Basyal v. Mac's Convenience Stores Inc., [2018] B.C.J. No. 1086

British Columbia and Yukon Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

M.V. Newbury, J.E.D. Savage and B. Fisher JJ.A.

Heard: May 7 and 8, 2018.

Judgment: June 8, 2018.

Dockets: CA44830, CA44832

[2018] B.C.J. No. 1086 | 2018 BCCA 235 | 20 C.P.C. (8th) 1 | 293 A.C.W.S. (3d) 695 | 12 B.C.L.R. (6th) 1 | 2018 CarswellBC 1427

Between Prakash Basyal, Arthur Gortifacion Cajes, Edlyn Tesorero and Bishnu Khadka, Respondents (Plaintiffs), and Mac's Convenience Stores Inc., Respondent (Defendant), and Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd. and Trident Immigration Services Ltd., Appellants (Defendants) And between Prakash Basyal, Arthur Gortifacion Cajes, Edlyn Tesorero and Bishnu Khadka, Respondents (Plaintiffs), and Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd. and Trident Immigration Services Ltd., Respondents (Defendants), and Mac's Convenience Stores Inc., Appellant (Defendant)

(81 paras.)

Case Summary

Court Summary:

C.A. allows appeal by defendants from chambers judge's certification order under Class Proceedings Act. Direct breach of contract claims may proceed provided an appropriate subclass is defined. Certification is confirmed against Overseas Defendants, but not against Mac's, for breach of fiduciary duty. However, plaintiffs' failure to plead material facts necessary to complete the pleading in respect of remaining causes of action (which include conspiracy and unjust enrichment) has resulted in failure to disclose such causes. Plaintiffs are given leave to amend as required and in the meantime those causes are stayed. Stay will remain in effect until C.A. approves amended pleading or all counsel agree in writing.

Appeal From:

On appeal from an order of the Supreme Court of British Columbia, dated September 18, 2017 (*Basyal v. Mac's Convenience Stores Inc.*, *2017 BCSC 1649*, Vancouver Registry Docket S1510284).

Counsel

Counsel for P. Basyal, A. Cajes, E. Tesorero and B. Khadka: C. Gordon, K. Smith, C. Allevato, S. Quail.

Counsel for Mac's Convenience Stores: G. Cowper, Q.C., A. Chowdhury.

Counsel for Overseas Immigration, Overseas Career and Consulting Services Ltd. and Trident Immigration Services Ltd.: D.B. Lebans, C.D. Hermanson.

Reasons for Judgment

The judgment of the Court was delivered by

M.V. NEWBURY J.A.

1 By order dated September 18, 2017, the chambers judge below certified in one class action two groups of allegations made by the plaintiffs as a class. The first, and clearest, relates to alleged breaches of employment contracts by the defendant Mac's Convenience Stores Inc. ("Mac's") in failing to provide work in the quantity promised by Mac's, or in other cases any work at all, to individual plaintiffs upon their coming to Canada specifically to take up such employment with Mac's. I refer to this group of allegations as constituting the "Direct Breach of Contract" claim.

2 The other group of allegations gives rise to more complex claims against all four defendants. Here, the plaintiffs assert the existence of an agency relationship between Mac's and one or more of the other defendants or alternatively, a conspiracy among them to commit an illegal act. On these bases, the plaintiffs assert the receipt of illegal recruitment fees from the plaintiffs by the defendants; the unjust enrichment of Mac's by virtue of its alleged 'recoupment' of all or part of such fees; breaches of fiduciary duties said to be owed to the plaintiffs; and so-called "waiver of tort". Three other causes of action -- negligent and fraudulent misrepresentation and one type of conspiracy -- had already been deleted from the pleading prior to the certification hearing, although remnants still appear in the Further Amended Notice of Civil Claim ("NOCC") contained in the Appeal Record. This only contributes to the disorganization and lack of clarity that unfortunately characterize the lengthy pleading.

The Plaintiffs' Pleading

The Temporary Foreign Worker Program

3 The plaintiffs' claims arise in the context of the federal Temporary Foreign Worker Program ("TFWP"), which we are told is administered jointly by Employment and Social Development Canada ("ESDC") and Immigration, Refugees and Citizenship Canada ("IRCC"). Under that program, Canadian employers who are unable to locate employees needed in Canada for particular types of work are permitted to hire temporary foreign workers ("TFWs"), provided such employment will not adversely affect the labour market in Canada. To this end, a "labour market impact assessment" or "labour market opinion" ("LMO") must be sought from the ESDC in respect of any such position. Once the opinion is obtained, the worker may apply to IRCC and upon arrival in Canada may receive a work permit issued by Canada Border Services Agency. This allows the worker to work for the specified employer at the specified location in Canada for a limited time. There is at least a general perception among TFWs that working in Canada under the Program may assist in obtaining permanent resident status in this country.

4 The ESDC requires that the contracts of employment for TFWs contain particular terms and conditions that may not be varied or contradicted by any additional terms in their employment agreements. Most importantly for purposes of this appeal, the federal program purports to prohibit *an employer* from charging or recouping from the employee or potential employee any fee or other payment for his or her recruitment. (Counsel were unable to point to any regulation that contains or authorizes such prohibition, and there appears to be no definition of "recruitment"

for these purposes.) A similar prohibition on employers' charging recruitment fees to employees or would-be employees is also imposed by s. 10 of the *Employment Standards Act*, *R.S.B.C. 1996, c. 113*.

The Facts as Pleaded

5 Mac's is an Ontario corporation that operates chains of convenience stores and restaurant outlets throughout Canada. The senior recruitment manager of its Western Division is Mr. Higuchi, who worked from Mac's district office in Surrey, British Columbia at all material times. The defendants Overseas Immigration Services Inc. ("Overseas Immigration") and Overseas Career and Consulting Services Ltd. ("Overseas Consulting"), referred to collectively as "Overseas" by the parties, are British Columbia corporations. The sole director and president of each of them is Mr. Bansal. The defendant Trident Immigration Services Ltd. ("Trident") is a British Columbia corporation controlled by his sister, Ms. Bala. Trident shares office space with Overseas and sometimes supplies services to one or both of them. Both Mr. Bansal and Ms. Bala are registered Canadian immigration consultants who are authorized to provide advice and services in connection with the Canadian immigration system. I will refer to all three corporations collectively as the "Overseas Defendants".

6 Between mid-2011 and the spring of 2014, Mac's was having difficulty finding Canadian workers for its corporate stores (as opposed to those operated by its franchisees) and food service operations in its western region. In early 2012, Mr. Higuchi met with Mr. Bansal and a Ms. Hirak to explore what services Overseas Consulting could provide to meet its needs. According to a brochure provided to Mac's, Overseas Consulting was able to provide the following services to employers:

- Pre-screening of candidates as per Mac's specified requirements
- Recruitment of qualified candidates for Business Partner Program
- Video-conferencing for personal interviews
- Settlement of selected candidates
  - Responsibility for the short fall (shrinkage) for 6 months to provide assurance
  - Provide corporate services for start up and continued business
  - Completion of all required documents for business and immigration documents required both Federally and Provincially
  - Recruitment of dependable staff for the Business Partner and their location
  - Classroom at our college to accommodate ongoing training.

Under the heading "Fees," the brochure stated:

- Placement fees payable by Mac's Convenience Store Inc.
- $500.00 retainer for each candidate
  - An additional $1,000.00 after successful completion of a 3-month probationary period
- Immigration document processing fees
  - If they are from a visa-requiring country, and the candidate requests our office to process their documentation, then we charge them for our time and disbursements in relation to completing the documentation.
  - If they are from a visa-exempt country, then minimal documentation is required and in most cases, candidates complete the documents themselves.

7 The plaintiffs were citizens of foreign countries who lived at the U.A.E. at all material times. Mr. Basyal and Mr.

Khadka were citizens of Nepal; and Mr. Cajes and Ms. Tesorero were both citizens of the Philippines. All four came into contact with one of more of the Overseas Defendants in Dubai, where the consultants were participating in a "jobs fair". According to the plaintiffs, a flyer distributed by the company indicated that it could provide "guaranteed job allocation" in Canada. It is unclear which of the Overseas Defendants were involved. In fact, the plaintiffs say the names of Overseas Consulting and Overseas Immigration were used almost interchangeably: one side of the brochure, for example, indicated the name of Overseas Consulting while the other indicated "Overseas Immigration." (These defendants respond that Overseas Consulting carried on business under the name "Overseas Immigration" until Overseas Immigration Services *Ltd*. was incorporated.)

8 The plaintiffs depose that they were either told expressly by one or more of the Overseas Defendants, or reasonably understood from representations made by them, that in exchange for a fee of between $7,500 and $8,075, they would be "guaranteed" a job in Canada. Of this, $2,000 was payable 'up front' as a "registration fee" for meeting with representatives of one or more of the Overseas Defendants. The NOCC states:

> 36. ... The remainder [was] paid after the worker [was] supplied with a positive LMO/LMIA and an employment contract from a Canadian employer.
>
> 37. The Recruitment Fees [were] paid by foreign workers to Overseas Immigration, Overseas Consulting and/or Trident Immigration (collectively, the "Recruitment Agents").

9 In their factum, the plaintiffs continue the narrative:

> 18. ... After that payment [of $2,000] was made, three of the Representative Plaintiffs were interviewed by Mr. Higuchi (Mr. Khadka was not). Sometime later, Overseas then sent each of them (including Mr. Khadka) an employment contract with Mac's and an LMO. The Representative Plaintiffs then used these documents to apply for and obtain visas to travel to Canada.
>
> 19. Overseas advised each Representative Plaintiff that they could not leave for Canada to begin work at Mac's before paying the remainder of their recruitment fees, or roughly $6,000 each. The payment of these fees was not optional.
>
> 20. Representatives of Overseas directed some of the Representative Plaintiffs to send the balance of their recruitment fee to Trident. Trident was not in Dubai recruiting workers and did not perform any services there or in Canada for workers recruited in Dubai, including for those directed to pay recruitment fees to Trident. The only function Trident served was to collect the fees. None of the Class Members communicated with Trident apart from sending fees to them.

10 The pleading also asserts at para. 39 that the Overseas Defendants:

> ... acted as agents for Mac's, and were vested with the express, implied, or apparent authority to facilitate and/ or arrange the class members' employment with Mac's on behalf of Mac's. [Emphasis added.]

In support, the plaintiffs rely at least in part on Mac's' execution of a form entitled "Appointment of Representative". Human Resources and Skills Development Canada required that this government form be completed by prospective employers in connection with the negotiation and issuance of LMOs. By completing and signing a form for each worker, Mac's appointed *Mr. Bansal* of Overseas Consulting to "act on my behalf in order *to obtain from HRSDC/Service Canada a labour market opinion"* relating to the worker and agreed to "ratify and confirm all that my representative shall do or cause to be done *by virtue of this appointment*." [My emphasis.]

11 At para. 40 of the NOCC, the plaintiffs say it is "unknown" to them whether Mac's received or recouped any portion of the fees (referred to in the NOCC as the "Recruitment Fees") of approximately $8,000 per person paid to the other defendants by the plaintiffs. In the plaintiffs' words:

> It is unknown whether Mr. Higuchi and/or Mac's received a portion of the Recruitment Fees or another payment from the Recruitment Agents in exchange for its role in the scheme, which was to apply to ESDC/HRSDC for LMOs and LMIAs and issue job offers based on those LMOs and LMIAs, even where the jobs offered did not actually exist or would not be provided to the workers to whom they had been offered. The particulars of this arrangement are known only to the Defendants. [Emphasis added.]

12 Nevertheless, the plaintiffs repeatedly suggest in the pleading that Mac's profited from and/or "recouped" the Recruitment Fees from the TFWs in some way and breached its duty of honest performance under the employment contracts. Para. 55 of the NOCC, for example, states:

> 55. The Defendants profited from this scheme by using positive LMOs/LMIAs secured by Mac's to charge workers Recruitment Fees and without providing them with the employment promised.

Para. 203 states:

> 203. Further, the Plaintiffs seek an order that the Defendants be required to disgorge to the Plaintiffs and other Class Members all profits related to the charging of Recruitment Fees to the members of the Class.

Para. 210(b) states:

> 210. The obligations contained in those employment contracts were breached when Mac's did not provide the Plaintiffs and Class Members with employment that complied with the terms of their employment contract and work permits. In particular, Mac's breached the employment contracts by:
>
> ...
>
> b. recouping the costs of recruitment from the workers;

(All emphasis added; see also paras. 219(a) and (b), 222 and 224.)

13 The plaintiffs seek compensatory damages from Mac's (although in some places the pleading says "the defendants"; see, e.g., para. 181) and an order that:

> 182.... the Defendant [presumably Mac's] identify each Class Member from its record and pay into a fund for distribution to each Class Member the average amount of the following without the need for any specific claim by each Class Member:
>
> ...
>
> b. the Class Members' payment of Recruitment Fees;
>
> [Emphasis added.]

To the extent that the Overseas Defendants are referred to, they of course received the Recruitment Fees directly. As I understand it, the plaintiffs do not assert any claim for breach of contract against them.

14 Like the judge below, we must of course generally assume that the facts as pleaded are true for purposes of the certification and of this appeal. The evidence provided by the defendants is not to be taken into account in the court's evaluation of the pleadings. As noted in *Lambert v. Guidant Corp.* *(2009) 72 C.P.C. (6th) 120* (Ont. Sup. C.J.):

> Most fundamentally, the purpose of the certification stage of a class proceeding is to determine whether the requirements in section 5(1) of the [Ontario] *CPA* are satisfied and, if so, to define the issues to be tried. It

> would be a reversal of the process to permit certification to be determined by deciding issues that are likely to be front and centre at a trial.
>
> The use that defendants' counsel sought to make of evidence on this motion was not consistent with the above principles. The fact that productions and examinations for discovery do not occur prior to certification is consistent with the legislative intention that the certification stage is not the time for facts that bear on the merits of a plaintiff's claims to be determined. It would be inconsistent with the purpose of discovery -- and manifestly unfair to plaintiffs -- to deny certification on the basis of findings of fact that may be in dispute and that would likely be the subject of discoveries prior to trial. To a very large extent, this is what defendants' counsel urged me to do in this case. [At paras. 70-1.]

(Cf. the comments of the majority at paras. 68 and 70 of *Sun-Rype Products Ltd. v. Archer Daniels Midland Co.* *2013 SCC 58*.)

15 In the interests of providing the full context of the lawsuit and understanding the issues of contention, however, I note that the affidavit evidence filed by the defendants provides a different picture of the facts from those pleaded. Mac's says the only agency it entered into in this case was the one created by the "Appointment of Representative" form, appointing *Mr. Bansal* as its agent. The agency was restricted to his obtaining the LMOs needed by Mac's as a pre-condition to hiring TFWs -- essentially negotiating with the government of Canada. Mac's submits that no material fact supporting a "broader" agency like that alleged at para. 39 of the NOCC has been pleaded and that it, Mac's, hired all the TFWs directly.

16 In return for the services provided *to Mac's* by Overseas Consulting, Mac's paid a retainer of $500 plus an additional $1,000 per worker on completion of a three-month "probationary period". (No written retainer agreement was signed by the parties.) Mac's says it understood that the fees charged to the plaintiffs by the Overseas Defendants under their separate contracts with the TFWs were *not* recruitment fees, but rather were for "settlement and immigration" services provided to the TFWs. Mr. Higuchi deposes:

> 30. Mac's never authorized Overseas to charge or collect any payments from TFWs, directly or indirectly, in exchange for securing employment at Mac's. Mac's has no means of knowing what, if any, payments or agreements were made between individual TFWs and Overseas.
>
> 31. Mac's understood that Overseas did not charge candidate fees for securing employment, but did charge candidate fees related to assisting them with processing immigration documents and generally navigating the immigration process. Mac's also understood that Overseas charged no fees to candidates from a visa exempt country.
>
> 32. Mac's has never received any payments from TFWs, directly or indirectly, in exchange for securing employment at Mac's, or for immigration consulting services.
>
> 33. Mac's retained Overseas to assist with recruiting TFWs. Mac's' involvement in the process was mostly limited to communicating and confirming its labour needs to Overseas, interviewing candidates, and reviewing, signing, and returning necessary documents. [Emphasis added.]

17 These themes were also taken up by the Overseas Defendants in their evidence. Notably, Mr. Bansal suggested that while most of the TFWs hired by Mac's did retain Overseas Consulting to provide immigration and settlement services, some did not. The services of the consultant included obtaining visas for the workers and their families (where applicable), assisting with travel arrangements, meeting them at YVR, taking them to their accommodations for 2-3 nights, setting up bank accounts and cellphone accounts for them, etc. The retainer agreements that were signed by TFWs with Overseas Consulting or Overseas Immigration contained an acknowledgement that "the fees are for services indicated ... and are not for Job Placement." Mr. Bansal also confirms that a representative of Mac's always signed the employment agreements; the Overseas Defendants did not act as agents of Mac's for this purpose.

18 Counsel for the defendants stress that no law or policy prohibited Mac's from paying *third parties* such as

Overseas Consulting for recruiting TFWs. Nor did any law or policy prohibit the *Overseas Defendants* from charging *Mac's* for their services, whether the fees were for recruitment or otherwise. Further, Mr. Cowper submits that no material fact that connects Mac's with the fees charged to the plaintiffs by the Overseas Defendants has been pleaded ? in fact, the plaintiffs have expressly acknowledged that they are not in a position to plead any such fact. In his submission, the causes of action based on the allegation of 'recoupment' of recruitment fees by Mac's must therefore fail. I will return to these arguments below.

19 It is worth re-emphasizing here, however, that the chambers judge had to reach his conclusions solely on the basis of the plaintiffs' pleading. The only issue to be decided was whether the NOCC disclosed causes of action that are not 'bound to fail' and whether the other requirements of s. 4(1) the *Class Proceedings Act*, *R.S.B.C. 1996, c. 50* ("*CPA*") were met. As stated in *Lambert v. Guidant, "*The starting point and the emphasis at this stage of the proceedings must be on the claims as formulated and advanced by the plaintiffs." (At para. 82.)

The Contracts of Employment

20 I return, then, to the plaintiffs' pleading. The NOCC states that once Overseas had obtained a LMO for an identified job with Mac's in Canada, one of the defendants would normally send Mr. Higuchi a form of written employment contract, which he signed and returned. This form was based on a "template" prescribed by Services Canada. It required the employer to specify the number of months of employment, a description of the tasks to be carried out by the employee, the number of hours to be worked each week; and to confirm the fact that overtime would be paid where required, the duration of break times, and the amount of paid vacation and wages on a weekly or hourly basis. Article 11 of the form of contract stated:

> The EMPLOYER shall not recoup from the EMPLOYEE, through payroll deductions or any other means, any costs incurred from recruiting the EMPLOYEE.

21 Where the employees' skills were at a low level, the employer was required to assume the cost of each employee's trip to and from Canada and to ensure that "reasonable and proper accommodation" was available for the employee. As well, the employer was required to provide health insurance at no cost to the worker and to register the employee under the relevant governmental insurance plan. Under the heading "Notice of Termination of Employment", the contract stated:

> 19. The EMPLOYER must give written notice before terminating the contract of the EMPLOYEE if the EMPLOYEE has completed 3 months of uninterrupted service with the EMPLOYER and if the contract is not about to expire. This notice shall be provided at least one week in advance.

The Direct Breach of Contract Claim

22 The plaintiffs assert that Mac's breached the employment contracts with the plaintiffs and other class members by refusing or failing to provide them with employment once "some of" the TFWs arrived in Canada. Specifically, they allege:

> 48. In reliance on their signed employment contracts with Mac's, the Plaintiffs and Class Members left the Middle East to travel to Canada. In doing so, they left behind family, jobs, employment opportunities, and friends. They came to Canada with an expectation that their Canadian jobs would improve their own lives and the lives of people who depended on them.
>
> 49. The Plaintiffs and Class Members were told to travel initially to Vancouver, British Columbia.
>
> 50. When the Plaintiffs and Class Members arrived in British Columbia, they were housed by Overseas in over-crowded housing or hotels.
>
> 51. After arriving in Canada, the Plaintiffs and Class Members learned that the jobs they had contracted to perform did not exist or were not made available to them.

52. Mac's breached its employment contracts with the Plaintiffs and Class Members by refusing or failing to provide them with employment.

53. Under the terms of their Canadian work permits, the Plaintiffs and Class Members were not permitted to work for any other employer than the specific Mac's Convenience Store identified on the work permit.

54. As a result, the Plaintiffs and Class Members were left without any legal source of income in Canada. They suffered mental and physical distress, humiliation and loss of self-esteem.

55. The Defendants profited from this scheme by using positive LMOs/LMIAs secured by Mac's to charge workers Recruitment Fees and without providing them with the employment promised. [Emphasis added.]

(As I understand it, the underlined allegation in para. 55 above is intended to refer to the defendants other than Mac's as there is no attempt to plead that Mac's charged or received any recruitment fees *directly* from any of the plaintiffs.) Elsewhere the NOCC alleges that in some cases, Mac's failed to pay transportation and accommodation costs it had agreed (and was required under the TFWP) to pay.

23 As mentioned earlier, I will refer to the forgoing allegations against Mac's as constituting the "Direct Breach of Contract" claim.

24 Each representative plaintiff's experience in finding 'no job' upon arriving in Canada is described in the NOCC under the heading "Representative Plaintiffs". Mr. Basyal, for example, flew from Nepal to Vancouver on the strength of a job at a "Subway" store in Edmonton and found there was no work for him there. He asserts that Mr. Bansal told him that he would be sent to work on a farm for a few months, but Mr. Basyal refused. Some days later, Mr. Bansal told him he had found work for him at a bottle depot in Calgary for $11 per hour. He was sent by bus to that city and worked there until he was found by the Canada Border Services Agency, which discovered him working illegally. He was brought to a homeless shelter in Calgary. He asserts that he was never given employment with Mac's in accordance with the terms of his employment contract and suffered mental distress and hardship as a result of the defendants' conduct.

25 As a remedy for the Direct Breach of Contract claim against *Mac's*, the plaintiffs seek an order that it pay into a general fund the average amount of:

> 182 (a) the value of all wages and benefits payable under the terms of the contracts of employment for each Class Member, less any mitigation;
>
> . . .
>
> (c) the cost of return airfare for the Class Members between Canada and their home countries.

They also seek general and aggravated damages and, although punitive damages are not expressly mentioned, they allege that Mac's' conduct in breaching the contracts was "harsh, malicious and reprehensible" and that there is a need to deter employers from engaging "in this sort of reprehensible conduct."

Other Causes of Action

26 *Conspiracy*: Turning to the other causes of action asserted generally against all four defendants, the plaintiffs plead that the defendants, through their respective employees Messrs. Bansal, Higuchi and Ms. Bala and others, combined or conspired with each other to:

a. offer foreign workers employment in Canada in exchange for a Recruitment Fee, which would be paid by the worker to the Recruitment Agents [defined to mean the Overseas Defendants];

b. collect an initial instalment of the Recruitment Fee;

c. secure unnamed LMOs or LMIAs allowing Mac's to hire foreign workers through the TFWP; and

d. extend offers of employment and enter into corresponding employment contracts with foreign workers to work at Mac's locations in Western Canada, which would prompt the payment of the final instalment of the Recruitment Fee.

It is said that these representatives of the defendants acted unlawfully in circumstances where they knew, or should have known, that their actions would likely cause injury to the plaintiffs, and in particular that:

a. the Recruitment fees charged and collected by the Defendants are illegal under the *Employment Standards Act*, *R.S.B.C. 1996, c. 113* and/or the *Employment Agency Business Licensing Regulation*, A.R. 45/2012; and

b. it is contrary to the express terms of the employment contracts entered into with Mac's for Mac's to seek to recoup the costs of recruiting workers from the workers themselves. [Emphasis added.]

In addition to seeking compensatory and aggravated damages, the plaintiffs again assert that the defendants' conduct was "high-handed and outrageous", and stress the importance of deterrence.

27 *Unjust Enrichment and Waiver of Tort*: We come next to unjust enrichment and waiver of tort. The plaintiffs allege that (all) the defendants were unjustly enriched by receiving Recruitment Fees and that because such fees "resulted from the defendants' wrongful or unlawful acts, there is and can be no juridical reason justifying the defendants' retaining any part of it." (At para. 224.) In the alternative, the plaintiffs "waive the tort" and plead that they are entitled to recover "the unjust enrichment accruing to the Defendants rather than their tort damages."

28 *Breach of Fiduciary Duty*: Finally, the plaintiffs allege that Overseas and Mac's owed fiduciary duties to the plaintiffs and breached those duties. With respect to Mac's, the plaintiffs assert that it was under an "express or implied undertaking of responsibility" to act in the plaintiffs' best interests and that such undertaking was "evident in the responsibilities imposed on employers under the TFWP", which imposes strict rules for the employment of foreign workers. It is said this undertaking arose from the terms of the plaintiffs' respective work permits, which authorized them to work only for Mac's at the specific stores identified on the employees' work permits. The NOCC continues:

229. Mac's was in a position to exercise power over the Plaintiffs and Class Members, and the Plaintiffs and Class Members were peculiarly vulnerable to how Mac's exercised that power. In particular:

a. The Plaintiffs and Class Members wanted to pursue employment opportunities in Canada and were willing to pay large sums of money for those opportunities.

1b. The Plaintiffs and Class Members were seeking permanent resident status in Canada and their ability to do that depended on their employment contracts with Mac's.

c. The Plaintiffs and Class Members were only legally authorized to work for the specific Mac's Convenience Store identified on their work permits. As such, Mac's was uniquely positioned to exercise complete power over whether the Plaintiffs and Class Members could work and support themselves once they arrived in Canada.

d. Once they arrived in Canada, the Plaintiffs' and Class Members' occupational and geographical mobility were restricted under the terms of the TFWP.

230. Mac's' power over the Plaintiffs and Class Members affected their legal and financial interests. Mac's exercised this power to promote its own interests in a manner that conflicted with its overriding duty not to take advantage of the Plaintiffs' and Class Members' vulnerability. In particular:

    a. By representing that the Plaintiffs and Class Members would obtain gainful employment with Mac's in Canada, Mac's extracted substantial Recruitment Fees from the Plaintiffs and Class Members.

    b. By representing that the Plaintiffs and Class Members would obtain gainful employment with Mac's in Canada, Mac's induced the Plaintiffs and Class Members to leave jobs and surrender employment opportunities to travel to Canada for work.

    c. By failing or refusing to provide employment to the Plaintiffs and Class Members as set out in their LMOs/LMIAs and employment contracts, Mac's deprived the Plaintiffs and Class Members of the opportunity to perform legal work and earn an income in Canada.

    d. By failing or refusing to provide employment to the Plaintiffs and Class Members as set out in their LMOs/LMIAs and employment contracts, Mac's placed the Plaintiffs and Class Members in a precarious situation where some were forced or deceived into performing illegal work and jeopardizing their opportunities to live and work in Canada.

    e. By failing or refusing to provide employment to the Plaintiffs and Class Members as set out in their LMOs/LMIAs and employment contracts, Mac's deprived the Plaintiffs and Class Members of a primary value of the contract, which was the possibility of achieving permanent resident status in Canada. [Emphasis added.]

Obviously, the allegations at subparas. 230(b) to (e) relate to the Direct Breach of Contract claim.

29 The plaintiffs also plead that Overseas Consulting and Overseas Immigration were under an undertaking to act in the plaintiffs' best interests since they held themselves out to the plaintiffs as professional advisors in the field of Canadian immigration law. As such, they were governed by the Code of Professional Ethics established by the Immigration Consultants of Canada Regulatory Council ("ICCRC"). It is said the Code requires members to be honest and candid in advising clients; to represent the clients' interests; and to "exercise independent judgement on behalf of a client." (At para. 234.) The pleading continues:

235. The Plaintiffs and Class Members paid Recruitment Fees to Overseas so that Overseas would use its special skills to find and secure employment for them in Canada.

236. The Plaintiffs and Class Members trusted Overseas and disclosed confidential information to its staff.

237. Overseas exercised power over the Plaintiffs and Class Members. In particular:

    a. the Plaintiffs and Class Members placed trust and reliance on Overseas to secure employment for them in Canada; and

    b. once it received the Recruitment Fees, only Overseas could provide the Plaintiffs and Class Members with a positive LMIA/LMO and employment contract.

238. The Plaintiffs and Class Members were peculiarly vulnerable to Overseas:

    a. the Plaintiffs and Class Members wanted to pursue employment opportunities in Canada and were willing to pay large sums of money for those opportunities; and

    b. advice and information given by Overseas in its capacity as immigration consultant would not likely be viewed with suspicion.

239. Overseas' power over the Plaintiffs and Class Members affected their legal and financial interests. Overseas exercised this power to promote its own interests in a manner that conflicted with its

overriding duty not to take advantage of the Plaintiffs' and Class Members' vulnerability. In particular:

a. By representing that the Plaintiffs and Class Members would obtain gainful employment in Canada, Overseas extracted substantial Recruitment Fees from them.

b. By representing that the Plaintiffs and Class Members would obtain gainful employment with Mac's in Canada, Overseas induced them to leave jobs and surrender employment opportunities to travel to Canada for work.

c. By failing or refusing to provide employment to the Plaintiffs and Class Members as promised, Overseas placed the Plaintiffs and Class Members in a precarious situation where some were later forced or deceived into performing illegal work and jeopardizing their opportunities to live and work in Canada. [Emphasis added.]

The Plaintiff Class

30 The plaintiffs purport to act on behalf of a class of persons that is defined at para. 1 of the NOCC as follows:

> The Plaintiffs bring this class action on behalf of a class of persons (the "Class Members") who, on or after December 11, 2009, made payments to Overseas Immigration Services Inc., Overseas [Career] and Consulting Services Ltd., and/or Trident Immigration Services Ltd. for the purpose of securing employment in Canada, and who were thereafter provided with employment contracts to work at Mac's Convenience Stores in British Columbia, Alberta, the Northwest Territories and Saskatchewan ("Western Canada") under Canada's Temporary Foreign Worker Program. [Emphasis added.]

Paragraph 172 asserts that members of the plaintiff class exceed 450 in number.

31 It will be noted that the class is not limited to those persons who turned up in Canada to work in accordance with employment contracts with Mac's but found no job waiting or received less work than promised. As noted earlier, para. 167 of the NOCC suggests that these assertions apply only to "some of" the plaintiffs.

The Chambers Judge's Reasons

32 The chambers judge below began his reasons by setting out the facts as pleaded by the plaintiffs, together with the parties' respective submissions. At para. 58, he reproduced s. 4 of the *CPA*. It provides:

> 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.

33 The judge described the parties' arguments concerning each of the conditions in s. 4(1) of the *CPA*, which I will not rehearse here. At para. 130, he noted that although the burden was on the plaintiffs to establish that they had met the conditions, that burden is not an onerous one. With respect to s. 4(1)(a) -- the most important criterion for purposes of this appeal -- it will be satisfied as long as it is not "plain and obvious" the pleadings disclose no reasonable cause of action. With respect to ss. 4(1)(b)-(e), he said, the plaintiffs are required to establish "some basis in fact" (see *Hollick v. Toronto (City)* 2001 SCC 68 at para. 25), for each of an identifiable class of plaintiffs, the existence of common issues, the preferability of a class proceeding, and the existence of a suitable representative plaintiff. Further, the chambers judge noted, the *CPA* is to be interpreted liberally so as to give effect to underlying policy considerations, including access to justice and ensuring that actual and potential wrongdoers modify their behaviour. (Citing *Hollick* and *Pro-Sys Consultants Ltd. v. Infineon Technologies AG* 2009 BCCA 503 at para. 64, *lve. to app. refused* [2010] S.C.C.A. No. 32.)

34 The chambers judge referred to *Dominguez v. Northland Properties Corp. (c.o.b. Denny's Restaurants)* 2012 BCSC 328, which like this case involved the certification of an action brought on behalf of temporary foreign workers recruited to work in Canada. He was satisfied that the facts in *Dominguez* and the legal issues it raised were "remarkably similar" to those of the case at bar. (At para. 135.)

35 After briefly describing the pleadings relating to each cause of action asserted, the chambers judge said he was satisfied the plaintiffs had met their burdens under s. 4(1) of the *CPA*. I will describe his conclusions in greater detail in the course of my analysis of the defendants' appeal below. The proposed common issues were set forth at Schedule "A" to the judge's order, which I have attached to these reasons.

On Appeal

36 Mac's and the Overseas Defendants appeal on grounds that substantially overlap. In its factum, Mac's states that the chambers judge erred as follows:

(a) By failing to strike out causes of action that are doomed to fail;

(b) By determining that the claims of the class members raise common issues as to common experiences, relationships with, or denial of employment by Mac's;

(c) By certifying an identifiable class, when members of the class may not have accepted or may not have been able to commence employment with Mac's; and

(d) By determining that damages are common to the class and can be assessed at a trial of common issues.

The Overseas Defendants state their grounds in the form of questions which they answer in the affirmative:

a. Did the Chambers Judge err in concluding that the plaintiffs' amended notice of civil claim discloses a cause of action against Overseas?

b. Did the Chambers Judge err in concluding that there is an identifiable class of two or more persons?

c. Did the Chambers Judge err in concluding that the claims of class members raise common issues?

Governing Principles

37 I begin with a few general principles that inform the analysis of this case. The question of whether the pleadings disclose reasonable causes of action as required by s. 4(1)(a) of the *CPA* (as well as the *Supreme Court Civil Rules*) is the primary issue on appeal. The chambers judge was correct that the 'plain and obvious' standard to be met by the plaintiffs is not an onerous one, and indeed it is the same standard as that applied to a motion to dismiss in an ordinary action. As stated in *Pro-Sys Consultants Ltd. v. Microsoft Corporation* 2013 SCC 57:

> The first certification requirement requires that the pleadings disclose a cause of action. In *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 ..., this Court explained that this requirement is assessed on the same standard of proof that applies to a motion to dismiss, as set out in *Hunt v. Carey Canada Inc.*, *[1990] 2 S.C.R. 959*, at p. 980. That is, a plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed. [At para. 63.]

Not surprisingly, the plaintiffs prefer a more "generous" statement of the applicable law provided by Moldaver J. (as he then was) in *Abdool v. Anaheim Management Ltd.* (1995) 21 O.R. (3d) 453 (Div. Ct.) as follows:

> The principles to be applied when considering whether pleadings support a legal cause of action are as follows:
>
> (a) All allegations of fact, unless patently ridiculous or incapable of proof, must be accepted as proved;
>
> (b) The defendant, in order to succeed, must show that it is plain and obvious beyond doubt that the plaintiffs could not succeed;
>
> (c) The novelty of the cause of action will not militate against the plaintiffs; and
>
> (d) The statement of claim must be read as generously as possible, with a view to accommodating any inadequacies in the form of the allegations due to drafting deficiencies. [At 469.]

38 Also relevant are ss. 5(1), (5) and (7) of the *CPA*:

> 5 (1) An application for a certification order under section 2(2) or 3 must be supported by an affidavit of the applicant.
>
> . . .
>
> (5) A person filing an affidavit under subsection (2) or (4) must
>
> (a) set out in the affidavit the material facts on which the person intends to rely at the hearing of the application,
>
> . . .
>
> (7) An order certifying a proceeding as a class proceeding is not a determination of the merits of the proceeding.

39 The requirement in s. 4(1)(a) that the pleadings disclose a cause of action is not met simply by stating a legal conclusion in one's notice of claim that "X negligently injured the plaintiff" or that "Y owed a fiduciary duty to the plaintiff and is in breach of it." Indeed the law is clear that the material facts -- i.e., the facts that constitute the

required elements of the cause of action and inform the defendants of the 'outline' of the case they must meet -- must be pleaded. This is one of the fundamental rules of pleading and dates back to the English *Judicature Act* of 1875. D.B. Casson, author of *Odgers on High Court Pleading and Practice* (23d ed., 1991), writes:

> ... A plaintiff must not merely aver, "I am entitled to recover $: 100 from the defendant," or "it was the defendant's duty to do so and so." He must state the facts which in his opinion give him that right, or impose on the defendant that duty; and the judge will decide, when those facts are proved, what are the legal rights and duties of the parties respectively. So, too, a defendant must state clearly the facts which in his opinion afford him a defence to the plaintiff's action. ...

40 Mr. Cowper referred us to a decision of the English Court of Appeal in *Bruce v. Odham's Press Ltd.* [1936] 1 All E.R. 287, in which Scott L.J. stated:

> The cardinal provision in rule 4 is that the statement of claim must state the material facts. The word "material" means necessary for the purpose of formulating a complete cause of action; and if any one "material" statement is omitted, the statement of claim is bad; it is "demurrable" in the old phraseology, and in the new is liable to be "struck out" under R.S.C. Ord. XXV, r. 4 (see *Phillips v. Phillips* [(1878), 4 Q.R.D. 127]**)** or a "further and better statement of claim" may be ordered under rule 7.
>
> The function of "particulars" under rule 6 is quite different. They are not to be used in order to fill material gaps in a demurrable statement of claim -- gaps which ought to have been filled by appropriate statements of the various material facts which together constitute the plaintiff's cause of action. [At 294.] [Emphasis added.]

41 In British Columbia, Rule 3-1(2)(a) of the *Supreme Court Civil Rules* continues the requirement that a notice of civil claim set out "a concise statement of the material facts giving rise to the claim"; and the notion that the cause of action is not complete without the material facts has been adopted on many occasions. In *Wyman v. Vancouver Real Estate Board (No. 2)* (1957) 8 D.L.R. (2d) 724 (B.C.C.A.), for example, the Court observed:

> The first and only substantial point for decision in this case is whether or not the plaintiffs in the statement of claim have with sufficient clarity pleaded membership in the defendant organization. It is unnecessary in the circumstances to discuss cases dealing with whether the plea is essential or not. The only point is whether it has been sufficiently pleaded.
>
> O. 19, R. 4, provides that:
>
> > every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be...
>
> The cases make it clear that a party must plead all the material facts on which he intends to rely at the trial, otherwise he is not entitled to give evidence of them at the trial. It is clear too, I think, that no averment must be omitted which is essential to success.
>
> In *Cooke v. Gill* (1873), L.R. 8 C.P. 107 ... Brett J. at 116 defines 'cause of action' as
>
> > every fact which is material to be proved to entitle the plaintiff to succeed -- every fact which the defendant would have a right to traverse. [At 726; emphasis added.]

42 More recent cases, including *North Ridge Fishing Ltd. v. "Prosperity" (The)* 2000 BCCA 283 at para. 29, *Halvorson v. British Columbia (Medical Services Commission*) 2010 BCCA 267 at para. 36 and cases cited therein, *Sahyoun v. Ho* 2013 BCSC 1143 and *McNaughton v. Baker* (1988) 25 B.C.L.R. (2d) 17 (C.A.), confirm the necessity for material facts to be pleaded in order to "outline" the claim or defence.

43 The case law is also clear that the requirement that material facts be pleaded applies to class actions: see, for example, *Abdool v. Anaheim Mgmt. Ltd.* (1993) 15 O.R. (3d) 39 (Ont. C.J.) at paras. 36?8, *aff'd* 21 O.R. (3d) 453 (Div. Ct.); *Harrington v. Dow Corning Corp.* (1996) 22 B.C.L.R. (3d) 97 (B.C.S.C.) at 114, *aff'd.* 2000 BCCA 605

(*lve. to app. dism'd* [2001] S.C.C.A. No. 21); *Sandhu v. HSBC Finance Mortgages Inc.* 2016 BCCA 301. At para. 118 of *Sandhu*, an appeal from a certification order, Saunders J.A. concluded on behalf of the Court:

> I return to the question of amending the pleading. In my view, the deficiencies in the pleadings I have identified go to the heart of the claims discussed. While a judge has considerable discretion in respect to amendments, I consider it was an error to certify issues in respect to many of the causes of action as they were presented, especially with there being no suggested amendments presented to the judge. For the reasons discussed earlier, I do not consider that the certification of the issues that rely on the deficient pleadings should survive, in anticipation of broad unspecific amendments.

44 The plaintiffs did not take issue in their factum or oral argument with the necessity of pleading the material facts to support a cause of action. They did emphasize, however, that where an application for certification has failed to meet the technical requirements of the *CPA* or the *Rules*, the court may permit the pleading to be amended so that the "real substantial question can be raised between the parties." (See *McNaughton* at pp. 23?4 and cases cited therein.)

45 It is trite law that the court's power to amend under Rule 9-5 and other rules of the *Supreme Court Civil Rules* is to be exercised liberally, but also judicially. At para. 44 of *Sandhu*, the Court reasoned:

> The standard of pleadings under s. 4(1)(a) is the same as on a motion under Rule 9-5(1) of the *Supreme Court Civil Rules* to strike pleadings for failure to disclose a cause of action. The question is, assuming the facts pleaded are true, is it plain and obvious that the claim cannot succeed: *Hunt v. Carey Canada Inc*., *[1990] 2 S.C.R. 959*, *74 D.L.R. (4th) 321*; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57; *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58. While the possibility of amendment of the pleadings is a consideration weighing against striking of pleadings under *Hunt*, it is an error to leave to trial issues that should be resolved on the pleadings at the certification stages: *Jer v. Royal Bank of Canada*, 2014 BCCA 116 at para. 108. Authorities tend to be generous in making available the possibility of amendments to fine tune the pleadings and to bring clarification to obscure issues, e.g., *Watson v. Bank of America Corporation,* 2015 BCCA 362 at paras. 87, 106, 140, 197. Nonetheless, in British Columbia -- a cost beneficial jurisdiction to plaintiffs -- fairness and access to justice considerations, including to defendants, reinforce the proposition that the essentials of a cause of action must be pleaded else the pleadings may be found to be fatally lacking. The court will consider in this mix the length of time the plaintiff has had to "get it right".

(See also *Teal Cedar Products (1977) Ltd. v. Dale Intermediaries Ltd*. (1996) 19 B.C.L.R. (3d) 282 (C.A.) at paras. 36 *et seq*.)

46 With respect to the standard of review to be applied where a certification order is appealed, s. 4(1) contains both discretionary and non-discretionary elements. The certifying court *must* certify the proceeding if the requirements set out in the subsection are met. At the same time, as observed by this court in *Finkel v. Coast Capital Savings Credit Union* 2017 BCCA 361, the certifying court has a measure of discretion in assessing the statutory requirements themselves. This fact gives rise to differing standards of review. In the words of Dickson J.A. in *Finkel*:

> The standard of review that applies to a chambers judge's conclusions reached under s. 4(1) of the *Class Proceedings Act* depends on the nature of the issue for appellate consideration. If the impugned element of the certification order is discretionary it will be reviewed with considerable deference, bearing in mind the need for judicial flexibility in the fair and efficient resolution of class proceedings: *Campbell v. Flexwatt Corp.* (1997), 98 B.C.A.C. 22 at para. 25, *leave to appeal ref'd* [1998] S.C.C.A. No. 13. Questions of fact and mixed fact and law also attract the deferential standard: *Charlton*, [2015] B.C.J. No. 88 at para. 108 citing *Andriuk v. Merrill Lynch Canada Inc.*, 2014 ABCA 177. However, to the extent the certification order rests on a question of law, it will be reviewed on a standard of correctness: *Jiang* [2017] B.C.J. No. 499 at para. 37.

> As noted, s. 4(1) of the *Class Proceedings Act* provides that an action must be certified if all of the listed requirements are met. Accordingly, a decision on whether to certify a class proceeding is not a matter of discretion. Nevertheless, the chambers judge has a measure of discretion in assessing the statutory requirements, which requirements set the boundaries for its exercise. Absent an extricable error of law, unless the judge erred in principle or was clearly wrong this Court will not interfere with his or her exercise of judicial discretion: *Pro-Sys Consultants Ltd. v. Infineon Technologies AG* *2009 BCCA 503* at para. 28, *lve to app ref'd* *[2010] S.C.C.A. No. 32*.
>
> It follows that Coast Capital must establish Justice Masuhara erred in law or principle in assessing the cause of action requirements for the breach of contract or breach of the *BPCPA* claims to succeed on the first appeal issue. To succeed on the second and third, it must establish that he made an extricable error of law, erred in principle or was clearly wrong. [At paras. 55-7.]

47 Finally by way of preliminaries, I must note my disagreement with the chambers judge's finding at para. 135 that the facts in *Dominguez* and the legal issues it raised were "remarkably similar" to those of the case at bar. Certainly both involved foreign workers as plaintiffs and a restaurant chain that hires many low-skilled workers recruited from foreign countries under the TFWP. However, as Fitzpatrick J. stated at para. 61 of her reasons in *Dominguez*, there was "*no contest"* between the parties that the notice of civil claim disclosed causes of action and that those causes had been properly pleaded. In particular, the plaintiffs had properly pleaded an agency relationship between the offshore recruiters (who were not defendants but were third parties) and the employer and that the recruiters were "liable for their actions in charging and receiving the agency fees which resulted in the breach of contract (including breach of duty of good faith and fair dealing), breach of fiduciary duty and unjust enrichment". The real issues for the certifying court related to other requirements of the *CPA*, especially the existence of common issues for purposes of s. 4(1)(c).

48 *Dominguez* was thus very different from this case, in which the defendants challenge the proper pleading of each cause of action. In the submission of counsel for Mac's, this fact necessitated a thorough analysis of the pleadings issues raised below -- an analysis that the defendants say was not carried out by the chambers judge in this instance.

Analysis

The Direct Breach of Contract Claim

49 I prefer to analyze the chambers judge's reasons and findings in a somewhat different order than he did. I would begin with the Direct Breach of Contract claim against Mac's -- specifically Mac's alleged failure to provide "a job" or to provide the number of hours of promised work to "some of" the plaintiffs. This claim is made only against Mac's and obviously does not depend on the agency of, or a conspiracy with, any other party.

50 Generally, I agree with the chambers judge that a cause of action for breach of contracts against Mac's is disclosed in the NOCC (although the reference to plaintiffs who were "provided" with an employment contract should be clarified.) However, the fact that only "some of" the plaintiffs are asserting this breach creates a difficulty in the definition of the plaintiff class. For convenience, I set out again here the definition in the chambers judge's order:

> All persons who, on or after December 11, 2009 to the opt-out/op-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.

51 The chambers judge addressed whether an identifiable class existed for purposes of s. 4(1)(b) of the *CPA*, at

paras. 145-153 of his reasons. The crux of his analysis was that:

> It is a complete answer to the objections of the defendants that the [Representative] 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.
>
> 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.
>
> 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*. [At paras. 147-9; emphasis added.]

With respect to whether the claims of the plaintiff class raised common issues for purposes of s. 4(1)(c), he noted that there were a "number of decisions" to the effect that the interpretation of a standard form contract is a common issue. (Citing, *inter alia*, *Dominguez*.)

52 Commonality requires, however, that there be issues of fact or law common to all class members -- i.e., that "success for one class member must mean success for all." (*Western Canadian Shopping Centres Inc. v. Dutton* 2001 SCC 46, at para. 40.) As explained by Chief Justice McLachlin in that case:

> The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. Determining whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to individual issues. In doing so, the court should remember that it may not always be possible for a representative party to plead the claims of each class member with the same particularity as would be required in an individual suit. [At para. 39; emphasis added.]

53 The Chief Justice also noted, and many subsequent courts have confirmed, that the criterion of class membership should "not depend on the outcome of the litigation." (*Dutton* at para. 38.) From this I infer that it is not acceptable to 'wait and see' which plaintiffs succeed at trial (and are therefore "in the class"), in order to define who is in the class. In the case at bar, then, it was error to certify an overly broad class of persons, some of whom are asserting the Direct Breach of Contract claim and others of whom are not. To the latter group, any success the plaintiffs enjoy on the Direct claim will be irrelevant.

54 The question then arises whether those plaintiffs who are asserting the Direct claim based on no or inadequate work, should be identified as a subclass, or whether the Direct claim advanced by the smaller group should be dealt with as a class proceeding at all.

55 Although I agree that existence of a standard form contract augurs in favour of the existence of a common issue, the plaintiffs' allegations raise many other issues that are not common and that would require individual assessment and adjudication. First, each plaintiff would have to show that any conditions precedent to his or her employment contract were satisfied -- here, for example, that a valid work permit and travel visa were obtained, that the TFW had accepted an offer of employment from Mac's, and that he or she had validly entered Canada in order to commence employment. As well, each plaintiff would have to show that he or she turned up to work at the specified location on the specified commencement date and was denied work, or the amount of work promised in breach of Mac's' contractual obligations. The assessment of damages in the employment context is also a highly

individualized process: the circumstances of each, including loss of earnings, future prospects, and out-of-pocket expenses, would have to be individually assessed. Efforts to mitigate -- again, an individual issue -- might also have to be shown.

56 Counsel for Mac's referred us to *Aston v. Casino Windsor Ltd.* *(2005) 42 C.C.E.L. (3d) 190* (Ont. Sup. C.J.), in which the Court declined to certify a class action sought to be brought by 19 individuals who had been 'let go' by their employer at the same time due to an economic downturn. Although the Court noted that "judicial economy certainly would be achieved as 19 individual actions would now have to be commenced", it also observed:

> All the issues including the validity of the individual contract must be decided on an individual basis and whether the employer fairly considered the individual employment records and years of service in selecting those who were terminated. There may be other individual issues to be determined such as mitigation. [At para. 9.]

In the end, certification was refused, although the Court made certain orders to expedite dealing with the 19 claims in the action.

57 On the other hand, I note that under s. 7 of the *CPA*, the court must not refuse to certify a proceeding merely because:

> (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
>
> (b) the relief claimed relates to separate contracts involving different class members; [or]
>
> . . .
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

More importantly, s. 4(1)(c) provides that as long as the claims of the class members raise common issues, the fact that those may not predominate over issues affecting only individual members does not preclude certification. In my view, the fact that the Direct Breach of Contract claim arises in the context of an existing class action involving Mac's is also a factor to be considered.

58 I appreciate that because of the particular circumstances of the plaintiffs in this case, it would be very difficult for them to mount individual actions and to bear the expense of doing so. Obviously, making access to justice possible for vulnerable people such as the defendants is a key purpose of the *CPA*. Thus, although no particular question of contractual interpretation has been identified by the plaintiffs, I believe it would be preferable to permit a class action to proceed in respect of the Direct Breach of Contract claim provided the *subclass* is properly defined. I would suggest the following definition for counsel's consideration:

> All persons who, on or after December 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 and who thereafter:
>
> i) entered into binding contracts (i.e., contracts in respect of which all conditions precedent were satisfied or waived) of employment with Mac's Convenience stores to work in western Canada or the Northwest Territories under Canada's Temporary Foreign Worker Program;
>
> ii) obtained valid work permits and (where required) travel visas to enter Canada to undertake such employment; and
>
> iii) validly entered Canada and reported to work as required by their contracts of employment; and

> were not provided by Mac's with work at all, or were not provided with work in the amount specified in the contract of employment; or in respect of whom Mac's failed to pay expenses relating to accommodation or travel costs which Mac's was obligated to pay under such employment contracts.

If at a later point it becomes clear there is no common question in this part of the action, Mac's will be at liberty to apply for the decertification of the Direct Breach of Contract claim.

The Remaining Causes of Action

59 Subject to one exception, the remaining causes of action (which are pleaded against *all* the defendants) turn to a large degree on the so-called Recruitment Fees and the allegation that Mac's 'recouped' or otherwise benefited from them. (Whether they were in fact paid *for recruitment* as the plaintiffs assert, or for other services as the Overseas Defendants assert, should be a common question.) As seen above, however, it was not illegal for Mac's to "offer employment contracts" to the plaintiffs. It was not illegal for the Overseas Defendants to charge Mac's for their services (which likely qualified as recruitment services), or for Mac's to pay the $1,500 per person for recruitment, *to the Overseas Defendants*. It was not illegal for the Overseas Defendants to secure "positive LMOs" for positions at Mac's stores in Canada. Nor, it appears, was it illegal for the *Overseas Defendants* to charge the TFWs for services provided directly to them in connection with immigration matters and "settling" in Canada. Whether it would have been illegal for the Overseas Defendants to charge the plaintiffs for "jobs" may be debatable, but is not pleaded in any event.

60 It is only if the $8,000 fees were, in whole or in part, payment for "recruiting" or "jobs" *and* Mac's and one or more of its co-defendants shared the benefit of such payments in some way that (all but one of) the other causes of action could be viable. Such sharing might constitute a breach by Mac's of the TFWP, the *Employment Standards Act* and Article 11 of the employment contracts; it might constitute the "illegal act" required for purposes of an illegal act conspiracy; and it might constitute the enrichment of Mac's without juridical reason. As well, it might result in liability on the part of one or more of the Overseas Defendants in associating them (as agents or co-conspirators) with Mac's' misconduct. The compliance of the Overseas Defendants with their obligations as registered immigration consultants might also be called into question.

61 In summary, the receipt by Mac's of recruitment fees or some related benefit is the lynchpin of the plaintiffs' case and (again with one exception) of the various remedies, compensatory and restitutionary, that they seek. *Ipso facto*, it is certainly a material fact required in the 'outline' of the case.

62 The pleadings with respect to the remaining causes of action (discussed below) are replete with oblique *suggestions* that Mac's and the Overseas Defendants shared in some way the $8,000 Recruitment Fees paid by each TFW; but nowhere is the allegation made directly. The closest the plaintiffs seem to come is at para. 46 of the NOCC, which is very oblique indeed:

> Each Plaintiff and Class Member who contracted with Mac's under this scheme was charged a Recruitment Fee. The provision of an offer of employment and employment contract with Mac's induced the worker to pay the bulk of the Recruitment Fee, or approximately $6,000.

63 Yet as we have seen, the plaintiffs state at para. 40 of the NOCC that "*it is unknown*" whether Mr. Higuchi (who is not a defendant) and/or Mac's "received a portion of the Recruitment Fees or any another payment from the [Overseas Defendants] in exchange for its role in the scheme". In my respectful view this cannot be treated as an averment of any kind. The NOCC thus cannot be read as asserting that Mac's received a portion of recruitment fees or some related payment "in exchange for its role" in a "scheme" with the Overseas Defendants.

Agency

64 As I understand it, the plaintiffs take the position that if it could be shown that in collecting recruitment fees, the

Overseas Defendants were acting as the agents of Mac's or as co-conspirators with Mac's, the deficiency I have described could be overcome. I will deal first with agency and then with conspiracy in this regard.

65 It may be useful to recall how an agency relationship may arise, and the meaning of "actual" and "apparent" agency. F.M.B. Reynolds, the author of *Bowstead and Reynolds on Agency* (17th ed., 2001) states succinctly:

> Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts.
>
> ...
>
> Where the agent's authority results from a manifestation of consent that he should represent or act for the principal expressly or impliedly made by the principal to the agent himself, the authority is called actual authority, express or implied. But the agent may also have authority resulting from such a manifestation made by the principal to a third party; such authority is called apparent authority. (At 1.)

66 The plaintiffs state at paras. 38?9 of the NOCC that:

> 38. At some point, known only to the Defendants, Mac's entered into an agreement with Overseas Immigration and/or Overseas Consulting, wherein Mac's authorized Overseas Consulting to act as its agent to recruit workers from abroad to work in Mac's Convenience Stores in Western Canada, through Canada's TFWP.
>
> 39. At all material times Overseas acted as agents for Mac's, and were vested with the express, implied, or apparent authority to facilitate and/or arrange the Class Members' employment with Mac's on behalf of Mac's. [Emphasis added.]

67 Counsel for the defendants contend that again, the material facts that would be necessary for an agency (which of course is not a cause of action) or conspiracy to be proven have not been pleaded. Mr. Cowper on behalf of Mac's submits that no material facts were pleaded in support of a "broad" agency relationship between Mac's and any of the Overseas Defendants. In his submission, if the agreement referred to in para. 38 was a reference to the governmental form in which Mac's appointed *Mr. Basyal*, to obtain LMOs from Canada for the TFWs hired by Mac's, it simply could not be equated to an agreement under which Mac's colluded with the Overseas Defendants to obtain a 'kickback' in the form of the recoupment of recruitment fees. I agree with this submission.

68 The plaintiffs then contended (although this does *not* appear in the NOCC) that an agency of some kind could be inferred from the general notion that the Overseas Defendants were "put in the position" of being able to charge each plaintiff a fee of $8,000 by reason of their, the Overseas Defendants', relationship with Mac's. But the fact the Overseas Defendants came into contact with the plaintiffs as a result of their, the Overseas Defendants', retainer by Mac's would not create an agency relationship without some form of authorization or "manifestation of consent." Without that, an argument similar to that made by Ms. Allevato in respect of Mac's could be made against, for example, the government of Canada: because it established the TFWP, the Overseas Defendants were "put in the position" of providing services to the plaintiffs. Yet it is not pleaded that the Overseas Defendants were agents of Canada and it would be wrong in logic and in law to suggest they were.

Conspiracy

69 I turn next to the tort of conspiracy alleged by the plaintiffs at paras. 216 and 219-221 of the pleading. I reproduce them here:

> 216. At some point, known only to the Defendants, through their employees Mr. Bansal, Ms. Bala, Mr. Higuchi and other employees or representatives, combined or conspired with each other to:

a. offer foreign workers employment in Canada in exchange for a Recruitment Fee, which would be paid by the worker to the Recruitment Agents;

b. collect an initial instalment of the Recruitment Fee;

c. secure unnamed LMOs or LMIAs allowing Mac's to hire foreign workers through the TFWP; and

d. extend offers of employment and enter into corresponding employment contracts with foreign workers to work at Mac's locations in Western Canada, which would prompt the payment of the final instalment of the Recruitment Fee.

. . .

219. In the alternative, Mr. Bansal, Mr. Higuchi, Ms. Bala, and other employees or representatives of the Defendants acted unlawfully in circumstances where they knew, or should have known, their actions would likely cause injury to the Plaintiffs and Class Members. In particular:

a. the Recruitment fees charged and collected by the Defendants are illegal under the *Employment Standards Act*, *R.S.B.C. 1996, c. 113* and/or the *Employment Agency Business Licensing Regulation*, A.R. 45/2012; and

b. it is contrary to the express terms of the employment contracts entered into with Mac's for Mac's to seek to recoup the costs of recruiting workers from the workers themselves.

220. The Defendants are liable for the unlawful acts of their employees.

221. As a result of the Defendants' conspiracy, the Plaintiffs and Class Members suffered loss and damage as set out at paragraph 220 of this Notice of Claim.

70 Again, these must be read together with para. 40 of the NOCC, where it will be recalled the plaintiffs acknowledged that "it is unknown" whether Mac's received a portion of the Recruitment Fees or another payment in exchange for "its role in the scheme". Without a pleading that Mac's did, by means of a conspiracy, recoup the costs of recruiting from the workers themselves, the cause of action is incomplete.

Unjust Enrichment and Waiver of Tort?

71 The pleading relating to unjust enrichment also refers to the defendants' "receiving" and 'recovering' the Recruitment Fees and seeks the remedy of 'disgorgement'. Once more, this must be read in conjunction with the acknowledgment in para. 40 that it is "unknown" whether Mac's received a portion of those fees.

72 The plaintiffs contended in their oral submissions that Mac's might have been "enriched" by being saved certain expenses it would otherwise have had to pay in connection with the hiring of the plaintiffs. However, the NOCC does not make this assertion; nor does it specify what these expenses might have been or why they would have represented legal obligations of Mac's. Paragraph 45 of the NOCC does state that "certain" class members had a provision in their employment contracts under which Mac's was obliged to pay transportation costs for the workers to and from Canada and others to the effect that Mac's would ensure that reasonable and proper accommodation was available and would provide such accommodation if necessary. These were obviously contractual obligations that, if breached, would be compensable in the Direct Breach of Contract claim.

73 Without the allegation of a benefit or enrichment received by Mac's, the cause of action to this extent must, in my opinion, be regarded as incomplete as against Mac's.

74 As against the Overseas Defendants, we are left with the bare assertion that they were "unjustly enriched by receiving the Recruitment Fees paid by the plaintiffs" (at para. 222) and that such receipt "resulted from the defendants' wrongful or unlawful acts" (at para. 224), as the foundation for unjust enrichment and waiver of tort. The pleading does not explain what "unlawful" or "illegal" act is asserted against the Overseas Defendants. I have already noted that one of the common questions in this case will be whether the fees received from the plaintiffs

were truly fees for recruitment, either in whole or in part. If they were indeed 'fees for jobs,' are the plaintiffs asserting they were illegal, and if so, on what basis? If they were only for other services such as immigration advice and settlement assistance, are the plaintiffs asserting they were illegal, and if so, on what basis? The answers to these questions are unclear.

Breach of Fiduciary Duty?

75 We come finally to the allegation that in entering into employment contracts with the plaintiffs, Mac's assumed a fiduciary duty to them -- i.e., a duty to act in the plaintiffs' best interests. As stated in Mac's' factum, there is no special relationship between employers and employees that normally would give rise to such duty. In *Alberta v. Elder Advocates of Alberta Society* 2011 SCC 24, the Court confirmed its statement in *Galambos v. Perez* 2009 SCC 48 that in both "*per se*" and "*ad hoc*" fiduciary relationships, "there will be some undertaking on the part of the fiduciary to act with loyalty." (*Elder Advocates* at para. 32.) The Court continued:

> In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame:* (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control. [At para. 36.]

Following *Alberta v. Elder Advocates*, the Supreme Court of Canada confirmed, in *Professional Institute of the Public Service of Canada v. Canada (Attorney General)* 2012 SCC 71, that the second element referred to in *Elder Advocates* requires "(i) a defined *person or class of persons* (i.e., the beneficiary or beneficiaries), who is or are (ii) *vulnerable* to the fiduciary, (iii) in that the fiduciary has a *discretionary power* over them." (At para. 128.)

76 At paras. 28 and 29 above, I quoted the allegations that are said to support the existence of a fiduciary duty in this case. There is no doubt that vulnerability on the part of the plaintiffs is pleaded, but the pleading contains no material fact that supports an undertaking given by Mac's to act in the best interests of its employees; nor does it assert that the contracts of employment gave Mac's any discretionary power to affect the plaintiffs beyond the strictly stated employment relationship.

77 As for a fiduciary duty on the part of Overseas Defendants, the allegations pleaded at paras. 235-239 (quoted above at para. 29) are in my view sufficient ? although barely so -- to disclose a cause of action.

Amendment

78 Notwithstanding the incompleteness of most of the causes of action, and the disorganized and unclear state of the NOCC generally, I turn to consider whether the plaintiffs should be permitted to amend the document to rectify the deficiencies. As we have seen, unless some particular prejudice is shown, the court should consider whether it is in the interests of justice to permit appropriate amendments to be made, as opposed to striking out pleadings that are deficient. This pleading is deficient in many ways that are not only technical -- they go to the crux of most of the causes of action advanced, and will necessitate a thorough 're-think' of the case. However, the plaintiffs are obviously vulnerable and the goals of the *CPA* must be kept in mind. With some reluctance, then, I conclude that the plaintiffs should be given the opportunity to make the required amendments.

79 Obviously, the starting point should be to plead the material facts relating to Mac's 'recouping' or otherwise benefiting from the Overseas Defendants' receipt of the so-called Recruitment Fees. This is the assertion on which most of the action will depend. Counsel for the plaintiffs must determine what material facts are known to them, and whether they can be asserted in a way that is consistent with good conscience and their barristers' oaths.

Disposition

80 In the result, I would allow the appeal, set aside the chambers judge's order and substitute orders to the following effect:

1. The claims of breach of contract made in this proceeding directly against Mac's by the plaintiffs in respect of:
    a) the allegation that Mac's failed to provide a job or failed to provide the amount of work it had promised in contracts of employment with members of the plaintiff subclass; and
    b) allegations that Mac's failed to pay travel costs or other accommodation expenses which it agreed to pay in the employment contracts with members of the subclass;

   may continue in this proceeding as a certified class action provided a subclass of plaintiffs is created as suggested in these reasons or as the parties may find appropriate. This claim would not include allegations of the breach of Article 11 of any of the said contracts of employment; but could include breach of the duty of honest performance.
2. I would confirm the certification of the class action as against the Overseas Defendants for breach of fiduciary duty, given my finding that that cause of action is disclosed.
3. As for the remaining causes of action, I would stay the action pending the plaintiffs' amendment of the NOCC such that the material facts relating to each cause and to the existence of an agency relationship (if counsel chooses to pursue that allegation) are clearly stated. The stay would remain in force until either all parties have agreed in writing on an amended NOCC, or this court has approved same. Counsel may correspond with the Registry and make written submissions as required in connection with the lifting of the stay in due course.

81 I would also remind counsel that the proposed common issues will likely require substantial amendment, although counsel did not focus on this point in any detail in their submissions.

M.V. NEWBURY J.A.
J.E.D. SAVAGE J.A.:— I agree.
B. FISHER J.A.:— I agree.

* * * * *

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?
