IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Liptrot v. Vancouver College Limited,* 2023 BCSC 346

Date: 20230308
Docket: S211242
Registry: Vancouver

Between:

Darren Liptrot

Plaintiff

And

Vancouver College Limited, St. Thomas More Collegiate Ltd., Edward English, Joseph Burke, Douglas Kenny, Gerard Gabriel McHugh, the Roman Catholic Episcopal Corporation of St. John's, Roman Catholic Archbishop of Vancouver and the Catholic Independent Schools of Vancouver Archdiocese

Defendants

Before: The Honourable Mr. Justice Coval

Reasons for Judgment

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Counsel for the Attendee, John Drescher:	C. McDougall
Appearing on his own behalf:	E. English
Place and Dates of Hearing:	Vancouver, B.C. August 8–12 and November 14–17, 2022
Place and Date of Judgment:	Vancouver, B.C. March 8, 2023

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Introduction

[1] The plaintiff, Darren Liptrot, seeks to certify this class action for damages on behalf of students at Vancouver College ("VC") and St. Thomas More Collegiate ("STM") schools, between 1976 and 2013, who claim they were physically or sexually abused by members of the Christian Brothers of Ireland in Canada Ltd.

[2] The proposed claim relates back to the notorious physical and sexual abuse of children at the Mount Cashel Orphanage in St. John's, Newfoundland and Labrador ("Mount Cashel"). Those tragic events ultimately led to criminal convictions of many Christian Brothers who ran the orphanage and the 1991 Royal Commission of Inquiry led by the Honourable S.H.S. Hughes.

[3] In the late 1970s and early 1980s, before the events at Mount Cashel came to light, six Christian Brothers were transferred ("Transferees") from the orphanage to these two Greater Vancouver schools ("Schools"). The claim alleges that senior Christian Brothers orchestrated the transfers, despite knowing what had occurred at Mount Cashel, and that the Transferees and other Christian Brothers went on to abuse students at the Schools.

[4] In the 1990s, when the crimes at Mount Cashel were revealed and prosecuted, four of the six Transferees were convicted, including the defendants Brother English and Brother Kenny.

[5] The plaintiff submits that, since the Supreme Court of Canada's decision in *Rumley v. British Columbia*, 2001 SCC 69 [*Rumley*], our courts have repeatedly held class actions to be the appropriate approach for cases of alleged sexual abuse of vulnerable groups such as young students.

[6] The defendants oppose certification. While acknowledging the seriousness of the allegations and the need for them to be heard in a timely, sensitive manner, they argue the proposed common issues are framed too broadly and will inevitably devolve into a series of individual trials. They submit that individual proceedings would be fairer and more efficient for all involved.

[7] For the reasons that follow, certification of the proposed claim is granted, though within narrower parameters than sought by the plaintiff regarding STM.

[8] The plaintiff's evidence establishes common factual and legal issues regarding the institutional defendants' alleged knowledge of what occurred at Mount Cashel, and their decisions, actions, and policies regarding the Christian Brothers at the Schools. In these circumstances, a class proceeding is preferable to individual actions. It will enhance access to justice for the class members and provide the fairest and most efficient method of managing their claims.

The Parties

[9] The representative plaintiff, Mr. Liptrot, alleges being sexually abused by the defendant Brother English between 1981–83, while in high school at VC.

[10] The defendants Vancouver College Limited and St. Thomas More Collegiate Ltd. are British Columbia companies that own and operate VC and STM, respectively. They are independent (i.e., fee-paying) schools providing Catholic education, VC in Vancouver since 1922 and STM in Burnaby since 1960.

[11] The defendant Brother English was a supervisor at Mount Cashel in the early 1970s. He taught at STM from 1976–81 and at VC from 1981–87. In 1991, he was convicted of 13 counts of assault, gross indecency and assault causing bodily harm perpetrated on the orphans at Mount Cashel.

[12] The defendant Brother Burke was a teacher at Mount Cashel from 1974–76 and 1978–81. He taught at STM from 1981–82. In 1982, he left the Christian Brothers organization. He was a lay teacher at VC from 1982–89 and 1996–2013, before being forced to leave due to his disciplinary methods.

[13] The defendant Brother Kenny was the Superior and Superintendent of Mount Cashel from 1971–76. From 1976–79, he was a teacher and dormitory supervisor at VC. In 1991, he was criminally convicted of abuse at Mount Cashel.

[14] The defendant Brother McHugh was the Christian Brothers' Provincial Superior for Canada, the organization's highest-ranking Canadian position, from 1972–78. From 1972–77, he was a director of STM. From 1972–81, he was a director of VC, and the school's President from 1980–81. From 1978–90, he was the Christian Brother's Superior General in Rome.

[15] The defendant Roman Catholic Archbishop of Vancouver ("RCAV") is a corporation under *The Roman Catholic Archbishop of Vancouver Incorporation Act,* S.B.C. 1909, c. 62, as amended S.B.C. 1938, c. 69. The Archbishop of Vancouver is appointed by the Pope and has responsibility for the ministerial and pastoral activities within the Vancouver Archdiocese. The plaintiff's evidence indicates that the RCAV established the Schools and oversaw them at material times for purposes of this litigation.

[16] The plaintiff has discontinued his case against the defendant Catholic Independent Schools of Vancouver Archdiocese. There is a stay of proceedings against the defendant Roman Catholic Episcopal Corporation of St John's due to its filing of a notice of intention to make a bankruptcy proposal.

[17] In this hearing, the Schools, RCAV and Brother McHugh were represented by counsel. Brother English attended the hearings by telephone and made brief submissions. Brothers Burke and Kenny did not attend.

<u>The Intervenor</u>

[18] In *Liptrot v Vancouver College Limited*, 2022 BCSC 1762, I granted John Drescher intervenor status to provide evidence and argument about the unintended negative consequences of this proposed class action on some survivors of the alleged abuse.

[19] Mr. Drescher has ongoing litigation against Brother English, STM and others, alleging that he was sexually assaulted by Brother English between 1981–82, while a student at the school.

The Class Definition

[20] As mentioned, the proposed Class Members are students, enrolled at the Schools between 1976 and 2013 ("Class Period"), who claim they were physically or sexually abused by current or former members of the Christian Brothers of Ireland in Canada Ltd. ("CBIC").

[21] The Class Definition extends to both the Transferees from Mount Cashel and the other Christian Brothers who taught at the Schools at the time ("Non-Transferees").

Factual Overview

The Christian Brothers

[22] The Christian Brothers of Ireland, officially known as the Congregation of Christian Brothers, is a religious institute, headquartered in Rome and approved by the Roman Catholic Church. Founded in Ireland in 1808, its communities expanded into England, Canada, the United States and Australia.

[23] The Christian Brothers eventually incorporated their operations in Canada through an Act of Parliament that established the CBIC.

Abuse at Mount Cashel

[24] The horrific events at Mount Cashel resulted in criminal convictions of many of the Brothers who ran the orphanage. By 1996, the CBIC was insolvent. It was ultimately wound up so its assets could compensate its victims. During that process, three claimants alleged abuse in CBIC institutions in British Columbia, though the record in this case does not indicate whether those allegations related to the Schools.

[25] In the winding-up proceedings, *Christian Brothers of Ireland (Re)*, 69 O.R. (3d) 507, 2004 CanLII 66324 (S.C.J.), Justice Blair described the tragedy at Mount Cashel:

> [2] Between December 1962 and the late 1980s a succession of teachers -- all cloaked in the trust-evoking aura of religious orders -- committed unspeakable acts of physical, sexual and emotional abuse on a group of boys who were under their protection and care at the Mount Cashel Orphanage in Newfoundland and elsewhere. These cruel and sadistic men were all members of the Christian Brothers of Ireland in Canada, a corporate entity that is being wound up in these proceedings.

[26] In 1975, the police investigated sexual assault allegations at Mount Cashel. Numerous boys were interviewed and alleged serious misconduct. Two of the Christian Brothers, including the defendant Brother English, confessed to some of their crimes. Justice Blair described the cover-up that followed:

> [3] The heartbreak of this tragedy was exacerbated when revelations of the abuse, made by some of these vulnerable boys in 1975, were suppressed and covered up, and the boys sent back to the "care" of their abusers. The cover-up involved not only leaders of the Christian Brothers themselves, but people in very high places in the police and the Government of Newfoundland and Labrador. …
>
> …
>
> [63] Shortly after the March 3rd report, it seems, a meeting took place between senior officials of the Christian Brothers and the Deputy Minister of Justice, at which time a tacit agreement was made whereby the implicated Brothers would be removed from Newfoundland and would undergo treatment, in exchange for which the laying of any criminal charges would be suspended.

[27] The plaintiff's evidence in this application included letters, memoranda and police reports, taken from the exhibits to the Hughes Report, and transcripts from sworn testimony of three Christian Brothers in the 1980s and early 1990s. In *Liptrot v. Vancouver College Limited*, 2022 BCSC 1851, I found these documents admissible for demonstrating some basis in fact for the common issues the plaintiff seeks to certify.

[28] One such document is a report, December 18, 1975, by detective R. Hillier of the Newfoundland Constabulary. It summarizes his interviews of boys from Mount Cashel, alleging physical and sexual abuse by four of the Transferees. It also describes interviews in which two of the Brothers—including the defendant Brother English—admitted abuse.

[29] Another document is a memorandum, March 18, 1976, from Brother Dermod Nash to the defendant Brother McHugh, describing a meeting with the Deputy Minister of Justice, where agreement was reached regarding four of the Transferees. The agreement recorded was that Brother English was not to return to Newfoundland, Brothers Kenny and Short were to leave Mount Cashel, and Brother Burke might also have to leave the orphanage.

[30] Brother McHugh's affidavit filed in this application acknowledged meeting with the Deputy Minister of Justice about the investigation of the allegations against Brother English.

The Transferees

[31] The six Transferees were the defendants Brothers English, Burke and Kenny, and Brothers Edward French, David Burton, and Kevin Short. The appended Table 1, prepared by counsel for the plaintiff, depicts their tenures at the two Schools.

[32] As indicated, the Transferees arrived at the Schools from Mount Cashel between 1976-83. All six taught at VC, and five taught at STM. There was at least one Transferee at VC almost continuously from 1976–91, and at STM from 1977–89. After 1991, the only Transferee at either School was Brother Burke, who returned to VC from 1996-2013.

[33] The plaintiff alleges that the transfers were implemented by senior Christian Brothers who were directors of the Schools and knew of the crimes at Mount Cashel. These senior representatives included the defendant Brother McHugh, the Superior General Justin L. Kelty, Brother Nash and Brother Gordon "Gerard" Bellows.

[34] As mentioned, at the time Brother McHugh was the senior Christian Brother in Canada and a director of VC from 1972–81 and STM from 1972–77. Brother Kelty was a director of VC from 1975–78. Brother Bellows was a director of STM from 1978–84, and a director of VC from 1979–84 and president of the school from 1982–84. Brother Nash was the Superior of VC from 1985–87 and a director after 1987.

[35] My Reasons for Judgment, 2022 BCSC 1851, summarizes the plaintiff's documentary evidence, between 1975-82, suggesting that these senior Christian Brothers knew of the abuse at Mount Cashel before the transfers. It includes: a memorandum from Brother Nash informing Brother McHugh of the allegations against Brother Burke; a letter from Brother Bellows to Brother McHugh, describing a public leak of an alleged "cover-up" at Mount Cashel; and, a transcript from Brother McHugh's evidence before the Hughes Commission saying he reported the sexual abuse at Mount Cashel to Mr. Kelty, as the Superior General in Rome, while Mr. Kelty was also the president and a director of VC.

Criminal Convictions of the Transferees

[36] Between 1991-93, Brothers English, Kenny, Burton and French were convicted of their crimes at Mount Cashel.

[37] Brother Burke was also initially convicted, but his convictions were set aside by the Supreme Court of Canada in *R v. Burke*, [1996] 1 S.C.R. 474, 1996 CanLII 229, apart from one charge of assault causing bodily harm for which he was eventually discharged. In 2013, he retired from VC after admitting to professional misconduct for his methods of discipline.

[38] In 1991, Brother Short was convicted of gross indecency with a student in British Columbia.

Alleged Abuse at the Schools

[39] Counsel for Mr. Liptrot filed affidavit evidence of the best information available about the potential number of Class Members, as required by s. 5(5)(c) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*].

[40] As of October 31, 2022, counsel for Mr. Liptrot had received allegations of abuse involving 65 individuals within the Class Definition. The evidence is that each of the Transferees is implicated at least once in these allegations.

[41] The affidavit does not describe when the alleged abuse occurred or its nature. It says that:

a) for VC, 32 former students alleged being physically or sexually abused themselves, and 17 others were identified by someone who alleged witnessing their abuse; and

b) for STM, 11 former students alleged being physically or sexually abused themselves, and five others were identified by someone who alleged witnessing their abuse.

[42] The plaintiff also filed five additional affidavits from former students of the Schools, alleging abuse by Christian Brothers during the Class Period. Also in the record are Notices of Civil Claim filed by two other former students, alleging abuse that would fall within the Class Definition.

[43] Appended as Table 2 is a timeline of the evidence of alleged abuse in the record. The following is a chronological summary of that evidence for each School.

Vancouver College

[44] Christopher Dziekan attended VC from 1976–84. He alleges abuse by one Transferee and two Non-Transferees.

[45] He alleges that, between 1976 and 1977, Brother Duff hit him and other students with a metre-long ruler in front of the class and violently struck them with a strap from the principal's office. He alleges that, on a field trip to an outdoor camp in 1978-79 when he was in Grade 7, Brother Raymond had him pose shirtless for photographs in his private cabin.

[46] He alleges several incidents of abuse by Brother English between 1981 and 1983, while in grades 10 and 11. The most serious involved sexual abuse when Brother English had him move boxes into the Brothers' residence. Mr. Dziekan described the end of the incident as follows:

> I franticly left his room, struggled to find the right hall to exit from, and finally made my way back to class. I was ashamed, embarrassed, scared, and uncertain of what had just happened.

[47] More generally, Mr. Dziekan accused teachers at VC of “belittling, threatening, emotionally manipulating, and physically hurting” the students. He deposed to seeing, or hearing of, incidents of physical abuse, including students who had been “hit with a long metre stick, received the strap, had to kneel for a whole hour, had to come in on Saturday to pick up rocks from the field, been physically manhandled or grabbed in a painful way, or even been punched by a teacher.”

[48] Next chronologically are the allegations of the representative plaintiff, Mr. Liptrot, who attended VC from 1980–85. He alleges repeated physical and sexual abuse by Brother English over two years. He alleges reporting this abuse to VC’s vice-principal at the time, to no avail. He alleges physical abuse by Brother Burke, who he claims picked him up by his shirt and groin on several occasions.

[49] Hamish McArthur attended VC from 1985–87. He alleges abuse, or threatened abuse, by Brothers English and Burke. Against Brother English, he alleges threats and looking for opportunities to beat him. Against Brother Burke, he alleges repeated physical and sexual abuse.

[50] An anonymized affiant, John B. Doe, attended VC from 2007–11. He alleges sexual abuse by Brother Burke on a number of occasions.

[51] The current Director of Finance & Facilities Management at VC swore two affidavits, identifying allegations of abuse in VC’s personnel files and other school records, as required for purposes of providing evidence of potential class size pursuant to *CPA* s. 5(5)(c).

[52] Against Brother Burke, the files contained multiple allegations of physical abuse of students, particularly between 2002–2013. Against Brother English, the files referred to approximately 5 allegations of physical and sexual abuse. It also referred, in 1995, to concerns raised by staff members against un-named Christian Brothers including a rumour of “sexual behaviour”.

St. Thomas More Collegiate

[53] Richard Pedersen attended STM from 1980–83. He alleges being physically abused by Brothers English and Burke, and seeing them and Brother Short physically abuse other students.

[54] The anonymized affiant, John A. Doe, alleges sexual abuse by Brother English between 1978-82.

[55] The plaintiff’s evidence included the notice of civil claim of a former STM student, Jeffrey Knowles, who has an ongoing claim against Brother English and STM, alleging sexual abuse by Brother English from 1978-80. Mr. Knowles alleges reporting the abuse at the time to Brothers Burke, French and Short, and STM’s Principal.

[56] As mentioned, the intervenor John Drescher alleges sexual abuse by Brother English at STM in 1981-82.

Common Issues

[57] The plaintiff’s proposed common issues are attached as Schedule A.[1]

[58] In summary, they involve questions about:

a) The defendants’ knowledge of abuse at Mount Cashel and their role in bringing the Transferees to the Schools;

b) The RCAV’s authority over the Christian Brothers in the Vancouver Archdiocese;

c) The defendants’ duties and standards of care, fiduciary duties, and breaches of those duties;

d) The defendants’ satisfaction of factors relevant to establishing vicarious liability; and

e) Punitive damages.

[1] In Schedule A, common issues 2 and 5 are omitted because the plaintiff abandoned them during the hearing.

Expert Evidence

[59] The plaintiff filed expert evidence from two witnesses that was uncontested by the defendants.

[60] The first expert, Dr. Charles Marmar, is a clinical psychiatrist, professor and expert in post-traumatic mental health issues. In his opinion, class actions provide important litigation advantages for survivors of traumatic systemic abuse.

[61] Dr. Marmar described barriers to litigation for survivors of childhood abuse that make them hesitant to engage in civil litigation, including social stigma, re-traumatization, anxiety about the process, cost, and media scrutiny. In his opinion, survivors benefit from a representative prepared to shoulder much of the litigation burden. For some, these reduced demands are essential to their participation.

[62] The second expert, Father Thomas Patrick Doyle, is a priest, counselor, academic and expert in canon law and the history of sexual abuse in Catholic institutions. His evidence addressed the relationship between the Christian Brothers, RCAV, and educational institutions like the Schools.

[63] His opinions were accurately summarized in the plaintiff's submissions as follows:

> a) Religious institutes like the Christian Brothers are bound by the Church's Code of Canon Law.
>
> b) A bishop, or in the case of an archdiocese, the archbishop, has responsibility for, and authority over, all ministries in his diocese, including its private Catholic schools.
>
> c) Private schools run by religious communities like the Christian Brothers are under the bishop's authority, and, in the circumstances of this case, the RCAV had authority over the Schools.
>
> d) The bishop's authority extends to his right to inspect a school concerning all matters related to religious instruction or moral instruction. He has the right to approve teachers and demand their replacement. He has a duty to see that students are protected from any teachers who would inflict any form of inappropriate sexual contact, which is a threat to the students' moral well-being.

e) A bishop who learns of allegations of sexual abuse within the diocese, committed by a member of a religious institute such as the Christian Brothers, is obligated by canon law to investigate the report.

f) There appears to be no record of any proper canonical investigations or prosecutions as a result of criminal sexual abuse perpetrated by members of the Christian Brothers either in the Archdiocese of Vancouver or the Archdiocese of St. John's, Newfoundland.

Test for Certification

[64] The underlying premise of a class proceeding is the existence of a class of persons with claims against one or more defendants, issues common to all of their claims, and a class proceeding being the preferable resolution (*Ewert v. Nippon Yusen Kabushiki Kaisha*, 2019 BCCA 187, para. 23).

[65] A case must be certified if, and only if, it satisfies the five criteria in *CPA* s. 4(1):

> **Class certification**
>
> **4** (1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would 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, on the common issues, an interest that is in conflict with the interests of other class members.

[66] These provisions are construed generously to serve the objectives of judicial economy, access to justice and behaviour modification (*Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, para. 64 [*Pro-Sys*]).

[67] The first criteria, whether the pleadings disclose a cause of action, is assessed in the same manner as a motion to strike proceedings. Plaintiffs need only show that, assuming the pleaded facts are true, it is not “plain and obvious” that the claim will fail (*Hollick v. Toronto (City)*, 2001 SCC 68, para. 25).

[68] The other four criteria require the plaintiff to show “some basis in fact” that they are met. This is not an onerous evidentiary standard. It does not require resolving conflicting facts and evidence, assessment of the merits, or a pronouncement on the viability of the action. Instead, the focus is on the form of the action, to assess whether it should go forward as a class proceeding. The question is not whether there is some basis in fact for the claim itself, but whether there is some basis in fact for each of the components of the statutory certification test (*Pro-Sys*, paras. 99–105; *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338, paras. 132–37).

Certification of Systemic Abuse Cases

[69] Since *Rumley*, the case law supports the appropriateness of class actions for allegations of systemic liability for abuse of vulnerable groups such as young students. Systemic liability being liability that is not specific to the individual circumstances of particular survivors of the abuse, but to the class of survivors as a whole.

[70] In that regard, Justice Brown, writing for the majority in *L’Oratoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35, noted that class actions are often seen as highly appropriate in sexual abuse cases given the difficulty of the litigation process and the vulnerability of the survivors (para. 8, citing, among other cases, *Rumley* and *Griffiths v. Winter*, 2003 BCCA 367).

[71] In *Rumley*, the Supreme Court of Canada certified a class action for sexual and physical abuse, on behalf of current and former students of Jericho Hill School, a school for deaf and blind children operated and maintained in Vancouver by the Province of British Columbia.

[72] In granting certification, Chief Justice McLachlin overturned the finding below that the proposed common issues were unique to each student and so required individual adjudication (paras. 28–33). Instead, she accepted as common issues whether, between 1952–92, the Crown was negligent or in breach of fiduciary duty in failing to take reasonable measures to protect students in the operation or management of the school and whether punitive damages were warranted (paras. 21, 27).

[73] The Chief Justice recognized that evidence from individuals might be relevant to assessing the respondents' conduct, and that individual findings of causation and harm would inevitably occur in the individual trials to follow. She found, however, that allegations of systemic breach of legal duties could be determined without reference to the circumstances of any individual class member. These were liability questions "not specific to any one victim but rather to the class of victims as a group" (paras. 30-34).

[74] The focus of the common issues trial would be systemic, meaning how the respondents' conduct affected all class members as a group rather than individually. This involved questions of how the respondents ran the school over time, including practices or actions contributing to the opportunity for abusive situations, and shortcomings of preventative policies and practices that would reasonably have prevented the abuse. Chief Justice McLachlin rejected the argument that, even at the systemic level, the inquiry would become inescapably individualistic because the relevant standard of care varied over time (paras. 30–34).

[75] The Chief Justice found class proceedings to be more practical and efficient than individual actions for reasons that the plaintiff says apply in the circumstances of this case:

> [38] … individual actions would be less practical and less efficient than would be a class proceeding. As Mackenzie J.A. noted (at pp. 9-10), "[i]ssues related to policy and administration of the school, qualification and training of staff, dormitory conditions and so on are likely to have common elements". Further, "[t]he overall history and evolution of the school is likely to be important background for the claims generally and it would be needlessly expensive to require proof in separate individual cases".

[76] In *Griffiths v. HMTQ et al.*, 2003 BCCA 367, the Court of Appeal upheld certification of claims arising from the alleged sexual assault of foster children by a foster parent who provided child care services to the Province of British Columbia from 1963–87. The foster parent had been subsequently convicted of his crimes.

[77] As against the Province, the common issues included breach of the standard of care and fiduciary obligations, for failure to adequately vet, monitor and investigate, and vicarious liability and punitive damages. The Province argued that class proceedings were not preferable to individual actions because of the small number of class members (estimated at around 15), the limited number of common issues and the individual dimensions of each case. The Court of Appeal upheld the decision from below that class proceedings were preferable because of the reduction in trauma for class members, the efficiency of determining the common issues compared with individual trials, and avoidance of inconsistent decisions (paras. 18–20).

[78] In *White v. Attorney General of Canada*, 2004 BCSC 99, Justice Cullen followed *Rumley* in certifying a class proceeding on behalf of former members of the Royal Canadian Sea Cadets who suffered alleged sexual abuse in Vancouver between 1967–77.

[79] Justice Cullen rejected the Crown's arguments that the common issues would devolve into individual inquiries, comprehensive individual trials would be required in any event for each and every class member, and certification would increase cost, complexity and delay (para. 34).

[80] Following *Rumley*, he found these arguments failed to appreciate that the cause of action was "systemic – the failure to have in place management and

operations procedures that would reasonably have prevented the abuse”. Thus, the Crown failed to recognize that the “cause of action at issue does not depend on the individual circumstances in which the abuse has been alleged, but rather … the presence or sufficiency of management and operations procedures that would reasonably have prevented abuse from occurring, given the inherent nature of the relationship of the officers to the cadets and the range of circumstances in which they could be expected to interact” (paras. 50-52).

[81] In *Cloud v. Canada (Attorney General)*, 73 O.R. (3d) 401, 2004 CanLII 45444 (C.A.), the Court of Appeal overturned the lower court’s refusal to certify a class action brought on behalf of the former students of the Mohawk Institute Residential School near Brantford, Ontario, alleging systemic abuse of the students between 1922–69. The defendants included the Attorney General of Canada, the General Synod of the Anglican Church of Canada, the Incorporated Synod of the Diocese of Huron and the New England Company, an English charitable organization with the mission of teaching the Christian religion and English language to the Indigenous peoples of North America.

[82] The plaintiffs in *Cloud* sought damages for breach of fiduciary duty, negligence, assault, sexual assault, battery and breach of aboriginal rights. They alleged that the residential school was designed and operated to create an atmosphere of fear, intimidation and brutality, and that it sought to assimilate the Indigenous children.

[83] Once again, the Court rejected the defendants’ argument that the majority of issues required individual determination, any commonality was superficial and negligible by comparison, and a class action would create an unmanageable proceeding. The Court held that a single trial of the common issues would significantly advance the litigation by facilitating access to justice and judicial economy, mitigating the difficulties faced by class members (paras. 83–88).

[84] Following *Rumley*, the Court in *Cloud* stated that an important part of the claims of all class members turned on how the respondents ran the school, with the

common issues including the allegation that the respondents had punitive policies and practices (e.g., excessive physical discipline) and failed to have preventative policies and practices (e.g., reasonable hiring and supervision), which together resulted in the intimidation, brutality and abuse endured by the students at the residential school (para. 80).

[85] Counsel for Mr. Liptrot relied on *Cavanaugh v. Grenville Christian College*, 2021 ONCA 755 [*Cavanaugh ONCA*], as exemplifying a successful common issues trial in circumstances similar to this case. The representative plaintiffs, former students of the fee-paying school, Grenville Christian College, in Brockville, Ontario, brought a class action against the school and its former headmasters on behalf of 1360 former boarding students at the school between 1973–97. They alleged abusive practices, including corporal punishment, public humiliation and other excessive discipline.

[86] In *Cavanaugh v. Grenville Christian College*, 2014 ONSC 290, paras. 19–21, 28 [*Cavanaugh Certification*], the Superior Court of Justice's Divisional Court overturned the denial of certification, based on considerations of access to justice and the common issues prevalent in a systemic abuse case. The Court held that a determination of the common issues would consider matters affecting all class members regardless of their personal circumstances. Those might include:

- the history of the school;
- the duties owed by the respondents to class members particularly relating to discipline;
- the practices and policies, if any, that existed at the school and their impact on those duties;
- any practices or policies that should have been in place to prevent abuse;
- whether certain of the school's alleged disciplinary practices were systemic and a breach of the school's duties to its students.

[87] The case proceeded to a five-week common issues trial, in which the trial judge found systemic negligence, class-wide breaches of the duty of care and

fiduciary obligations, and punitive damages as appropriate: *Cavanaugh et al. v. Grenville Christian College et al.*, 2020 ONSC 1133, para. 362.

[88] Upholding the judgment on appeal, the Court of Appeal rejected the defendants' argument that the case was really about individual negligence 'writ large'. The Court found the trial judge recognized that systemic negligence involved an assessment of the practices used to run the school, whether these practices were systemic, and the extent to which the practices created a risk of harm to the class as a whole. Individual claims of harm and differences in impact on members of the class were for the individual issues stage, if necessary (*Cavanaugh ONCA,* paras. 77-78).

[89] The defendants relied on *VLM v. Dominey*, 2022 ABQB 299, in which certification was refused. The plaintiff alleged that, between 1985–89, he and other youths were sexually assaulted by an Anglican priest while detained at a youth centre operated by the Province. As part of his work for the Synod of the Diocese of Edmonton, Gordon Dominey provided chaplaincy, spiritual and other services to young persons detained at the centre. The plaintiff alleged he used his authority to perpetrate sexual abuse against highly vulnerable young persons.

[90] Justice Henderson held that a class action was not the preferable procedure because each class member would be required to proceed with individual trials to prove whether he was sexually abused and the defendants were liable for damages (para. 95). He found that individual actions would focus on the liability issues for each individual claimant, enabling earlier resolution (paras. 114–19).

[91] In my view, a factor that potentially differentiates *VLM* from our situation is that Henderson J. found no basis for common issues regarding the knowledge of the Province or the Synod regarding Mr. Dominey's potential for abuse (para. 73). It also appears that the case differs from *Rumley, Griffiths, White* and *Cavanaugh ONCA* in that he saw the defendants' breach of duty as an individual, not systemic, issue (paras. 79, 95, 114). Justice Henderson wrote that "to establish a breach of duty, each individual prospective class member will need to testify as to his experiences

…" (para. 79). Finally, the number of potential class members was only 14 and therefore significantly less than on the evidence in this case to date (paras. 97, 124).

[92] In a letter delivered after the hearing, counsel for the defendants drew my attention to Justice Perell's refusal to certify the proposed class action in *Carcillo v. Canadian Hockey League,* 2023 ONSC 886. Having not heard submissions about the case, I will just say that in my view it deals with a different situation than ours, in that it involves 60 amateur hockey teams and 4 hockey leagues as proposed defendants. In the judgment, Justice Perell states (paras. 415-416) that he is responsible for settling the protocol for individual issue trials in the *Grenville College* case, and around 600 of the 1,360 class members are expected to pursue individual claims. He notes his concern that claimants who have serious and provable claims for negligence or vicarious liability "do not need the decelerate of a common issues trial to prove systemic negligence or systemic vicarious liability. The preferable procedure is to get on with individual trials".

Analysis

[93] I turn to applying the statutory test for certification to the circumstances of this case.

Section 4(1)(a) – Viable Causes of Action

[94] As against the defendants Brothers English, Burke and Kenny, the amended notice of civil claim ("NoCC") alleges liability for assault and sexual abuse.

[95] As against all defendants, it alleges liability in negligence and breach of fiduciary duty. For the institutional defendants and Brother McHugh, the NoCC alleges legal duties of care and fiduciary loyalty owed to the Class Members, arising from their relationships to the Schools and students, their knowledge of the past abuse at Mount Cashel and their authority over the Christian Brothers at the Schools. It alleges breach of these duties by failing to protect the students from the alleged physical and sexual abuse that caused them injury and damage.

[96] As against the RCAV and the Schools, the NoCC alleges vicarious liability for abuse by the Christian Brothers. As against the Schools, it also alleges breach of the *Occupiers Liability Act*, R.S.B.C. 1974, c. 60 [*OLA 1974*], and the *Occupiers Liability Act*, R.S.B.C. 1979, c. 303 [*OLA 1979*].

[97] The Schools concede viable causes of action against them in negligence, fiduciary duty and vicarious liability, regarding the actions of the Transferees. The RCAV and Brother McHugh concede the same for the claims in negligence, but not in fiduciary duty or vicarious liability. These defendants all argue, however, that the NoCC fails to plead material facts supporting the claims against them arising from any actions by Non-Transferees.

Material Facts Regarding Non-Transferees

[98] In *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 [*Mercantile*], Justice Voith explained that, for pleading purposes, the material facts are those necessary to prove in order to establish a right to judgment (para. 45, referring to *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 54).

[99] The defendants say the Transferees are the clear target of the proposed claims and common issues, and that the requisite material facts are not pleaded for claims relating to the Non-Transferees. They support this argument as follows:

a) Of the first 45 paragraphs in the NoCC’s Statement of Facts, 40 deal exclusively with the Transferees. Specifically, these paragraphs raise allegations about the Transferees’ conduct at Mount Cashel; their transfer to the Schools despite knowledge at the highest levels of the Schools and the RCAV of their prior conduct; and, their continued abuse of students at the Schools;

b) The Class Period precisely matches the first Transferee’s arrival at the Schools and the last Transferee’s departure;

c) There are no particulars pleaded of abuse by Non-Transferees, and none provided in response to the defendants’ demand; and

d) The plaintiff cannot rely on the possibility that new facts might emerge regarding the Non-Transferees (*R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, para. 22).

[100] In response, plaintiff's counsel referred to the pleading throughout the NoCC regarding the "current or former Christian Brothers" at the Schools, as opposed merely to the Transferees. For example:

a) The Statement of Facts (para. 1) alleges that the action "arises from psychological, physical and sexual abuse of children perpetrated by current or former members of the Christian Brothers" at the Schools;

b) The Statement of Facts (paras. 9, 13) pleads that the proposed class action is on behalf of students at the Schools "who were physically and/or sexually abused by current or former members of the Christian Brothers" during the Class Period;

c) The Statement of Facts (paras. 47, 50, 53, 65) pleads that the Schools employed and were responsible for the vetting, appointing, managing, discipling and dismissing of "Christian Brothers and former Christian Brothers" as teachers; the RVAC was responsible for the hiring and firing of "Christian Brothers and Former Christian Brothers" at the Schools; and, Brother McHugh had a high degree of authority over "any Christian Brother", including the power to expel or transfer them;

d) The Relief Sought (e.g., para. 88(b), (c) and (g)) seeks various declarations regarding the institutional defendants being liable for damages flowing from their breaches of duties to the plaintiff in relation to the conduct of "current and former Christian Brothers"; and

e) The Legal Basis (paras. 89(b)–(g), 90, 91, 92, 93(b)–(e), 95, 96–98, 112(c) and (d), 113–115, 121) includes specific pleadings against each defendant regarding the factual circumstances giving rise to their duty of care, fiduciary duty, and breach of those duties for failure to protect the Schools' students from physical and sexual assault.

[101] Plaintiff's counsel also argues that, because certification applications come at an early stage of the proceedings, plaintiffs are not strictly held to their pleadings and arguments as initially formulated. Certification is a fluid, flexible process aimed at the statutory purposes of judicial economy, access to justice and behaviour modification (*Halvorson v. British Columbia (Medical Services Commission)*, 2010 BCCA 267, para. 23).

[102] In my view, the NoCC paragraphs summarized above plead the material facts for the claims arising from alleged abuse of Class Members by Non-Transferees. They allege that such abuse occurred. They plead the defendants' authority and control giving rise to their alleged legal duties. They plead the breach of those duties by inadequate assessment, monitoring, investigation and control of the Christian Brothers at the Schools, i.e., both Transferees and Non-Transferees.

[103] In terms of providing particulars regarding alleged abuse by Non-Transferees, the defendants did not provide authority for the necessity of such particulars in the context of a class action pleading. If further particulars are required, there is evidence in the record of specific alleged abuse by Non-Transferees, as described above. If necessary, plaintiff's counsel may be able to provide further particulars from the potential class members who have contacted them.

[104] For these reasons, I find the plaintiff has pleaded sufficient material facts for certification of claims relating to Non-Transferees under s. 4(1)(a).

Material Facts Regarding the RCAV and Brother McHugh's Fiduciary Duties

[105] The RCAV and Brother McHugh argue that the plaintiff has not pleaded the material facts for their alleged fiduciary duty to the students or breach of that duty. Specifically, they say there is no pleading of any undertaking of duty or betrayal of the loyalty required of a fiduciary.

[106] They rely on *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, para. 36, for the requirements of an *ad hoc* fiduciary relationship, which are:

a) vulnerability arising from the relationship;
b) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries;
c) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and
d) 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.

[107] In my view, the material facts are pleaded to support these components of the fiduciary relationship.

[108] The material facts pleaded against the RCAV include: broad allegations of its authority over the establishment, oversight and operation of the Schools (NoCC, paras. 62, 64); responsibility for and control of major decisions regarding the Christian Brothers, including their transfer, appointment and hiring and firing (para. 65); ultimate authority to appoint, approve and remove teachers from the Schools (para. 67); and, that it knew, or ought to have known, of the serious allegations of abuse against the Transferees, but failed to take adequate measures to protect students at the Schools from abuse by Christian Brothers (paras. 68–69).

[109] The material facts pleaded against Brother McHugh include: his ultimate authority over the Christian Brothers in Canada (para. 53); his power to transfer them between positions or expel them from the organization (para. 53); his various roles as president and director of the Schools from 1972–81 (para. 54); and, that, while knowing of the abuse at Mount Cashel, he used his position of authority among the Christian Brothers and the Schools to transfer the Transferees to the Schools (paras. 18–25).

[110] The legal basis alleges that the fiduciary duty arose from the authority these defendants had over the teachers and students at the Schools, the power imbalance faced by the students and the obligations of the defendants as *in loco parentis* to the students (NoCC, para. 96).

[111] In my view, these pleaded facts could, if proven, establish that these two defendants undertook a level of responsibility and control over the Schools and those teaching there, which obligated them to act in the best interests of the students. Further, in exercising their authority they betrayed the loyalty required by this relationship by preferring their own aims in placing the Transferees in the Schools and failing to adequately protect the students from abuse by the Christian Brothers who taught there.

[112] That these pleadings establish a claim in fiduciary duty is supported by the certification of similar claims in the leading systemic abuse cases discussed above. In *Rumley*, *Cloud* and *Griffiths,* similar fiduciary duty claims were certified as common issues against defendants who were responsible for overseeing the schools and teachers in issue.

[113] Similarly, in *C.O. v. Williamson*, 2020 ONSC 3874, paras. 121–29 [*Williamson*], the Trillium Lakelands District School Board was found to have breached its fiduciary duty to act in the best interests of a student who suffered a teacher's sexual abuse. The fiduciary duty arose from the Board's power and discretion over the school, the plaintiff's vulnerability to the Board's power as a 16-year-old student, and its standing in *loco parentis* for all students.

Material Facts Regarding the RCAV's Vicarious Liability

[114] The RCAV argues that the plaintiff has not pleaded the material facts about its relationship with the Christian Brothers at the Schools to support a claim of vicarious liability for the Brothers' alleged abuse.

[115] It says there is no allegation that the relationship between the RCAV and the Christian Brothers was close enough to justify the imposition of vicarious liability, nor pleading of material facts to suggest sufficient connection between the Christian Brothers' assigned tasks as teachers and the alleged abuse.

[116] In *Bazley v. Curry*, [1999] 2 S.C.R. 534, 1999 CanLII 692, Justice McLachlin (as she then was) said the test for vicarious liability should focus on whether the employer's enterprise and empowerment of the employee materially increased the risk of the sexual assault and hence the harm (para. 41). She summarized the required approach as follows:

> 46 … This requires trial judges to investigate the employee's specific duties and determine whether they gave rise to special opportunities for wrongdoing. Because of the peculiar exercises of power and trust that pervade cases such as child abuse, special attention should be paid to the existence of a power or dependency relationship, which on its own often creates a considerable risk of wrongdoing.

[117] In my view, the NoCC pleads material facts going to these factors.

[118] It pleads that the RCAV, with ultimate authority over the Schools and Christian Brothers, afforded the Christian Brothers the opportunity for abuse by placing them as teachers in the Schools. It pleads, if not expressly then by clear implication, that doing so furthered the RCAV's aims. As a result, the RCAV created the possibility of friction, confrontation or intimacy between the Brothers and the students who were vulnerable to their abuse of power. The NoCC alleges the RCAV was, or should have been, aware of serious allegations of abuse by the Transferees at Mount Cashel, and failed to take adequate steps to protect students at the Schools from abuse by Christian Brothers. This all occurs, of course, in the context of the Christian Brothers being placed in positions of high moral and religious authority over the students.

[119] The case law supports such pleadings as sufficient for a claim in vicarious liability in similar circumstances.

[120] In *John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's*, 2020 NLCA 27, the Court of Appeal found the Archdiocese of St. John's vicariously liable for abuse at Mount Cashel because of its ultimate authority over the Christian Brothers, despite the Archdiocese not exercising day-to-day supervision and control of their activities at the orphanage (para. 125). The Court also found that the Brothers' assigned tasks and wrongdoing were sufficiently related such that the assaults were a materialization of the risks created by the Archdiocese (para. 201).

[121] The Court in *John Doe (G.E.B. #25)* referred to additional cases supporting the plaintiff's claim in this case, such as the Supreme Court of Canada's decision in *John Doe v. Bennett*, 2004 SCC 17, in which the Diocese of St. George's, though not an employer in the traditional sense, was vicariously liable for sexual assaults perpetrated by one of its priests in the parish.

[122] The plaintiff's claim is also supported by *Blackwater v. Plint*, 2005 SCC 58. In that case, the plaintiff was sexually abused by an employee of the home for Indigenous children in which he resided. The United Church of Canada and the Government of Canada were vicariously liable on the basis that they operated the home as partners (*John Doe (G.E.B. #25)*, paras. 69–70).

[123] It is also supported by: certification of vicarious liability as a common issue in *Griffiths*; the finding of the Trillium School Board's vicarious liability for sexual abuse perpetrated by the teacher in *Williamson*; and acceptance of the question of the ballet company's vicarious liability for its employee's inappropriate photographing of students in private settings as a common issue in *Doucet v. The Royal Winnipeg Ballet*, 2018 ONSC 4008, para. 105.

[124] The RCAV sought to distinguish its situation from the Archdiocese of St. John's in *John Doe (G.E.B. #25)* in the following ways:

a) Mount Cashel involved orphans who resided at the school and were therefore the epitome of vulnerability.

b) The Archdiocese was the interface between the Brothers at Mount Cashel and the Government in regard to matters concerning admissions, child welfare policies, and funding.

c) Mount Cashel was not owned by a corporation or governed by a board of directors or trustees.

d) The Christian Brothers at Mount Cashel were not part of an incorporated entity during the period of time in question (prior to 1962).

e) In correspondence with the Government of Newfoundland, the Archbishop provided a "guarantee" or assurance of future success of the orphanage.

[125] In my view, while these differences may be relevant to the ultimate assessment of the RCAV's vicarious liability, they are too collateral to establish the lack of a viable claim at this stage.

Remaining Causes of Action

[126] The NoCC alleges viable claims against the defendants Brothers English, Burke and Kenny for assault, battery, breach of trust, sexual abuse and intentional infliction of pain, suffering and mental distress. No defendant argued otherwise.

[127] As against the Schools under the *Occupiers Liability Act*, the plaintiff pleads they were both occupiers within the meaning of *OLA 1974* and *OLA 1979*. As such, they owed a duty to take reasonable care to ensure the Class Members' safety using the premises, and they allegedly breached that duty causing injury to the Class Members who suffered damage as a result. The Schools did not contest the viability of this cause of action.

Section 4(1)(b) – Identifiable Class

[128] Chief Justice Bauman explained the governing principles of s. 4(1)(b) in *Jiang v. Peoples Trust Company*, 2017 BCCA 119, at para. 82:

> - the purposes of the identifiable class requirement are to determine who is entitled to notice, who is entitled to relief, and who is bound by the final judgment;
> - the class must be defined with reference to objective criteria that do not depend on the merits of the claim;
> - the class definition must bear a rational relationship to the common issues — it should not be unnecessarily broad, but nor should it arbitrarily exclude potential class members; and
> - the evidence adduced by the plaintiff must be such that it establishes some basis in fact that at least two persons could self-identify as class members and could <u>later</u> prove they are members of the class.
>
> [Emphasis in original.]

[129] The plaintiff points to approval of similar class definitions in *White*, paras. 48–54, and *Cloud*, para. 47.

[130] The defendants concede an identifiable class of two or more persons who could self-identify as Class Members and later prove they are members of the class. They argue, however, that inclusion of the Non-Transferees makes the definition broader than the pleadings or evidence can support. The definition, therefore, lacks

a rational relationship to the asserted common issues, and many of the proposed Class Members do not have potential causes of action.

[131] I dealt with the defendants' arguments about the pleadings under s. 4(1)(a). In terms of the evidence, I consider these arguments under s. 4(1)(c) below.

[132] The Class Definition is neither too broad nor too limited. It comprises students at the Schools claiming to have suffered physical or sexual abuse by current or former Christian Brothers in the Class Period.

[133] It bears a rational relationship to the causes of action and the common issues. All Class Members must claim breach of the legal duties encompassed in the common issues and that they suffered some harm as a result. They thus share a common interest in determination of the legal implications arising from these factual issues.

[134] While some common issues relate solely to the Transferees, some raise factual and legal questions about the defendants' knowledge, authority, actions, policies and procedures regarding the conduct of all Christian Brothers in the Schools during the Class Period.

[135] The Class Period is also rationally connected to the common issues and the evidence. It spans roughly the time that the specific Christian Brothers are alleged, in the pleadings and evidence, to have perpetrated abuse at the Schools. Although the proposed Class Period is long, it is five years shorter than in *Rumley* and 10 years shorter than in *Cloud*.

Section 4(1)(c) – Common Issues

[136] Section 1 of the *CPA* defines "common issues" as issues that are:

> (a) common but not necessarily identical issues of fact, or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts …

[137] The resolution of common issues is at the heart of a class proceeding. A question is common if, from the perspective of the litigation as a whole, it advances the resolution of every class member's claim. Commonality is approached purposively. While the class members' claims must share a substantial common ingredient to justify a class action, they need not be identically situated with respect to the defendants, nor must common issues predominate over non-common issues (*Pro-Sys*, para. 108).

[138] The factual evidence required at the certification stage goes to establishing that the issues are common to the class. Evidence is not required as to whether the acts underlying the common issues actually occurred. The evidentiary threshold required to demonstrate some basis in fact for a common issue is described in *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338:

> [133] In analyzing whether there is some basis in fact for a common issue, the court must consider the language of the common issue that is proposed, <u>and whether there is some evidence that supports the argument that it is a common issue across members of the class</u>.
>
> [134] This is a low threshold. The purpose of the requirement is to ensure there is a minimum evidentiary foundation to support the certification order. Because the standard is simply to ensure that the action is suited to a class proceeding, it does not entail a robust analysis of the merits of the claim. However, the court must undertake more than superficial scrutiny of the sufficiency of the evidence. This standard requires "an evidentiary basis" to show the plaintiff has met the certification requirements. Such evidence does not have to be conclusive or satisfy the civil standard of a balance of probabilities, and the particular level of evidence that is sufficient is highly fact-specific.
>
> …
>
> [139] The requirement that there be <u>some basis in fact</u> to support the proposed common issues <u>is there to provide the certification judge with some level of confidence that certification will be of practical benefit when, in the future, the claims reach trial, as opposed to being simply a procedural complication for claims that are not truly common</u>. It also helps the judge determine if a class proceeding is in fact a preferable procedure.
>
> [Emphasis added, citations omitted.]

[139] In my view, subject to consideration of the defendants' specific arguments below, the proposed common issues generally raise essential components of the claims for all Class Members.

[140] This conclusion regarding the common issues for allegations of systemic breaches of legal duties regarding abuse of students is supported by the leading cases described above. As in those cases, the plaintiff seeks to establish, not just that abuse occurred, but that the institutional defendants and Brother McHugh are legally responsible because of their systemic decisions, actions, policies and practices regarding the Christian Brothers at the Schools.

[141] The proposed common issues would determine the defendants' involvement with, knowledge about, and authority over the Christian Brothers who perpetrated the alleged abuse at the Schools. They would assess whether the defendants owed and systemically breached legal duties to the students, which in turn would involve a thorough examination of the actions, policies, procedures and standards of the defendants. Common issues of this kind will move the litigation forward for all Class Members.

[142] The proposed common issues relating specifically to the Transferees will also advance the litigation for the entire Class. The Schools share a common history regarding the Transferees, four of whom taught at both Schools. Senior Christian Brothers, with alleged knowledge of the abuse at Mount Cashel, held key positions at both Schools at material times. The RCAV allegedly shared that knowledge and had overarching authority over both Schools. Determination of the defendants' respective roles and knowledge regarding Mount Cashel, the transfers, and the authority and powers given to the Transferees at the Schools, all potentially advance the claims of every Class Member. They also advance the claims of those alleging abuse by Non-Transferees, as they go to systemic issues regarding the conduct of the Christian Brothers in the Schools.

[143] I turn now to the defendants' specific arguments against the proposed common issues.

Non-Transferees and the Class Period

[144] The defendants' most strenuous objection is that there is no basis in fact for the proposed common issues regarding the conduct of Non-Transferees.

[145] They submit that, if certified, the claims should be limited to the actions of the Transferees during their tenures at the Schools (Table 1). VC further submits that Brother Burke's return to the school in 1996 raises distinct issues because, by then, the crimes at Mount Cashel were exposed and the criminal charges against him set aside or discharged.

[146] In response, the plaintiff says that, to establish the proposed common issues, evidence of abuse is not required throughout the proposed Class Period, and it is important not to arbitrarily exclude potential Class Members. He says the question of whether the developments regarding Brother Burke relieved the defendants of liability for his actions after 1996 is, if anything, another common issue.

[147] The plaintiff relies on *Weremy v. The Government of Manitoba*, 2020 MBQB 85, where the Court certified a class action alleging systemic abuse at the Manitoba Development Centre in Portage la Prairie, Manitoba, between 1954–2019, despite no direct evidence of harm after 1977. The Court based this on documentary evidence providing some basis in fact for the claims during that time period (paras. 71–72).

[148] I accept the plaintiff's position that requiring evidence of alleged abuse throughout the Class Period would be unduly burdensome and inconsistent with the "some basis in fact" evidentiary threshold, and that one must be careful not to arbitrarily exclude class members.

[149] I also accept, regarding Non-Transferees, that the evidence of abuse by Transferees is some basis in fact for the existence of systemic common issues regarding the conduct of the Christian Brothers generally at the School, both Transferees and Non-Transferees.

[150] Having said that, the evidentiary gaps are significant enough to raise the question of whether there is any basis in fact for the existence of common issues during parts of the Class Period.

[151] Regarding VC, there is evidence of abuse by Transferees and Non-Transferees between 1976–87. After 1987, there is the internal reporting of abuse in 1995, and the allegations and evidence against Brother Burke during his return to the School from 1996-2013 (Table 2).

[152] This evidence clearly provides some basis in fact for the existence of systemic common issues regarding the conduct of the Christian Brothers at VC from 1976-1991, as Transferees remained at the School until that time.

[153] The School's internal report in 1995, and the evidence of continued abuse by Brother Burke after his return in 1996, provide some basis in fact for the continuation of systemic common issues regarding the conduct of the Christian Brothers at VC until Brother Burke's forced departure in 2013.

[154] Considered as a whole, in my view this evidence provides some basis in fact for systemic common issues at VC regarding the conduct of the Christian Brothers from 1976–2013.

[155] Regarding STM, the evidence of abuse by Christian Brothers during the Class Period is against Transferees between 1976 and 1983 (Table 2). There is no evidence of abuse after 1983, no evidence of Transferees at the school after 1989, and no evidence of abuse by Non-Transferees at any time during the Class Period.

[156] This evidence clearly provides some basis in fact for the existence of systemic common issues regarding the conduct of the Christian Brothers at STM from 1976-1983.

[157] Regarding 1984–89, although there is no evidence of abuse in the record, in my view there is some basis in fact for systemic common issues in those years. This is based on the evidence of abuse in the prior years against three Transferees (Brothers English, Burke and Short), two of whom remained at STM until 1989.

[158] In my view, however, there is no basis in fact to support the existence of systemic common issues at STM from 1990-2013. The latest evidence of abuse at

STM is in 1983. The evidence is limited to the Transferees, all of whom had departed by 1989. In these ways, the evidence of abuse lacks any connection to 1990-2013, and suggests no practical benefit to certifying claims against STM in that period.

[159] I would therefore revise the Class Definition to:

(a) All students enrolled at VC, between 1976–2013, who claim they were physically or sexually abused by current or former members of the Christian Brothers; and

(b) All students enrolled at STM, between 1976–89, who claim they were physically or sexually abused by current or former members of the Christian Brothers.

(“Revised Class Definition”)

[160] The case being in its early stages, more evidence of specific allegations may emerge, particularly given the evidence of potential class size. If so, the plaintiff may seek to expand the Revised Class Definition based on that evidence.

[161] I agree with the plaintiff that the effect of Brother Burke’s criminal conviction being set aside on the liability of the other defendants for his alleged conduct between 1996–2013 is a common issue. I also agree this includes a viable claim against STM, as there is at least an arguable case on the pleadings that, if STM had fulfilled its legal duties regarding the alleged abuse by Brother Burke when he was at STM, he would not have been able to continue his alleged abuse at VC after 1996.

[162] I turn now to the defendants’ arguments regarding the specific common issues in light of the Revised Class Definition.

Common Issues 1, 3

[163] These issues address the Transferees’ abuse at Mount Cashel, what the Schools, the RCAV and Brother McHugh knew about that abuse, and their respective roles in the transfers. They advance the determination of the claims, and the defendants do not contest that these are common issues regarding the Transferees.

[164] The only exception is that the RCAV opposes certification of issues 1(c) and 3(c). It says there is no basis in fact for its alleged knowledge of the Mount Cashel abuse or role in the transfer of Christian Brothers from Mount Cashel to the Schools.

[165] In my view, the uncontested evidence of Father Doyle, the plaintiff's canon law expert, provides some basis in fact for these common issues regarding the RCAV's knowledge of, and role in, the transfers.

[166] As described above, Father Doyle's evidence was that, in the specific circumstances of this case, the Archbishop had ultimate authority over the Schools, which included the duty to see that students were protected from teachers who would inflict harm to their moral well-being, and to approve teachers and demand their replacement. Also, sexual abuse of a minor by a Brother is a specific crime under the Code of Canon Law. If such allegations were revealed to the Archbishop of St. John's, an investigation and a canonical trial should have taken place. Although Father Doyle is unaware whether or not it did, in his opinion, it ought to have and, if it did, every Archbishop in Canada would have been aware.

[167] There is also the evidence that, at the time of the transfers, the events at Mount Cashel were known to numerous senior Christian Brothers, some of whom held senior positions in the Schools. This is also some basis in fact supporting the RCAV's potential knowledge of events at Mount Cashel at the material times.

Common Issue 4

[168] This addresses the RCAV's authority over the actions of the Christian Brothers in the Archdiocese of Vancouver, including to investigate allegations of abuse at the Schools and terminate or remove Christian Brothers.

[169] The RCAV says there is no basis in fact in the record for it having such authority.

[170] I find there is some a basis in fact in the record based on Father Doyle's evidence regarding common issues 1(c) and 3(c), described above, and his

evidence that, if the RCAV learned of alleged abuse within the diocese committed by the Christian Brothers, it was obliged to investigate by canon law.

Common Issues 6–9

[171] These issues address whether the defendants owed a duty of care to protect Class Members from abuse at the Schools and, if so, the applicable standard of care and whether it was breached.

[172] The defendants do not contest that issues 6–8 (relating to the duty and standard of care) are common if limited to the Transferees and the reference to psychological harm is removed (because psychological harm is not referred to in the Class Definition).

[173] In my view, for the reasons given in the section regarding Non-Transferees and the Class Period above, these are all common issues regarding the Revised Class Definition.

[174] Regarding common issue 9, and whether the defendants breached the standard of care, VC accepts such issues are common if limited to an assessment of a systemic breach of duty. On the other hand, STM, the RCAV and Brother McHugh say they are not common but relate to individual circumstances.

[175] In my view, the leading cases considered above are clear that assessments of systemic breach are suitable for common determination in cases such as this. The defendants provided no basis for distinguishing this case from those decisions, some of which are binding on me.

[176] The defendants say the reference to “psychological abuse” should be removed because it is not included in the Class Definition. It is pleaded, however, in the NoCC. I see no reason why the Class Definition cannot be augmented to include such abuse, and I grant the plaintiff leave to do so.

Common Issues 10, 11

[177] These issues address whether the defendants owed fiduciary duties to protect the Class Members from abuse by Christian Brothers at the Schools and, if so, whether they were breached.

[178] The defendants do not contest these being common issues regarding the Transferees and systemic breaches of duty, though they again dispute the inclusion of “psychological abuse”.

[179] For the reasons given above, in my view there is some basis in fact to support the existence of these common issues regarding breaches of fiduciary duty with respect to the Revised Class Definition. Psychological abuse is dealt with as in Issues 6-9.

Common Issues 12–16

[180] These issues address some of the factors identified in the case law relevant to establishing the existence of a vicarious duty.

[181] The institutional defendants and Brother McHugh argue that they are inherently individual and “determination would be entirely abstract and useless in the absence of specific facts relating to the specific circumstances of: (a) the alleged abuser; and (b) the actual incident of abuse including time, place and setting – i.e., all the facts required to connect the ‘opportunity’ to actual wrongful conduct.”

[182] In my view, these questions can be usefully answered by examining, at a systemic level, these defendants’ decisions, rules, policies, procedures and practices regarding the relationships and interactions between the Christian Brothers and the students.

[183] The issue will be whether those systemic decisions, rules, etc.: provided opportunities for abuse (common issue 12); served the defendants’ aims and goals (common issue 13); permitted friction, confrontation, and intimacy (common issue

14); conferred extensive power (common issue 15); and/or created vulnerability (common issue 16).

[184] *Bazley* identifies numerous specific considerations that will likely arise systemically in this case, particularly given the religious authority of the Christian Brothers in the Schools:

> 44 The risk of harm may also be enhanced by the nature of the relationship the employment establishes between the employee and the child. Employment that puts the employee in a position of intimacy and power over the child (i.e., a parent-like, role-model relationship) may enhance the risk of the employee feeling that he or she is able to take advantage of the child and the child submitting without effective complaint. The more the employer encourages the employee to stand in a position of respect and suggests that the child should emulate and obey the employee, the more the risk may be enhanced. In other words, the more an enterprise requires the exercise of power or authority for its successful operation, the more materially likely it is that an abuse of that power relationship can be fairly ascribed to the employer.

[185] The vicarious liability case law discussed under s. 4(1)(a) supports certification of issues relating to this issue in cases of alleged systemic abuse.

[186] Finally, Brother McHugh argues there is no claim pleaded against him in vicarious liability. In my view, that omission can be corrected by a simple amendment, as the material facts to establish that claim are pleaded, including that, at material times, he had a high degree of authority over the Christian Brothers at the Schools, power to transfer them between positions or expel them from the organization, and was a director of both Schools and president of one.

Common Issue 17

[187] The defendants accept punitive damages as a common issue regarding the alleged systemic breaches of duty. They contest however whether assessment of the amount of such an award is common.

[188] The Transferees coming to the Schools, in circumstances where the defendants allegedly knew, or ought to have known, they had abused children at

Mount Cashel, is some basis in fact capable of supporting an award of punitive damages.

[189] In *Rumley*, the Supreme Court of Canada certified the appropriateness and amount of punitive damages as a common issue. The Court held that the issues of breach of duty of care and fiduciary duty required assessment of the knowledge and conduct of those in charge of the Schools over a long period of time, being the kind of fact-finding relevant to punitive damages. Further, because the plaintiffs had limited liability to systemic negligence, the appropriateness and amount of punitive damages was amenable to resolution as a common issue (para. 34).

[190] As stated in *Griffiths*, an award of punitive damages can be a common issue to be determined and assessed in the context of all claims and not on an individual basis (paras. 8–9; see also *Cloud,* para. 70; *White,* para. 155).

[191] In my view, both the appropriateness and amount of punitive damages should be certified at this stage. It may turn out on the evidence at trial, however, that determining the amount will require the assessment of harm to individual students.

Section 4(1)(d) – Preferability

[192] After the common issues are determined, s. 4(1)(d) asks if a class proceeding is the preferable procedure for the fair, efficient and manageable advancement of the proposed claims (*Hollick*, para. 28).

[193] The analysis considers the three principal goals of class actions—judicial economy, access to justice and behaviour modification—and the non-exhaustive criteria listed under *CPA* s. 4(2).

[194] Turning first to the three principal goals, in cases of alleged systemic abuse, courts have repeatedly found that access to justice and judicial economy favour a common issues trial, to determine fundamental aspects of the nature and extent of the legal duties owed by the defendants to the class members and whether those

duties were breached (*Rumley*, paras. 36–39; *White*, paras.141–43; *Cavanaugh Certification*, paras. 21–24; *Cloud*, paras. 79–90; *Griffiths*, paras. 18–20).

[195] In my view, the defendants failed to differentiate this case from these other systemic abuse cases. As in those cases, access to justice and judicial efficiency will be served by a common issues trial that will significantly advance the litigation.

[196] On the evidence in this case, access to justice is a particularly compelling consideration. Over the many years since the alleged abuse began, few individual actions have been pursued. The current record includes only the claims by Messrs. Drescher and Knowles.

[197] By contrast, Mr. Liptrot having commenced these proceedings, five additional affiants have come forward who wish to be Class Members, and the best information available about class size is that 65 potential Class Members have identified themselves, or been identified, to the plaintiff's law firm.

[198] As the cases say, access to justice and judicial efficiency are also served by a streamlined common process of examinations for discovery, documentary disclosure and expert evidence. The risk of inconsistent outcomes is avoided. The class proceeding process will allow for simplified procedures to resolve the individual issues. Behaviour modification is also served by deterring other potential wrongdoers. All of this applies in this case.

[199] The defendants argue that individual actions are in the best interests of the individual litigants and the defendants. They suggest test cases or joinder, and say re-litigation of the same issues would be constrained by the principles of abuse of process, *stare decisis* and issue estoppel. They argue that the common issues are relatively straightforward because the Mount Cashel crimes have been litigated, so the complexity of a class proceeding is not justified. They say that the critical and time-consuming issues will involve individual factual and legal causation—and this inquiry would be delayed by the class process.

[200] The defendants point to *John Doe (G.E.B. #25)* as their example of this alternative model. As plaintiff's counsel argued in reply, however, this is not a persuasive example. In that case, the claims began in 1999, and six plaintiffs from a group of 29 were selected to proceed to trial against the St John's Archdiocese and the Christian Brothers Institute of Canada Inc. for sexual abuse at Mount Cashel in the 1950s.

[201] The trial did not start until 2016, and two of the six plaintiffs died in the meantime. The other four remain judgment creditors, and the other plaintiffs never went to trial but were swept up in the defendant's bankruptcy process. Presumably, the bankruptcy process played a role in this inordinate delay, but the point remains that the defendants provided no useful, concrete examples of their alternative model as preferable for a systemic abuse case like this one.

[202] The defendants also point to the judgment of Justice Humphries in *Rumley et al. v. HMTQ*, 2003 BCSC 234 [*Rumley BCSC*], as demonstrating the inevitable pitfalls of certifying such cases. Her judgment identifies challenges for a common issues trial in a complex systemic abuse case. But, in my view, it does not suggest the preferability of individual trials in cases such as this.

[203] As case management judge after the Supreme Court of Canada's certification in *Rumley*, Humphries J. faced an application to decertify based on the defendant's argument that the proceedings had become "irredeemably individual and … not manageable as a class proceeding" (*Rumley BCSC*, para. 54).

[204] In the end, Humphries J. dismissed the application to decertify. She held that, by aggressive case management that focussed the case on systemic issues, findings could be made on common issues that would advance the litigation of class members who, if successful, would then seek to prove on an individual basis that these systemic breaches had caused their damages. Accordingly, she identified 11 common issues for determination (*Rumley BCSC*, paras. 80–81, 90).

[205] As Cullen J. wrote in *White*, what led to the decertification application and subsequent amendment of the common issues in *Rumley BCSC* was plaintiff's counsel's failure to focus the case on the nature of the alleged, systemic negligence. Instead, they attempted to address individual issues that were suitable to resolution only within the context of the causation inquiry in the subsequent individual aspects of the case (*White,* para. 90).

[206] The defendants also supported Mr. Drescher's intervenor arguments about the potential for class actions to have unintended negative effects on survivors of sexual abuse.

[207] Mr. Drescher provided important evidence and argument about potential negative impacts on survivors who do not wish to be class members, but become so by default by failing to opt-out under *CPA* s. 16. He argues that these survivors lose their right to sue individually without their consent or input.

[208] Mr. Drescher submitted evidence from Russell Howe, an experienced litigation counsel for sexual abuse plaintiffs. Mr. Howe deposed that it is common for survivors of childhood abuse to fail to opt out of class proceedings in a timely fashion. Some fail to do so because they are unready to come forward until their 50s or even later due to the nature of the incidents in issue. Some do not learn of the opt-out process in time, which in some cases can be connected to the consequences of the abuse itself – such as homelessness, substance abuse and living "off the grid" in seclusion.

[209] Further potential prejudice arises for those who do not opt out and then eventually face a specified deadline to come forward and prove individual causation and damages. Without the class action process, they would face no such limitation period for their claims alleging childhood sexual abuse.

[210] Mr. Howe's evidence is that, for survivors, controlling litigation can be beneficial as a form of gaining control over what occurred to them. Thus, losing control of it to class proceedings in these ways can be harmful.

[211] On this issue, the defendants also point to Justice Grauer's decision, when in this Court, in *Lakes v. MacDougall*, 2012 BCSC 49. The representative plaintiff sought to certify a class action on behalf of prison inmates who were sexually abused by Mr. MacDougall while he worked in the prison system. Mr. Lakes also sought to approve a settlement agreement process made with the defendant the Province of British Columbia.

[212] Justice Grauer refused certification and settlement because the advantages to potential class members of a class proceeding were outweighed by the disadvantages of losing the absence of any limitation period for claims of sexual abuse. The terms of the proposed settlement provided for a 90-day opt-out period and then a further 21 months to file a claim, failing which the claim would be forever barred.

[213] The proposed class was expected to be around 200 people. Some potential class members had already successfully litigated their claims. Justice Grauer stated:

> [14] But what of the rest of the proposed class, who remain unidentified? The evidence before me clearly establishes the roadblocks that inhibit these victims from breaking silence and coming forward to disclose the abuse they suffered. They are accordingly particularly vulnerable to losing their claims through the effluxion of time. This is exacerbated by notice provisions that, while likely to ensure maximum dissemination to those still in the prison population, offer little hope of reaching those in more isolated circumstances.
>
> [15] It is no answer, in my view, to say that these victims may avoid the risk of losing their rights by simply filing a single piece of paper to opt out within the 90-day period mandated for doing so. That is a very short time in the context we are discussing. Once it has passed, they may no longer opt out; they are left with 21 months within which to file a claim, failing which they are forever barred.

[214] It goes without saying that the concerns raised by Mr. Drescher and in *Lakes* are important and complex. As are the comments about common issue trials versus individual trials by Justice Perell in *Grenville College*, mentioned above.

[215] In trying to identify the best overall approach in this case, in my view the key consideration is access to justice. The evidence of those affiants who have come forward to support certification, and the evidence of potential class size, suggest that

access to justice is better served by class proceedings than individual actions, which only two plaintiffs have pursued over all this time.

[216] While involvement in the class action will no doubt be traumatic for class members, the evidence indicates it is likely to provide greater access to justice. Presumably, this reflects at least in part the reduced stress, demands and cost that class members face in prosecuting their claims.

[217] This perspective is supported by Dr. Marmar's expert opinion that vulnerable survivors of systemic abuse benefit from a representative plaintiff prepared to shoulder the burdens of litigation. In cases of alleged systemic abuse, potential class members need not come forward and confront litigation of the common issues. Afterwards, armed with the knowledge of the outcome, they can decide whether to opt out and whether to come forward.

[218] Dr. Marmar's opinion finds support in the evidence of the affiants who have come forward to support certification. For example, Mr. Pedersen's affidavit says:

> I decided to come forward with my story because Darren [Liptrot] came forward with his. He created an opening for me to come forward. I was uncertain that my events were enough on their own to file a claim, particularly given the expected legal costs and expenses involved if I brought an action on my own.

[219] There is also reason to believe the individual damages process will provide some of the autonomy and closure that Mr. Howe describes, but in a less taxing manner given the prior resolution of the common issues (*Rumley*, para. 37).

[220] Also important is that the *CPA* is a powerful procedural statute, giving the case management judge flexible tools, unavailable in standard litigation, to address complexities, manage individual issues, and provide a more streamlined, sensitive process if and when class members become involved.

[221] In sum, in this case considerations of access to justice and efficiency favour class proceedings over individual actions.

[222] I turn now to consider the factors specified in s. 4(2) of the *CPA,* namely whether:

> (a) questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) other means of resolving the claims are less practical or less efficient; and
>
> (e) the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

Section 4(2)(a)

[223] In my view, as in the other systemic abuse cases referred to above, the common issues will substantially advance the litigation. They will determine the nature and extent of the legal duties owed by the defendants to the Class Members and whether those duties were breached. They will go some distance towards deciding whether vicarious liability exists, and also whether punitive damages are appropriate.

[224] I cannot say at this stage, however, that these issues will dominate the individual issues. In many cases, causation and amount of damages may well involve significant individual issues.

[225] I therefore do not see this factor tipping the balance for or against certification.

Section 4(2)(b) and (c)

[226] Based on the passage of time since the events in question, the evidence does not suggest that a significant number of Class Members have a valid interest in individually controlling the prosecution of separate claims. This weighs in favour of certification.

[227] The proceedings overlap the individual claims of Mr. Drescher and Mr. Knowles but, in my view, this does not weigh against certification.

Section 4(2)(d) and (e)

[228] I have considered above the defendants' submissions regarding the benefits of individual proceedings and drawbacks of a class action.

[229] Given the number of people who have come forward in these proceedings or have been identified to plaintiff's counsel as potential class members, compared to the few who have sued individually over all these years, these proceedings appear to be the most practical and efficient means of addressing these serious issues. This is supported by the clear trend in the case law of class actions being the more efficient means of resolving allegations of systemic abuse of vulnerable persons.

[230] As mentioned above, practicality and efficiency are also served by a streamlined common process of examinations for discovery, documentary disclosure and expert evidence. The risk of inconsistent outcomes is avoided, and the class proceeding will allow for more simplified, sensitive procedures to resolve the individual issues.

Conclusion on Preferability

[231] In my view, for the same reasons expressed in the leading cases discussed above, a class action is the preferable procedure for the fair, efficient and manageable advancement of this litigation. In this case, the evidence suggests it will particularly serve access to justice. It will also serve judicial economy, behaviour modification and most of the considerations in *CPA* s. 4(2).

Section 4(1)(e) – Representative Plaintiff and Litigation Plan

[232] The defendants do not challenge the representative plaintiff as adequately representing the interests of the Class Members, without conflict of interest.

[233] They argue that the litigation plan is unworkable, however, because: (i) it protects the confidentiality of those who opt out from the defendants and (ii) it lacks a *CPA* s. 27(4) deadline for class members to make their claims.

[234] In argument, counsel for the plaintiff agreed to the approach sought by the defendants for the confidentiality of those who opt out. Their names and addresses will be provided to the defendants, who will undertake to maintain that confidentiality. The information will also be filed with the Court in a sealed envelope. The parties did not discuss which defendants specifically should receive the information. In my view, it should be the Schools and the RCAV, though the parties have leave to address that issue further should they wish.

[235] Regarding the deadline in s. 27(4), in my view it is premature to decide this issue as we are far from the time of giving notice to Class Members of the determination of common issues. As pointed out by plaintiff's counsel, s. 27(5) might allow extensions for those who come forward late for reasons related to their alleged abuse, though the defendants reserved their right to argue this issue further.

[236] Finally, the defendants mentioned some unspecified technical revisions to the litigation plan that they wished to reserve to a case management conference. I agree with this approach.

Conclusion

[237] These proceedings are certified on the basis of the Revised Class Definition.

"Coval J."

Schedule A – Proposed Common Issues

1. Did English, French, Burton, Kenny, Short or Burke abuse children in their care at the Mount Cashel orphanage? If yes:

(a) What knowledge did the defendant McHugh have of the conduct?

(b) What knowledge did the defendant Archbishop of St. John's have of the conduct?

(c) What knowledge did the defendant Archbishop of Vancouver have of the conduct?

(d) What knowledge did the defendant CISVA have of the conduct?

(e) What knowledge did the defendant Vancouver College have of the conduct?

(f) What knowledge did the defendant St. Thomas More have of the conduct?

…

3. Were Brothers English, French, Burton, Kenny, Short or Burke transferred to teaching positions at St. Thomas More or Vancouver College? If yes:

(a) Did the defendant McHugh authorize, approve, endorse or ratify the transfer?

(b) Did the Archbishop of St. John's authorize, approve, endorse or ratify the transfer?

(c) Did the Archbishop of Vancouver authorize, approve, endorse or ratify the transfer?

(d) Did St. Thomas More authorize, approve, endorse, or ratify the transfer?

(e) Did Vancouver College authorize, approve, endorse or ratify the transfer?

4. What authority did the Archbishop of Vancouver have over the activities of the Christian Brothers in the Archdiocese of Vancouver? Did it include:

(a) The authority to investigate allegations of abuse at St. Thomas More and Vancouver College?

(b) The authority to terminate or otherwise remove members of the Christian Brothers from teaching positions at St. Thomas More and Vancouver College?

…

6. Over the period 1976 to 2013, did any of the defendants owe a duty of care to class members to protect them from psychological, physical and sexual abuse by current or former members of the Christian Brothers who taught at St. Thomas More Collegiate and/or Vancouver College?

7. If yes, what was the standard of care required of each institutional defendant and Gerald McHugh? Did the standard of care include:

(a) An obligation to investigate allegations of abuse committed by Brothers English, French, Kenny, Burke, Short and Burton at Mount Cashel?

(b) An obligation to investigate allegations of abuse committed by members of the Christian Brothers including Brother English, Short, Burton and Burke at St. Thomas More?

(c) An obligation to investigate allegations of abuse committed by members of the Christian Brothers including Brother English, French, Kenny and Burke at Vancouver College?

(d) An obligation to have in place a system of procedures and policies to prevent abuse of students?

(e) An obligation to report suspected incidents of physical or sexual abuse to police or government authorities?

(f) An obligation to warn or disclose to other dioceses, bishops or Catholic schools that a member of the Christian Brothers teaching staff was suspected of abusing students?

(g) An obligation to screen members of the Christian Brothers including Brother English, Short, French, Burton and Burke for a history of abusive conduct before employing them at St. Thomas More?

(h) An obligation to screen members of the Christian Brothers including Brother English, French, Kenny, Burton and Burke for a history of abusive conduct before employing them at Vancouver College?

(i) An obligation to monitor the conduct of the Christian Brothers at St. Thomas More including Brother English, French, Burton, Short and Burke for indications of abusive conduct against students?

(j) An obligation to monitor the conduct of the Christian Brothers at Vancouver College including Brother English, French, Kenny and Burke for indications of abusive conduct against students?

(k) An obligation to prevent Brother English, French, Burton, Short, Kenny and Burke any other members of the Christian Brothers suspected of abuse from teaching at St. Thomas More or Vancouver College?

8. What was the standard of care required of each of English, Burke and Kenny? Did the standard of care include an obligation to warn about the risk of harm to students posed by other Christian Brothers?

9. Did any of the defendants breach the required standard of care?

10. Did any or all of the defendants owe a fiduciary duty to the class members to protect them from psychological, physical and sexual abuse by current or former members of the Christian Brothers who taught at St. Thomas More Collegiate and/or Vancouver College?

11. If yes, did any or all of the defendants breach that fiduciary duty?

12. Did any of the institutional defendants or Gerald McHugh provide an opportunity for current or former members of the Christian Brothers to abuse their position of power as teachers or religious figures?

13. What were the aims or goals of any each of the institutional defendants and Gerald McHugh?

14. What friction, controversy or intimacy was inherent in any each of the institutional defendants' enterprises and Gerald McHugh's?

15. What was the extent of the power conferred by the institutional defendants or Gerald McHugh on current or former members of the Christian Brothers in relation to the class members?

16. Were the class members vulnerable to wrongful exercise of power by current or former members of the Christian Brothers?

17. If there is a finding of negligence or breach of fiduciary duty, does the conduct of any or all the defendants justify an award of punitive damages and, if so, what amount of punitive damages is appropriate?

Table 1 – Transferees at the Schools

English	STM (1976-1981)	VC (1981-1987)		
Short	STM (1977-1989)			
Burke	STM (1981-1982)	VC (1982-1989)	VC (1996-2013)	
Kenny	VC (1976-1979)			
Burton	VC (1983-1984)	STM (1984-1989)		
French	STM (1982-1983)	VC (1985-1991)		

Table 2 – Timeline of Allegations of Abuse

		1976–77	1978–79	1980-81	1982–83	1984–85	1986–87	1988–89	1990–91	1992–93	1994–95	1996–97	1998–99	2000–01	2002–03	2004–05	2006–07	2008–09	2010–11	2012–13
VC	Transferees			DL, CD,	DL, CD	DL, HM	HM								VC		JBD, VC	JBD, VC		VC
	Non-Transferees	CD	CD																	
	Identity Unknown			VC							VC									
STM	Transferees		JAD, JK	JD, RP, JAD, JK	JD, RP, JAD															
	Non-Transferees																			
Years		1976–77	1978–79	1980-81	1982–83	1984–85	1986–87	1988–89	1990–91	1992–93	1994–95	1996–97	1998–99	2000–01	2002–03	2004–05	2006–07	2008–09	2010–11	2012–13

Abbreviation	Source of Allegation
CD	Christopher Dziekan
DL	Darren Liptrot
HM	Hamish McArthur
JD	John Drescher
JK	Jeffrey Knowles
JAD	John A. Doe
JBD	John B. Doe
RP	Richard Pedersen
VC	VC school records