IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Basyal v. Mac's Convenience Stores Inc.,*
2017 BCSC 1649

Date: 20170918
Docket: S1510284
Registry: Vancouver

Between:

Prakash Basyal, Arthur Gortificaion Cajes, Edlyn Tesorero and Bishnu Khadka

Plaintiffs

And

Mac's Convenience Stores Inc., Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd., and Trident Immigration Services Ltd.

Defendants

Before: The Honourable Mr. Justice Silverman

Reasons for Judgment

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Place and Date of Hearing:	Vancouver, B.C. April 3-6, 2017
Place and Date of Judgment:	Vancouver, B.C. September 18, 2017

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INTRODUCTION

[1] The plaintiffs apply for an order certifying this action as a class proceeding.

[2] They argue that the overriding question for the Court, pursuant to s. 4 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("*CPA*") is whether it would be more fair and efficient to determine the class members' claims in a single class proceeding as opposed to having their claims determined in separate individual proceedings.

[3] The representative plaintiffs ("Rep Plaintiffs") submit that the application meets the requirements of s. 4 of the *CPA* and furthers the policy objectives of that legislation and thus should be granted.

[4] The proposed class is one of individuals who were identified by the defendant Mac's Convenience Stores Inc. ("Mac's") as potential candidates for employment under the Government of Canada's Temporary Foreign Worker Program ("TFWP"). The allegations are that:

1. Mac's promised jobs and failed to provide them; and
2. Mac's and the other defendants unlawfully collected fees from prospective temporary foreign workers ("TFW") who Mac's had agreed to hire.

[5] The defendants argue that the Rep Plaintiffs have failed to meet the requirements for certification. This action is inherently individual. Investigation of the individual circumstances of each potential Class Member, necessary to determine the core claims in this case, overwhelms any potential common issues.

[6] In addition to a disagreement on legal issues, the parties disagree with respect to many important issues of fact and inferences of fact. This application, and this decision, is not the place for resolving those differences in fact. Rather, it addresses the question of which procedure should be employed to resolve those factual and legal disputes.

FACTS

Submission of Rep Plaintiffs

[7] Each of the Rep Plaintiffs was living and working in the United Arab Emirates ("UAE") when they met a representative of the defendant, Overseas Immigration Services Inc. ("OIS") and/or Overseas Career and Consulting Services Ltd. ("OCCS"), (collectively "Overseas"). Overseas told each Rep Plaintiff that in exchange for a fee (the "Recruitment Fee"), Overseas could secure them legal employment in Canada. Sometimes Trident collected the fee from, or received it on behalf of, Overseas.

[8] The TFWP is jointly administered by various government departments. It governs when, and in what circumstances, foreign workers will be permitted to come and work in Canada on a temporary basis in areas of occupation where there are labour shortages.

[9] The TFWP has rules that employers, seeking to hire a foreign employee, must abide by. Among those rules:

1. An employer must first provide a written employment offer to the prospective worker;
2. The employer must then attempt to secure a positive Labour Market Opinion ("LMO"), subsequently renamed a Labour Market Impact Assessment ("LMIA"). The purpose of the LMO was to ensure that the employment of the TFWs would not adversely affect the labour market in Canada.
3. Employers are permitted to use the services of third-party representatives. The employer must pay for all fees associated with this service and comply with provincial standards.

[10] In or around 2012, Mac's retained Overseas to recruit TFWs to work at its stores in Western Canada. They authorized Overseas to work on its behalf with the relevant government agencies to obtain approvals allowing foreign workers to work in their stores.

[11] In Mac's' LMO applications, OCCS acted as the "third party representative" authorized to act for the employer.

[12] The LMO application for lower-skilled occupations differs from that of higher skilled occupations:

1. For lower-skilled occupations, it advises that third-party representatives, acting on behalf of an employer, must have written authorization from the employer to do so and that employers who wish to have third-party representation must complete and sign a specific form in that regard.

2. For higher-skilled occupations it notes that third-party representatives are not authorized to act on behalf of an employer until the employer has completed, signed, and submitted the appropriate form in that regard.

[13] The appropriate documents were completed and submitted in the circumstances of this case appointing Kuldeep Bansal of OCCS as Mac's' representative.

[14] All of the potential class members were recruited initially in Dubai, by Overseas to work for Mac's under the TFWP.

[15] Despite the prohibition against fees being charged, the Rep Plaintiffs were advised by a representative of Overseas that they were required to pay an initial fee installment to Overseas in order to commence the process of obtaining work in Canada. Each of the Rep Plaintiffs paid a first installment to Overseas.

[16] Later, the Rep Plaintiffs were required to pay a second installment. Sometime after they paid the initial installments, each received an employment offer, a signed employment contract with Mac's, and a copy of the relevant LMO obtained by Mac's. The Rep Plaintiffs used these documents to apply for and obtain visas to travel to Canada. They were told by Overseas that they could not travel to Canada and begin working in the jobs promised to them until they paid a second installment. Each paid a second installment to Overseas.

[17] The following amounts were charged to the Rep Plaintiffs by Overseas:

Prakash Basyal	$8,000
Arthur Gortificaion Cajes	$8,075
Edlyn Tesorero	$7,500
Bishnu Khadka	$7,500 (USD)

[18] Some of the Rep Plaintiffs paid part of the recruitment fee to Trident Immigration Services Ltd. ("Trident") as directed by representatives of Overseas.

[19] The Rep Plaintiffs' employment contracts with Mac's had substantially identical terms relating to the following:

1. The term of employment;
2. The number of hours to be worked per week;
3. The percentage of vacation pay;
4. Terms of health insurance;
5. The prohibition against the employer recouping from the employee any costs incurred in recruiting or retaining the employee;
6. The employers' agreement to abide by provincial labour standards; and
7. The employers' assurance in providing the availability of reasonable and proper accommodation.

[20] Basyal and Khadka's contract included a term that Mac's would assume the cost of return transportation from the Middle East to Alberta and back to their home countries.

[21] Cajes and Tesorero's contract did not include such a term for transportation.

[22] Each of the Rep Plaintiffs signed their employment contract and returned it to Overseas.

[23] The contract which Mac's executed for all of the potential class members, including those of the Rep Plaintiffs, are precisely or substantively identical to the sample contract provided by one of the government departments jointly tasked with administering the TFWP.

[24] They each received a visa that allowed them to travel to Canada. Upon arrival, they each received work permits. These allowed them to work only in the jobs for which they had contracted with Mac's and for which Mac's had received positive LMOs.

[25] Shortly after arriving in Canada, each of the Rep Plaintiffs learned that there was no job for them at Mac's.

[26] Similarly, numerous other potential class members who had signed an employment contract with Mac's were not provided employment with Mac's in accordance with the terms of their employment contract.

[27] Because they were legally unable to work for any other employer and in any other position than that authorized in their work permits, they were left unable to earn income in Canada. As TFWs, they were excluded from access to social benefits or social services. They also suffered mental and emotional distress. The fees they had paid were not refunded.

[28] The involvement of Overseas and Trident are as follows:

1. They are related companies under the control of Kuldeep Bansal.
2. Mr. Bansal is a Regulated Canadian Immigration Consultant authorized to represent and advise workers with respect to the Canadian immigration systems.
3. Mr. Bansal's sister is the sole director of Trident.
4. OIS and OCCS supply foreign workers to local, national, and multi-national businesses.
5. Some of the Rep Plaintiffs paid part of the recruitment fee to Trident, as directed by representatives of Overseas.

Submission of Mac's

[29] Mac's owns a chain of convenience stores that operate throughout Canada.

[30] Starting in or around summer of 2011, Mac's had difficulties finding Canadian workers to employ in corporate stores and corporate food service operations in the Western region. Between September 2011 and June 2014, Mac's employed TFWs to help address its labour challenges through the TFWP.

[31] Between spring 2012 and June 2014, Mac's engaged OCCS to assist in recruiting TFWs to address labour challenges in parts of Western Canada. At all

material times, OCCS was licensed as an employment agency through British Columbia's Employment Standards Branch.

[32] Mac's agreed to pay OCCS a success fee for every TFW that was hired to work in a Mac's' corporate store or corporate food service operation.

[33] In or around July 2012, Mac's executed a prescribed written authorization form appointing OCCS to act as its representative for the specific and limited purpose of submitting LMO applications.

[34] At the same time, OCCS began submitting LMO applications for Mac's. A copy of the appropriate form was attached to each of the LMO applications which OCCS submitted for Mac's between July 2012 and the end of the parties' relationship in 2014.

[35] As part of its recruiting services, OCCS introduced prospective TFW candidates to Mac's. Mac's conducted interviews of these individuals by phone or in person.

[36] During Mac's' engagement with OCCS, Mac's would tell OCCS when it had an available position to be filled. OCCS would then, pursuant to its written authority, provide to the appropriate Government of Canada department, the necessary information about that person. OCCS would then send to Mac's a written employment contract which would be signed by the appropriate Mac's' employee and returned to Overseas to give to the prospective TFW candidate. The employment contracts were based on a template prescribed by the Government of Canada department responsible for the TFW program.

[37] The employment contracts varied with respect to a number of terms, depending on the nature and location of the position, including wage rate, hours of work, job description and duties, length of the contract, and payment of travel costs.

[38] All of the employment contracts were conditional upon the TFW obtaining a valid work permit and his or her successful entry into Canada.

[39] Further, all of the employment contracts included a number of terms which were required to be present, including written terms relating to termination.

[40] The recruitment and hiring process took many months, sometimes as many as 12 for TFW candidates who were not already in Canada. One of the main causes of delay was government delay in processing visa applications.

[41] In the meantime, Mac's' labour needs were changing constantly.

[42] While Mac's only executed employment contracts when positions were available, there was always a possibility that the position would no longer be available by the time the TFW candidates' visas, work permits, and travel arrangements could be finalized.

[43] Mac's understood that OCCS advised all candidates who were not already in Canada to wait until Mac's confirmed their job was still available before travelling to Canada.

[44] Mac's has never had a relationship, contractual or otherwise, with the defendants OIS or Trident.

[45] With respect to Recruitment Fees:

1. Max never authorized OCCS, or any other party, to charge or collect any payments from TFWs, directly or indirectly, in exchange for securing employment at Mac's. Nor has Mac's ever collected or received any such payments from TFWs, directly or indirectly.

2. Mac's understood that OCCS did not charge candidates fees for securing employment, but did charge candidates fees relating to assisting them with processing immigration documents and generally navigating the immigration process. Mac's had no involvement in providing any such services or collecting any fee relating to them.

3. Most of the TFW candidates signed formal written agreements with Overseas. These agreements state that "The client(s) agree that the fees paid are for services indicated above and are <u>not</u> for job placement and any refund is strictly limited to the amount of fees paid".

[46] The evidence indicates numerous variable and different circumstances of the Rep Plaintiffs and the other prospective class members with respect to numerous different aspects of their dealings with the defendants, including:

1. No binding employment agreement;
2. Successful employment of some TFWs;
3. Some TFWs employed by Mac's who resigned;
4. Some TFWs employed by Mac's were dismissed for various reasons;
5. Candidates received various representations regarding the availability of jobs; and
6. Candidates relied on representations in various ways.

Submission of OIS, OCCS and Trident

[47] From approximately the beginning of 2012 until approximately June 2014, OCCS had an agreement with Mac's regarding the provision of recruiting services (the "Recruitment Contract"). The services included:

1. Assisting Mac's in obtaining LMOs from Service Canada, which authorized Mac's to fill vacancies at stores with foreign workers under the TFWP;
2. Organizing job fairs in Dubai where a representative of Mac's could meet and interview foreign workers for the purpose of offering them jobs under the TFWP; and
3. Facilitating communications between Mac's and the foreign workers that Mac's decided to hire under the TFWP.

[48] Under the Recruitment Contract, OCCS was paid a fee by Mac's for each successful recruitment of a foreign worker by Mac's.

[49] A number of Mac's' stores were operated by an individual known as a dealer. The foreign workers who were hired by Mac's' dealers entered into employment contracts with the particular Mac's' dealer who hired them.

[50] OCCS did not collect any fees for recruitment or job placement with Mac's or Mac's' dealers from the foreign workers who signed an employment contract. Rather, all payments for the recruitment services were paid by Mac's or Mac's' dealers.

[51] OCCS fulfilled its obligations to Mac's and a number of foreign workers hired, partly as a result of the efforts of OCCS.

[52] The Rep Plaintiffs entered into employment agreements with Mac's. The terms of the employment agreements varied depending on the nature of the job that the foreign worker was hired to do and the location of the store where the foreign worker would be employed. In every case, Mac's or Mac's' dealers entered into the employment contract with the foreign worker directly. A representative of Mac's always signed the employment contract. No one from the OCCS or Trident ever signed an employment contract as an agent for Mac's.

[53] OCCS also offered other services to the foreign workers, including the Rep Plaintiffs, that were unrelated to the services concerning their employment. OCCS offered seminars to foreign workers who attended about the process for obtaining a work permit and provided them with information about immigrating to Canada under the TFWP.

[54] While neither OCCS or Trident collected any fees for recruitment of job placement from TFWs who signed an employment contract:

1. OCCS and Trident entered into agreements for the provision of immigration and settlement services with certain foreign workers who were hired by Mac's and Mac's' dealers.
2. At no time was it a term of the Recruitment Contract with Mac's that workers offered employment must also enter into an immigration and settlement service agreement with OCCS. However, most workers hired by Mac's did decide to retain OCCS themselves for this additional purpose.
3. Most of the foreign workers hired by Mac's who retained OCCS to provide immigration and settlement services, signed formal written agreements with OCCS for the provision of those immigration and settlement services.
4. The terms of the written retainer agreements that foreign workers hired by Mac's signed with OCCS specifically confirmed that "The clients agree that the fees paid are for services indicated above and are <u>not</u> for job placement and any refund is strictly limited to the amount of fees paid."
5. Under the arrangements with OCCS and Trident, foreign workers hired by Mac's were required to pay the balance of the agreed fees for immigration and settlement services when they had obtained their visa to come to Canada under the TFWP. The triggering event for payment of this amount was

> completely independent of any events related to the hiring of the foreign worker by Mac's, their commencing employment in Canada, or their satisfaction with their employment.

[55] Trident has an agreement with OCCS to assist with the provision of immigration and settlement services to foreign workers who contracted with Mac's for employment in Canada. Essentially, Trident took on the overflow, providing immigration and settlement services to foreign workers when OCCS was too busy.

[56] Where Trident provided immigrant and settlement services to a foreign worker, Trident was paid directly by the worker. There was no payment from OCCS to Trident.

[57] At no time was Trident, or its principal, involved in providing recruitment services to Mac's under the Recruitment Contract.

RELEVENT LEGISLATION

[58] The requirements for certification of an action as a class proceeding are set out in s. 4 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 ("*CPA*"):

> **Class certification**
>
> 4 (1) 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.
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

ARGUMENT

General – The Rep Plaintiffs

[59] The Rep Plaintiffs argue that the FACTS form the basis for various causes of action against the defendants, and that the circumstances under which those causes of action arose are precisely those anticipated by the *CPA*. Therefore, they seek the certification which is the basis of this application.

[60] The Rep Plaintiffs submit that this application for certification meets the test set out in s. 4 of the *CPA*:

1. The pleadings disclose a reasonable cause of action – s. 4(1)(a);
2. There is an identifiable class – s. 4(1)(b);
3. The claims of the class members raise common issues – s. 4(1)(c) ;
4. A class proceeding would be the preferable proceeding – s. 4(1)(d); and
5. There are appropriate Rep Plaintiffs – s. 4(1)(e).

[61] The burden is on the Rep Plaintiffs to establish:

1. With respect to s. 4(1)(a), that it is not plain and obvious that the pleadings disclose no reasonable cause of action.

2. With respect to ss. 4(1)(b) through (e), that there is "some basis in fact" for each of those subsections.

[62] The Rep Plaintiffs argue that each of the foregoing burdens have been met.

General – The Defendants

[63] Each of the defendants deny wrongdoing on their own behalf, and deny any responsibility for whatever wrongdoings, if any, that any of the other defendants may have committed.

[64] However, they argue that the determination with respect to the merits of those allegations should be addressed in individual proceedings, leading to individual trials, with a single plaintiff each. They argue that this is not the type of case anticipated by the *CPA*.

[65] There is not a single over-arching issue here that makes this inappropriate for class proceedings. Rather, the most important reason is that it is not manageable as a class proceeding.

[66] For the most part, and with respect to most of the issues in dispute, all of the defendants rely on the same arguments. There are, however, several areas where Overseas and/or Trident advance an independent argument, particularly with respect to the issue of agency.

The Pleadings Disclose a Cause of Action – s. 4(1)(a)

Submission of Rep Plaintiffs

[67] The burden is on the Rep Plaintiffs to establish that it is not plain and obvious that the pleadings disclose no cause of action. The Rep Plaintiffs have satisfied this burden.

[68] During the course of argument, the Rep Plaintiffs filed an amended notice of civil claim ("ANOCC") abandoning two of the previous pleaded causes of action: negligent misrepresentation and fraudulent misrepresentation.

[69] The Rep Plaintiffs argue that the remaining causes of action set out in the ANOCC do disclose a cause of action, and sufficiently plead all the requisite elements of those causes of action. Specifically, they take this approach with respect to:

1. Breach of contract;
2. Conspiracy;
3. Unjust enrichment and waiver of tort; and,
4. Breach of fiduciary duty.

[70] The Rep Plaintiffs respond to the defendants' argument that there are some causes of action for which there is no evidence concerning mandatory elements. The Rep Plaintiffs point to the evidence which they claim counters this particular argument.

[71] The Rep Plaintiffs responds to the defendants' argument that the ANOCC sometimes pleads conclusions without pleading any supporting material or particulars. In this regard, the Rep Plaintiffs point to the evidence which they claim counters this particular argument.

[72] The Rep Plaintiffs argue that the evidence establishes an agency relationship between themselves and the defendants. This relationship arises out of the work that the defendants did on behalf of the Rep Plaintiffs in assisting them to meet, interview, vet, provide and receive information, eventually hire, and all the necessary arrangements concerning the requirements to be fulfilled before they could come to Canada, together with all the other related aspects of their dealings with the Rep Plaintiffs by agreement with Mac's.

[73] One of the issues is whether the Rep Plaintiffs relied on Mac's, or on one or more of the other defendants for representations that were made that induced the Rep Plaintiffs to come to Canada.

[74] The Rep Plaintiffs provide the following explanation with respect to which causes of action are advanced against which defendant(s):

Breach of Contract	Mac's
Conspiracy	All defendants
Breach of Fiduciary Duty	All defendants except Trident
Unjust Enrichment	All defendants
Alternative Remedy: Waiver of Tort	All defendants

Submission of Mac's

[75] The Rep Plaintiffs have failed to satisfy the burden upon them to establish that it is not "plain and obvious" that their alleged causes of action will fail at trial.

[76] With respect to the individual causes of action, there are two fundamental problems with the way this case has been framed by the Rep Plaintiffs in their ANOCC:

1. In some cases, there is no evidence at all with respect to mandatory elements of the cause of action they pursue; and,
2. In some cases, the Rep Plaintiffs plead conclusions without pleading any supporting material facts or particulars. They do this in order to give their claim a false air of commonality.

[77] The Rep Plaintiffs' failure to plead elements of their claims with reference to material facts and particulars makes it difficult to proceed with the analysis in a meaningful way.

[78] Although the Rep Plaintiffs have abandoned the causes of action of fraudulent and negligent misrepresentation in their ANOCC, allegations of dishonest representations are still present in the claims for breach of contract, conspiracy, and breach of fiduciary duty.

[79] With respect to the assertion of agency:

1. No claim based on an allegation of agency between Mac's and Trident satisfies the cause of action requirement because the ANOCC contains no pleading regarding an agency relationship between Mac's and Trident. Further, no claim based on an allegation of agency between Mac's and OCCS or OIS satisfies the cause of action requirement because the ANOCC contains no material facts that could bring the Rep Plaintiffs' allegation of agency within the basic legal requirements necessary to establish agency; and,

2. For an Agency relationship to exist in law, an "agent" must be in a position to legally bind the principal, for example, enter a contract on behalf of the principal. No such thing is in evidence here.

[80] With respect to the asserted cause of action of breach of contract, the ANOCC contains conclusory allegations of various breaches without any supporting material fact.

[81] With respect to the asserted cause of action of unlawful means conspiracy:

1. There is no proper pleading of an agreement between Mac's and the other defendants; and,
2. There is no proper pleading of unlawful conduct by Mac's.

[82] With respect to the asserted cause of action of unjust enrichment, the ANOCC does not plead an unjust enrichment or benefit to Mac's.

[83] With respect to waiver of tort, the Rep Plaintiffs do not plead this as a cause of action but as an "alternative remedy".

[84] With respect to the asserted cause of action of breach of fiduciary duty:

1. The claim fails because there is no recognized special duty between prospective employers and employees that gives rise to a fiduciary duty;

2. The ANOCC does not include the necessary "hallmarks" to give rise to an ad hoc fiduciary relationship; and,

3. The ANOCC suggests conclusions but does not include a sufficient pleading of material facts in support of an undertaking by Mac's to act in the best interests of the Rep Plaintiffs and class members.

Submission of Overseas and Trident

[85] They rely upon the same argument of Mac's with respect to the pleadings not disclosing a cause of action with respect to the Rep Plaintiffs' claim for conspiracy.

[86] With respect to the Rep Plaintiffs' claim in agency, they argue as follows:

1 While the Rep Plaintiffs claim that Overseas acted as agents for Mac's, there are no material facts pleaded that indicate any agency relationship between Mac's and Overseas.

2 There is no pleading that alleges any agency or relationship between Trident and Mac's.

There is an Identifiable Class – s. 4(1)(b)

Submission of Rep Plaintiffs

[87] The burden on the Rep Plaintiffs is "some basis in fact".

[88] Section 7(d) and (e) of the *CPA* states that certification of a class proceeding must not be refused simply because the number of class members or the identity of each class member is not known or because the class includes a sub-class whose members have claims that raise common issues not shared by all class members.

[89] The Rep Plaintiffs propose that their original suggestion of the class definition be amended in response to various concerns expressed by the defendants. They now propose the following class definition:

> All persons who, on or after December 11, 2009 to the opt-out/opt-in date set by the Court, made payments to Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd., and/or Trident Immigration Services Ltd. and who were thereafter provided with employment contracts to work at Mac's Convenience Stores in British Columbia, Alberta, the Northwest Territories and Saskatchewan under Canada's Temporary Foreign Worker program.

[90] The Rep Plaintiffs argue that this class definition meets the criteria of s. 4(1)(b). The class is defined with reference to objective criteria: persons either did or did not make payments to the named parties in exchange for securing employment in Canada, and were or were not provided employment contracts as set

out. The class is bounded and not unlimited, the class is sufficiently numerous: the Rep Plaintiffs suggest perhaps as many as 450 people; the defendants suggest closer to 250.

[91] The argument that there are so many differences in the contracts that they are effectively different contracts and that, therefore, the potential plaintiffs cannot be members of the same class, has no merit. To a large extent, the Rep Plaintiffs agree and acknowledge that those who do not fall within the confines of the class definition are not members of the class, nor are they intended to be members of the class.

[92] The "employment contracts to work" referred to in the class definition is a standard form contract.

[93] The only variations in contracts are inconsequential in terms of determining whether or not there should be a class proceeding. These variations primarily refer to:

1. Wage rate.
2. Location of the Mac's.
3. Whether the workers were higher or lower skilled.

[94] Section 6(2) of the *CPA* requires that persons resident in British Columbia and persons not resident in British Columbia are divided into sub-classes along those lines. Accordingly, the Rep Plaintiffs propose that the class be divided into two sub-classes, one of persons resident in British Columbia and one of persons not resident in British Columbia.

Submission of Mac's

[95] The Rep Plaintiffs have not satisfied the burden that there is some basis in fact with respect to this requirement.

[96] The *CPA* requires an identifiable class of two or more persons who have claims that raise common issues. The Rep Plaintiffs fail in satisfying this pre-requisite of the *CPA*:

1. The class is not rationally related to the alleged common issues. It is overbroad in that it includes many persons who have no claim against Mac's. Further, the class is not objectively determinable and embeds an assumption about the merits of the lawsuit that is contested because it is defined with reference to the purpose for which proposed class members made payment to other defendants;

2. The proposed class includes different categories of persons with no claims, including:

    a) people who were employed, people who got jobs at Mac's and people who worked the entire time;

    b) people who paid fees to Trident, and therefore have no claim against an agent of Mac's;

    c) people with no travel cost claims;

    d) people who have come to Canada; and,

    e) people who dropped out;

3. The proposed class is overbroad because it includes:

    a) individuals who never actually entered into a binding employment contract with Mac's;

    b) individuals who were in fact employed by Mac's in various different locations;

    c) individuals who were employed by Mac's then resigned their positions and terminated their contracts before the end of the term;

    d) individuals who were employed by Mac's then properly dismissed from their positions before the end of the term of their contracts;

    e) individuals who were told by Mac's or OCCS that the job position they were seeking was not available and they should not travel to Canada; and,

    f) individuals who did not leave their country of citizenship to pursue employment with Mac's but were already in Canada and therefore did not pay any fee to any of the defendants.

4. There being different categories of different claims is not necessarily fatal to certification. The Rep Plaintiffs could suggest sub-classes, but they have not done so.

[97] The proposed class is not objectively determinable:

1. The proposed class embeds an assumption about the lawsuit that is contested and not objectively determinable. The proposed class is defined with reference to the purpose for which prospective class members made payments to OCCS and OIS, or Trident: securing employment;

2. The purpose for which persons made payments to the other defendants is not objectively determinable. It is not a common issue and it would require a subjective individual inquiry; and,

3. The Rep Plaintiffs ignore the fact that the purpose for which persons made any payment is a contested issue, and is only determinable upon individual inquiry.

Submission of Overseas and Trident

[98] Overseas and Trident argue that there are flaws in the Rep Plaintiffs' class definition. In this regard they rely upon the same argument made by Mac's.

Claims of Class Members Raise Common Issues – s. 4(1)(c)

Submission of Rep Plaintiffs

[99] The burden on the Rep Plaintiffs is "some basis in fact".

[100] Common issues are defined in s. 1 of the *CPA* as meaning:

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

[101] Section 4(1)(c) of the *CPA* mandates that one of the requirements for certification is that "the claims of class members raise common issues, whether or not those common issues predominate over issues affecting only individual members".

[102] The principles relevant to the commonality requirement, as set out by the Supreme Court of Canada, are as follows in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57:

1. The commonality question should be approached purposively.
2. An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. However, necessity does not require that the issue be determinative of the class members' causes of action. It need only move the litigation forward;
3. It is not essential that the class members be identically situated *vis a vis* the opposing party.
4. It is not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action.
5. Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[103] The burden on the Rep Plaintiffs is described in *Grant v. Canada (Attorney General),* [2009] O.J. No. 5232 at para. 21 where the court says: "...that the evidence must show merely that there is some basis in reality for the assertion that the Class members have claims raising issues in common with the claims of the plaintiff."

[104] To be successful on this aspect of the case, the defendants would have to show that there is no basis in the evidence for the claims asserted by the Rep Plaintiffs: *Lambert v. Guidant Corp.*, [2009] O.J. 1910 at para. 68.

[105] With respect to the evidence in this case, the Rep Plaintiffs argue that the foregoing requirements for commonality are present in, among other things, the following aspects of this case:

1. Breach of contract – there is commonality between the agreements reached between Mac's and each of the Rep Plaintiffs.
2. Agency – each of the Rep Plaintiffs dealt with Mac's, and/or one or more of the other defendants acting on behalf of Mac's.

3. Conspiracy – each of the Rep Plaintiffs was recruited by the defendants acting in concert to recruit foreign workers in an unlawful way including the charging of recruitment fees and the failure to provide what was promised in the contracts.

4. Unjust enrichment and waiver of tort – the defendants received recruitment fees from class members which were paid in exchange for securing employment contrary to statute. The fees were also contrary to the terms of the Rep Plaintiffs' and the class members' standard-form contracts. The defendants were unjustly enriched as a result.

5. Breach of fiduciary duty – each of the Rep Plaintiffs and class members shared a similar relationship with the defendants who recruited and promised to employ the Rep Plaintiffs and class members. In these relationships, each of the defendants implicitly undertook to act in the best interests of the Rep Plaintiffs and class members. In each case, they failed to do so.

6. Remedy and damages – if the common issues are resolved in the Rep Plaintiffs' and class members' favour, then they will be entitled to monetary relief and damages. Quantum may reasonably be determined on an aggregate basis rather than requiring proof from each individual class member. Failing that, all that will remain to be resolved as individual matters will be the question of quantum.

[106] This case is about the interpretation of a standard form contract. That issue is common to the entire class. The defence arguments suggesting issues of uncommonality are simply inconsequential and do not detract from the fact that there is a single contract that is common to them all.

[107] There are no individual issues to be decided with respect to the issues of remedy and damages. Once monetary and liability is established with respect to any of the causes of action, then the only individual aspect of damages is determining the quantum. The entitlement to damages is a common issue even if quantum is not.

Submission of Mac's

[108] The Rep Plaintiffs have not satisfied the burden that there is some basis in fact with respect to this requirement.

[109] With respect to common issues:

1. The Rep Plaintiffs proposed common issues are inherently individual.

2. The evidence does not establish "some basis in fact" for commonality.

3. The Rep Plaintiffs have adopted a "global assessment" approach to their argument on the common issues requirement. The Court is required to assess each proposed common issue individually to determine if the evidentiary standard has been met for each.

4. To a large extent, the Rep Plaintiffs' own pleadings and argument demonstrate that the common issues proposed by them could not be resolved commonly. Throughout their pleading and argument, the Rep Plaintiffs refer to "some of the class members". The obvious question remains unanswered: "which class members?". Answering that question will require individual inquiry.

5. The Rep Plaintiffs' own pleadings and written submissions demonstrate that this is not a case involving allegations or evidence of "systemic wrong" in an employment situation. This is a case involving individual circumstances where some class members had one experience and some class members had others.

Submission of Overseas and Trident

[110] They argue that there are no proper common issues. Once again, they rely upon the arguments advanced by Mac's. In addition, they argue as follows:

1 In order to decide the various agency issues, the Court will have to consider what was said by representatives of Overseas and Trident to each individual foreign worker. These interactions will necessarily have varied from worker to worker.

2 With respect to the Rep Plaintiffs' claims concerning contract, the formation, terms and enforceability of any oral terms of the contract cannot be assessed across the Class. The assessment depends on individual circumstances and therefore does not qualify as common issues.

3 The question of damages are not common, but will vary from individual to individual.

[111] Trident argues that the evidence establishes that it was not involved at all in the job fairs, recruitment, and things that happened that led up to whatever

relationship existed between the Rep Plaintiffs and Mac's. Therefore, there is no agency between Mac's and Trident.

[112] Even on the Rep Plaintiffs' theory of this case, individual issues will dominate these proceedings.

A Class Proceeding Would be the Preferable Procedure – s. 4(1)(d)

Submission of Rep Plaintiffs

[113] The burden on the Rep Plaintiffs is "some basis in fact".

[114] The Plaintiffs must show some basis in fact that a class proceeding is a preferable proceeding for the fair and efficient resolution of the common inquiry.

[115] The Court is required to have regard to those factors set out in s. 4(2) of the *CPA*, as set out earlier in this Judgment. It is not an exhaustive list.

[116] The question of preferability must be considered with reference to the policy considerations of judicial economy, access to justice, and behaviour modification: *Hollick*.

[117] Counsel agree that:

1. "Preferability" is referred to in the general sense and means "compared to the alternative". The alternative is a series of Small Claims trials.
2. Commonality is the key to the issue of preferability and to the issues of efficiency and manageability.

Submission of Mac's

[118] The Rep Plaintiffs have not satisfied the burden that there is some basis in fact with respect to this requirement.

[119] Even if the class is certified, it will essentially require individual trials because of the different variables, which are indicative of a lack of commonality.

[120] Even if there are certain limited issues common to the proposed class, it is not a situation where a class proceeding is the preferable procedure. Even if it were fair, it would be unworkable because of the individual evidence in fact finding that would be necessary. It would fail to satisfy the test that it be "fair, efficient and manageable".

[121] While I am entitled to consider how many Small Claims trials might be needed if they proceeded individually, I must also consider how many individual "trials" might be required if the class is certified. The defendants argue that these will be numerous and with respect to a variety of issues.

[122] Considering the time and expense associated with some of the procedural apparatus in a class proceeding (such as notice) and with litigation in the Supreme Court (such as examinations for discovery and production of documents), it is not obvious how a class proceeding offers advantages over Small Claims actions.

[123] In view of the highly individualistic nature of the potential class members' circumstances, the proposed class action would not advance the principle of judicial economy and access to justice. Far from promoting judicial economy, it would settle the Court with a large class action that has been cobbled together with an insufficient legal and evidentiary foundation.

Submission of Overseas and Trident

[124] These defendants make the same arguments as Mac's.

There is a Suitable Representative Plaintiff – s. 4(1)(e)

Submission of Rep Plaintiffs

[125] The burden on the Rep Plaintiffs is "some basis in fact".

[126] Section 4(1)(e)(ii) requires the Rep Plaintiffs to produce a plan that sets out a workable method of advancing the proceeding on behalf of the class and notifying class members of the proceeding.

[127] The Plaintiffs have produced such a plan and argue that it is a satisfactory one and fulfills the requirements of the section.

[128] The Rep Plaintiffs' litigation plan provides a basis for certification and can be amended as or if required including input from the defendants and the Court. The Rep Plaintiffs' litigation plan need not describe in detail how remaining individual issues will be resolved because at this stage it is not known whether and what individual issues will require individual resolution.

Submission of Mac's

[129] The Rep Plaintiffs have not advanced a sufficient "litigation plan". It is deficient in numerous ways, including:

1. It is too simplistic. It does not have the necessary detail to address class action issues.
2. It is true that the court has ability to amend a litigation plan, but here there is too much detail lacking.
3. Even if it did have sufficient detail, it would still show a lack of commonality.
4. It lacks detail with respect to the following:
    a. Communication and reporting to class members. There is no indication of how they will be contacted. It may be difficult to report to them and to receive instructions.
    b. Notice – there is no plan for dissemination of notice. The Class is diverse and widespread. How will they be located? What process will be used?
    c. Who will administer the opt-in/opt-out process? Counsel themselves? Or will there be an administrator?
    d. How long a delay will there be for potential class members to op-in if they choose to?
    e. There is no proposed litigation schedule.
    f. There are no proposed dates and procedure for document exchange and management.
    g. Will all the plaintiffs be available for examination for discovery? Where? In Vancouver?

h. Who, from the defendants, will the plaintiffs want to discover?

i. What will be the process for management of the remaining issues after the common issues are determined? What type of procedure? Mini-trials? Arbitrations?

ANALYSIS

General

[130] While the burden is on the Rep Plaintiffs to establish that they have met the requirements of s. 4, the evidentiary burden is not onerous: *Peppitt et al v. Nicol et al*, [1993] O.J. No. 2722 (Gen. Div.).

[131] The burden on the applicant is different under s. 4(1)(a) than it is under s. 4(1)(b) through (e).

[132] With respect to s. 4(1)(a), the requirement is satisfied so long as it is not plain and obvious that the pleadings disclose no reasonable cause of action: *Marshall v. United Furniture Warehouse Limited Partnership*, 2013 BCSC 2050 at para. 62; *Brogaard v. Canada (Attorney General)*, 2002 BCSC 1149.

[133] With respect to ss. 4(1)(b) through (e), the test is different. The Rep Plaintiffs must establish "some basis in fact" for each: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503, leave to appeal refused [2010] SCCA 32 at para. 65. In other words, the burden is on the Rep Plaintiffs to establish that there is "some basis in fact" concerning ss. 4(1)(b) to (e):

(b) identifiable class;
(c) common issues;
(d) preferable procedure; and
(e) a suitable representative plaintiff.

[134] The *CPA* must be interpreted liberally so as to give effect to certain policy considerations that underlie the *CPA* and in light of which the test must be applied. Those policy considerations are judicial economy, improving access to justice, and

ensuring that actual and potential wrongdoers modify their behaviour: *Hollick v. City of Toronto*, 2001 SCC 68; *Pro-Sys Consultants Ltd.* (BCCA)*, supra*, at para. 64.

[135] Both parties referred me to the case of *Dominguez v. Northland Properties Corp. (c.o.b. Denny's Restaurants)*, 2012 BCSC 328 (*Dominguez (Denny's)*). This was a decision with respect to an application for certification where the representative plaintiff was a temporary foreign worker who was recruited in the Philippines for the purpose of working at Denny's in Canada. Issues included for being required to pay substantial fees to proceed and complete the hiring process, as well as breaches of contract, the failure to be provided with as much work as was promised and other matters similar to the case at bar. The defendants argue that there are significant differences between that case and this and it is therefore of little assistance to the Court. However, I am satisfied that the facts in *Dominguez (Denny's*) and the legal issues it raises, are remarkably similar to that of the case at bar.

The Pleadings Disclose a Cause of Action – s. 4(1)(a)

[136] The burden is on the Rep Plaintiffs to establish that it is not plain and obvious that the pleadings disclose no reasonable cause of action.

[137] With respect to breach of contract, the following has been pleaded:

1. The relevant provisions of the standard form employment contract;
2. That the Rep Plaintiffs and members of the proposed class were not provided with employment;
3. Precisely which terms of the employment contracts were breached.

[138] With respect to agency, the following has been pleaded:

1. Mac's entered into an agreement with Overseas authorizing Overseas to act as its agent to recruit workers from abroad to work in Mac's' stores.
2. Each Rep Plaintiff paid an initial recruitment fee to Overseas.
3. Overseas then arranged for an interview with Mac's.

4. Each Rep Plaintiff then received an employment contract and an LMO to work at Mac's.

5. Each LMO identified Overseas as a "third party authorized to act on behalf of Mac's".

6. While the Rep Plaintiffs dealt with Overseas, they were later directed to make payments to Trident which did not provide them with any services but which held the money provided by the Rep Plaintiffs. Specific acts of OIS, OCCS, and Trident are pleaded suggesting that these three organizations functioned together in assisting Mac's in this regard.

[139] With respect to conspiracy:

1. The Rep Plaintiffs will only pursue a claim of unlawful means conspiracy, not predominant purpose conspiracy ("conspiracy to injure"). There is no allegation of intent to injure and none need be proven.

2. The pleadings indicate that Overseas acted as agents for Mac's. It is not necessary that the pleadings suggest that Mac's directly collected or benefited from the recruitment fees, nor is it necessary that any such thing be proven. Rather, Mac's would be liable for the actions of its agent on its behalf, including collecting the recruitment fees. That is what the pleadings assert. In this context, it is not necessary for Mac's to directly collect or benefit from the recruitment fees.

[140] With respect to unjust enrichment and waiver of tort:

1. Mac's argues that the claims for unjust enrichment and waiver of tort are defectively pleaded because the Rep Plaintiffs do not allege that Mac's directly received the benefit of the fees paid to the other defendants.

2. However, the Rep Plaintiffs have pleaded that Mac's' agent collected these fees on Mac's' behalf. On that basis, Mac's would be liable for the actions of its agent acting on its behalf, including the collection of unlawful fees in violation of the contracts between Mac's and the class members, even if Mac's did not directly receive a benefit.

[141] With respect to breach of fiduciary duty, the pleadings allege material facts in support of an undertaking. The defendants recruited and promised to employ the Rep Plaintiffs and class members and impliedly undertook to act in their best interests.

[142] On a certification application, the test is not whether the facts pleaded will prevail at trial. Rather, the test is whether it is not plain and obvious that the pleadings disclose no reasonable cause of action. The burden is on the Rep Plaintiffs.

[143] With respect to each of the foregoing, I am satisfied that it is not plain and obvious that the pleadings disclose no reasonable cause of action. It follows that the Rep Plaintiffs have satisfied the burden on them.

[144] With respect to breach of contract, agency, conspiracy, unjust enrichment and waiver of tort, and breach of fiduciary duty, I am satisfied that the burden has been met and that the Rep Plaintiffs have therefore satisfied s. 4(1)(a) of the *CPA*.

There is an Identifiable Class – s. 4(1)(b)

[145] The burden is on the Rep Plaintiffs to establish that there is "some basis in fact" for this requirement.

[146] The applicant must define the class by reference to objective criteria, that is, without reference to merits of the action: *Hollick, supra.*

[147] It is a complete answer to the objections of the defendants that the Rep Plaintiffs agree that there are numerous persons with a variety of different considerations than those of the Rep Plaintiffs. The reason this is a complete answer is because the Rep Plaintiffs also agree that these persons will simply not be members of the identifiable class if their circumstances do not fit the class definition.

[148] The defendants' main objections to the class description is that many people do not fit the class. The Rep Plaintiffs do not disagree with that. Rather, they indicate that the reason many people do not fit the class is that because they are in fact, not in the class.

[149] It is not essential that the class members be identically situated *vis a vis* the opposing party. However, the class members' claims must share a substantial common ingredient to justify a class action: *Pro-Sys Consultants Ltd., supra*.

[150] During the course of the hearing, the "class definition" was amended. The amended class description has the following elements:

1. Persons who made payments to one or more of the defendants.
2. On or after December 11, 2009 to the opt-out/opt-in date set by the court.
3. Who were there after provided with employment contracts to work at Mac's in various named locations.
4. Under Canada's Temporary Foreign Worker Program.

[151] The Rep Plaintiffs concede that potential class members will not be class members unless all four of those elements apply to them.

[152] Some people may have signed a significantly different type of contract and the Rep Plaintiffs agree that they will not be class members.

[153] On the basis of the foregoing, I am satisfied that there is "some basis in fact" for this requirement.

Claims of Class Members Raise Common Issues – s. 4(1)(c)

[154] The burden is on the Rep Plaintiffs to establish that there is "some basis in fact" for this requirement.

[155] With respect to breach of contract:

1. There are a number of decisions of the courts which have concluded that the question of interpretation of standard form of contracts is a common issue: *Dominguez (Denny's)*; *Scott v. T.D. Waterhouse Investors Services (Canada) Inc.*, 2001 BCSC 1299; *Glover v. Toronto (City)*, [2009] 70 C.P.C. (6th) 303 (O.S.C.J.); *Lam v. University of British Columbia*, 2010 BCCA 325.
2. In Dominguez (Denny's), the court said this:

> [112] There was considerable evidence about the different contracts and the different terms that are found in those agreements. Ms. Dominguez contends that at all material times, the defendants used a standard form contract, using the HRSDC sample contract, and that all these employment contracts have identical or virtually identical terms. The defendants disagree, asserting that there are 12 different forms of the 75 written employment agreements, all with different terms.

> ...
>
> [122] The defendants say that there are no common issues and that a determination of these contract issues requires an individual assessment on a case-by-case basis.
>
> ...
>
> [149] In conclusion, I find that the contract issues formulated by Ms. Dominguez, which include the duty of good faith and fair dealing, are common issues. ...

[156] With respect to agency:

1. Mac's argues that there is no basis in fact to support the proposed common issue related to the scope of authority conferred on Overseas.

2. However, via the form in which Mac's authorized Overseas to act on its behalf, and which was submitted with every LMO application for every class member, Mac's further agreed to ratify and confirm all of its representatives' actions as a result of the appointment.

3. Consideration of the scope of the agency is not made from the perspective of the principal and agent alone. However, neither does it require a consideration of the perspective of each individual class member.

4. In *Dominguez (Denny's)*, the court said this:

> [106] In my view, one of the key questions in this litigation is the status of ICEA and Luzern in relation to the defendants in terms of ICEA's dealings with the temporary foreign workers that they recruited for the defendants. That will be decided on the basis of either express or apparent authority. It will not require a detailed examination of each employee's circumstances or evidence in that the focus will be on the agreements and dealings between ICEA and Luzern and the defendants. To that extent, a determination as to whether they were acting as agents of the defendants and if so, are the defendants liable to repay the agency fees, will materially advance this litigation in relation to most of the putative class.

[157] With respect to conspiracy:

1. The unlawful conduct and/or the collection of recruitment fees does not necessitate individual inquiry.

2. Every employment contract of every member of the class had an identical provision prohibiting Mac's from recouping, from the employee, costs incurred in the course of recruiting the employee.

[158] With respect to unjust enrichment:

1. The Rep Plaintiffs do not allege that Mac's did not pay employees who worked at Mac's for the work they performed.

2. Rather, they allege that Mac's did not provide the employment promised in the contracts – by either not providing a job at all, or by not providing the full term of promised employment.

3. Mac's was also enriched by not having to pay the costs of recruiting the migrants pursuant to the terms of their employment contracts.

4. In *Dominguez (Denny's)*, the court said this:

> [161] Ms. Dominguez also asserts that there are common issues under the claims relating to unjust enrichment. The proposed common issues are firstly, whether the defendants have been enriched by failing to pay for the requisite hours per week, by failing to pay for all hours worked and by failing to reimburse the employees for the agency fees and the airfare and secondly, if there was enrichment, was there a corresponding deprivation.
>
> ...
>
> [166] I adopt the reasoning in *Bodnar* and also find that in this case, it is possible to determine all elements of the unjust enrichment claim on a group basis. I also note that claims of unjust enrichment arising from allegations that union dues were improperly paid were certified in *Vasquez* at para. 63.

5. I arrive at the same conclusions in this case.

[159] With respect to breach of fiduciary duty:

1. The defendants argue that the existence of a fiduciary duty, as well as the breach of any such duty, would require individual inquiry.

2. The facts pleaded provide some basis in fact for the assertion that a fiduciary duty owed by the defendants to the Rep Plaintiffs is common to all class members.

3. It is acknowledged that there is some variation in the nature of the breaches, in that some class members were provided employment and some were not, but it is common to all that the fiduciary duty was breached.

4. Therefore, there may be a variation in the damages flowing from the breach but the question of whether the duty was breached is common.

5. In *Dominguez (Denny's)*, the court said this:

> [158] In this case, the claim of breach of fiduciary duty is advanced on the basis of the shared experience of these temporary foreign workers. A consideration of that issue will involve a review of the relevant contract terms and the circumstances which directly arise from the employment relationship with the defendants and which affect all of them – including the TFWP, the LMOs, the restrictive terms of the work permits and the acknowledged goals of the workers to achieve a more permanent status in Canada. Internal policies of the defendants in relation to these workers, such as the acknowledged policy of the defendants to reduce the hours of these workers before any other type of worker would also be relevant. These factors do not depend on any individual assessment of each and every putative class member.

6. I arrive at the same conclusions in this case.

[160] With respect to remedy and damages:

1. Mac's argues that these would require individual inquiry.

2. The resolution of the common issues would establish monetary liability to the class. If the Rep Plaintiffs succeed in establishing the causes of action, all that will remain will be to determine the quantum of losses each class member suffered.

3. Similarly, the quantum of punitive damages is not a common issue. It is the availability of punitive damages which is the issue.

4. The court came to the same conclusions in *Dominguez (Denny's)*.

[161] With respect to each of the foregoing, I am satisfied that the claims of the Rep Plaintiffs and of other potential plaintiffs raise common issues with respect to each of the foregoing causes of action, and that the litigation will be significantly advanced if those issues are dealt with by the courts in a common way.

[162] On the basis of the foregoing, I am satisfied that there is "some basis in fact" for this requirement.

A Class Proceeding Would be the Preferable Procedure – s. 4(1)(d)

[163] The burden is on the Rep Plaintiffs to establish that there is "some basis in fact" for this requirement.

[164] Section 4(2) of the *CPA* mandates that the court "must consider all relevant matters" in determining whether a class proceeding would be the preferable procedure "for the fair and efficient resolution of the common issues", including five specified matters set out at s. 4(2)(a)–(e).

[165] The s. 4(2) factors are not an exhaustive list.

[166] In addition to the five enumerated factors, preferability must be examined with reference to the three principle advantages of the class action regime:

1. Judicial economy;
2. Access to justice; and
3. Behaviour modification.

[167] Concerning the factors set out in s. 4(2) of the *CPA:*

(a) Do the questions of fact or law predominate?

[168] I am satisfied that the essence of this case involves an interpretation of the standard contractual terms, and whether they were breached. The defendants argue that there are so many variables with respect to that, that the case will spiral into an unmanageable series of individual proceedings.

[169] Individual issues do not outweigh the common issues in this case. Individual trials will not be required for most of the claims at issue. The employment contracts and Mac's' payroll documents will show (for those who did work) the record of hours worked and wages paid.

[170] I am satisfied that those common issues are at the core of this litigation together with the relationship between the various defendants and how that affected their obligations.

[171] Resolving the foregoing, in a single proceeding, will materially advance the litigation.

(b) Do significant class members have an interest in individually controlling separate actions?

[172] There is no evidence to suggest that any class members had such an interest, nor have any of the parties suggested that this is so.

(c) Would the class proceedings involve claims that are or have been the subject of other proceedings?

[173] The answer is no.

[174] In the circumstance of this case, it will be sufficient to discuss ss. (d) and (e) together:

(d) Are there other means of resolving the claims that are less practical or less efficient?

(e) Whether the administration of the class proceeding would create greater difficulties...

[175] The defendants argue that hundreds of Small Claims actions would be more efficient and practical than the potentially equal number of common issue proceedings which (the defendants argue) will invariably be necessary if this certification application is successful.

[176] In *Thorburn, v. British Columbia (Public Safety and Solicitor General)*, 2012 BCSC 1585, the court held that the class action would not be the preferable procedure because the common issues would be overwhelmed or subsumed by the individual issues and therefore the goals of fairness (to both the plaintiffs and the defendants), and efficiency (i.e. judicial economy) would not be achieved. Rather, the effect of a predominance of individual questions of fact and law for each class member over the broadly-framed common issues, would simply render the class action merely "a prelude to many individual trials": *Thorburn,* paras. 120 and 121.

[177] In all of the circumstances, I am satisfied that there are no other reasonable means of resolving the claims that are more practical or efficient than a class proceeding. Many, arguably most, potential class members would be unlikely to pursue a Small Claim's matter because many are not in British Columbia, the

amounts of the individual claims would be relatively small, and they would have difficulty attracting individual lawyers because of the low dollar value of the claims.

[178] Further, class proceeding is the means by which the least difficulties of an administrative nature will be encountered. It will be much more administratively difficult for the combined resources of the courts, and the potential defendants, their lawyers, and the plaintiffs if the matter is pursued as a number of Small Claims proceedings.

[179] I agree with the Rep Plaintiffs that pursuing these claims through a class proceeding will be more practical and efficient. It will involve less judicial resources, will provide access to justice to potential plaintiffs, will promote behaviour modification, and it will do all of those things with much more efficiency than will the possibility of numerous Small Claim's trials.

[180] Considering all of the foregoing, and all other relevant matters, I am satisfied that a class proceeding would provide the most practical and efficient result and determination of all of these matters. I am satisfied that a class proceeding is the preferable procedure.

[181] On the basis of the foregoing, I am satisfied that there is "some basis in fact" for this requirement.

There is a Suitable Representative Plaintiff – s. 4(1)(e)

[182] The burden is on the Rep Plaintiffs to establish that there is "some basis in fact" for this requirement.

[183] Section 4(1)(e)(i) sets out that the representative plaintiff must produce a litigation plan that meets certain criteria. The defendants argue that the plan advanced in this case is insufficient and unsuitable.

[184] The argument that the defendants make about the deficiencies of the Rep Plaintiffs' litigation plan is derived from a paragraph in the case of *Bellaire v. Independent Order of Foresters*, [2004] O.J. No. 2242, (O.S.C.J.).

[185] The paragraph immediately following that list is also instructive:

> **54** I appreciate that any litigation plan will be a work in progress. It will need to be adjusted as the action proceeds. It may also be that the defendant and the court will need to have some input into variations to the proposed plan. None of those realities, however, relieves the representative plaintiff from his or her obligation to put before the court, on the certification motion, an initial effort at a plan to address these and other matters so that the court can be satisfied that, if the action is certified, some level of attention has been given to how the action will progress thereafter.

[186] It is likely, and common, the litigation plan will require amendments as the case proceeds and the nature of the individual issues are demonstrated by class members.

[187] That will be the case here. I am satisfied that the litigation plan is sufficient and not a bar to my finding that the Rep Plaintiffs advanced here satisfy the requirements of s. 4(1)(e).

[188] I am also satisfied that the Rep Plaintiffs would fairly and adequately represent the interests of the class, and do not have, on the common issues, an interest that is in conflict with the interests of other class members.

CONCLUSIONS

[189] I am satisfied with respect to the following:

1. The Rep Plaintiffs have satisfied the requirements of s. 4 of the *CPA*.
2. A class proceeding will substantially advance this litigation, including the question of common issues, having regard to the principles of judicial economy, access to justice, and behaviour modification.

[190] Consequently, I make the following orders:

1. I certify this action as a class proceeding.
2. The class is defined as:

> All persons who, on or after December 11, 2009 to the opt-out/opt-in date set by the Court, made payments to Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd., and/or Trident Immigration Services Ltd. and who were thereafter provided with employment contracts to work at Mac's Convenience Stores in

British Columbia, Alberta, the Northwest Territories and Saskatchewan under Canada's Temporary Foreign Worker program.

3. There will be a sub-class of persons resident in British Columbia and another of persons not resident in British Columbia.

4. Bishnu Khadka and Prakash Basyal are appointed as Representative Plaintiffs for the sub-class of persons resident in British Columbia.

5. Arthur Gortificaion Cajes and Edlyn Tesorero are appointed as Representative Plaintiffs for the sub-class of persons not resident in British Columbia.

6. The issues set out in Schedule "A" are certified as common issues.

"Silverman J."

Schedule "A"

Proposed Common Issues

A. Breach of Contract

i. What are the relevant terms (express, implied or otherwise) of the Class' employment contracts with the defendant Mac's Convenience Stores Inc. ("Mac's") respecting:

   a. wage rate;

   b. hours of work;

   c. length of the contract;

   d. recruitment fees;

   e. payment of two-way air transportation; and

   f. reasonable and proper accommodation.

ii. Did Mac's or its agents breach any of the foregoing contractual terms? If so, how?

iii. Does the contract require the class members to mitigate their damages?

B. Agency

i. Were the defendants Overseas Immigration Services Inc. and Overseas Career and Consulting Services Ltd. (collectively "Overseas") acting as agents of Mac's in recruiting class members to work for Mac's, including by securing employment contracts and LMOs for class members to work at stores operated by Mac's and/or otherwise facilitating their entry into Canada?

ii. If the answer to (B)(i) is "yes", is Mac's thereby liable for their agents charging and receiving recruitment fees from class members?

C. Conspiracy

i. Did the defendants conspire to harm the class members?

ii. Did the defendants act in furtherance of the conspiracy?

iii. Did the conspiracy involve unlawful act?

iv. Did the defendants know or should they have known that the conspiracy would injure the class members?

v. Did the class members suffer economic loss?

vi. What damages, if any, are payable by the defendants to the Class members?

D. Breach of Fiduciary Duty

i. Did the defendants, or any of them, owe a fiduciary duty to the Class?

ii. If the answer to D(i) is "yes", has there been a breach of that duty?

E. Unjust Enrichment

i. Was Mac's unjustly enriched by not having to pay the Class pursuant to the terms of the employment contracts?

ii. Were the defendants, or any of them, unjustly enriched by having the Class pay the recruitment fees?

iii. Were the defendants, or any of them, unjustly enriched by not paying the cost of two-way air transportation for the Class?

F. Waiver of Tort

i. What restitution, if any, is payable by the defendants, or any of them, to the class members based on the doctrine of waiver of tort?

ii. Are the defendants, or any of them, liable to account to the class members for the recruitment fees, if any, that they obtained from the class members based on the doctrine of waiver of tort?

G. Remedy and Damages

i. If the answer to any of the common issues is "yes", what remedies are class members entitled to?

ii. If the answer to any of the common issues is "yes", are the defendants potentially liable on a class-wide basis?

iii. What is the appropriate method of procedure for distributing the damages award to the Class?

iv. Is the Class entitled to an award of aggravated or punitive damages based upon the defendants' conduct and, if so, in what amount?

v. If the answer to G(iv) is "yes", what is the appropriate method of procedure for distributing any aggravated or punitive damages to the Class?