Preferability Analysis

[113] A series of individual actions is the only realistic alternative to certification as a class proceeding. Both procedures have shortcomings, particularly for those prospective class members who are vulnerable and face social and psychological barriers to participation in litigation.

[114] I conclude that there is no basis in fact to demonstrate that certification as a class proceeding is the preferable procedure, primarily because the potential liability of Alberta and the Synod is dependent upon an individual liability assessment for each of the claimants. This includes an assessment of whether each individual claimant was sexually abused by Dominey, the circumstances in which that abuse took place, and whether Alberta and the Synod breached any duty to the claimants. None of this can take place in a common issues trial. Instead, these fundamental issues can only be determined in individual trials.

[115] The concern is that, if certified, the proceeding will almost certainly devolve into a series of individual trials that would involve much more than the assessment of damages. In ***Tiemstra v ICBC*** (1997), 38 BCLR (3d) 377 (CA), the court upheld the decision of the Chambers Judge dismissing a certification application. In doing so the BCCA at para 17 said:

> I agree with the statement made in the Respondent's factum:
>
> > A class action which will break down into substantial individual trials in any event does not promote judicial economy or improve access to justice and is not the preferable procedure.

[116] The concerns expressed in ***Tiemstra*** are equally applicable here.

[117] Moreover, certification as a class proceeding and a common issues trial can only serve to delay the ultimate resolution of the claims of the individual prospective class members. Individual actions can proceed more quickly than class proceedings, particularly if the individual actions are subject to case management. Most significantly, individual actions will necessarily result in each claimant being questioned under oath by Alberta and the Synod much more quickly than would be the case in a class proceeding. This is because questioning in individual actions would not be deferred until after the common issues trial. I am satisfied that if a common

issues trial proceeds any questioning of the prospective class members would be delayed by at least one year, and perhaps much longer.

[118] I conclude that both the claimants and the Defendants will be well served by early questioning of the claimants. This is because any realistic chance at resolution for any claimant through either mediation, judicial dispute resolution, or trial is only possible after Alberta and the Synod have had an opportunity to question each individual claimant and, in this way, assess their potential liability.

[119] This does not mean that there will necessarily be resolution of individual actions. But one thing is virtually certain – there can be no chance at resolution until Alberta and the Synod have had a meaningful opportunity to assess their potential liability. Certification as a class proceeding will only delay this.

[120] For these reasons, I conclude that there is no basis in fact to establish that certification as a class proceeding is the preferable procedure.

[121] I conclude that the Plaintiff has not met his onus on this point.

#### g) Is VLM an Appropriate Representative Plaintiff?

[122] Alberta and the Synod agree that if this action is certified as a class proceeding, VLM would be an appropriate representative Plaintiff. The Plaintiff has met his onus on this point.

## III. Conclusion

[123] Certification of this action as a class proceeding is only possible if the Plaintiff demonstrates some basis in fact to meet each of the criteria set out in s 5(1) of the *Class Proceedings Act*. The Plaintiff has met the onus in relation to all but one of these criteria. The Plaintiff has failed to demonstrate that there is some basis in fact that certification as a class proceeding is the preferable procedure.

[124] I am satisfied that the preferable procedure would be for each prospective claimant to simply advance their own individual action to recover damages, particularly where the number of potential claimants is small, between 10 and 15. Proceeding by way of individual actions will permit counsel to focus on the liability issues that immediately affect the individual claimant. Individual actions can proceed much more quickly and would not be as cumbersome as a class action. This will provide greater opportunity for an earlier resolution or trial.

[125] There is the potential for overlap in relation to some of the factual and legal issues which have been identified as common issues. However, counsel have an obligation to work cooperatively to ensure that any overlaps are minimized. Furthermore, as I explained earlier, many of the factual issues relating to Dominey's work at the EYDC are not seriously contested and thus the risk of re-litigating factual issues in multiple trials is unlikely to occur. Case management of the individual actions would also serve to reduce any potential overlap.

[126] For all of these reasons, I dismiss the application for certification.

Heard on the 24th day of January, 2022.
**Dated** at the City of Edmonton, Alberta this 25th day of April, 2022.

**John T. Henderson**
**J.C.Q.B.A.**

**Appearances:**

Avnish Nanda
for the Plaintiff

No Appearance
for the Defendant Estate of Gordon William Dominey

Peter Gibson
for the Defendant The Synod of the Diocese of Edmonton

Luciana Brasil and John-Marc Dube
for the Defendant Her Majesty the Queen in the Right of Alberta