IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Dominguez v. Northland Properties Corporation,* 2012 BCSC 328

Date: 20120305
Docket: S110095
Registry: Vancouver

Between:

Herminia Vergara Dominguez

Plaintiff

And

Northland Properties Corporation doing business as Denny's Restaurants, and Dencan Restaurants Inc.

Defendants

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Plaintiff:	R.C. Gordon C. Foy
Counsel for the Defendants:	W. Branch P.D. McLean K. Saunders
Place and Date of Hearing:	Vancouver, B.C. August 29 and 30, 2011
Place and Date of Judgment:	Vancouver, B.C. March 5, 2012

Introduction

[1] In 2008, the plaintiff Herminia Vergara Dominguez came from the Philippines to work in Canada as a temporary foreign worker in one of the Denny's restaurants operated by the defendants.

[2] Ms. Dominguez contends that the defendants failed to provide her as much work as promised, failed to pay her overtime for hours worked and also failed to reimburse her for expenses relating to her employment, such as travel expenses from the Philippines and agency recruitment fees. She says that as a result, she suffered damages arising from the breach of contract (including breach of duty of good faith and fair dealing on the part of the defendants) and breach of fiduciary duty. She also alleges that the defendants were unjustly enriched by reason of their nonpayment of these wages and other expenses. Finally, she alleges that these breaches were systemic in the sense that the defendants failed to implement the necessary systems to ensure that she and other employees were appropriately compensated.

[3] The overarching allegation in this proceeding is that these breaches took place within an employment situation where these foreign workers were under a significant disadvantage in terms of protecting their own interests and that the defendants sought to take advantage of these vulnerable foreign workers given their tentative status here in Canada.

[4] Ms. Dominguez now applies under the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 (the "*Act*") to certify this action as a class proceeding on behalf of herself and all other current and former employees of the defendants in British Columbia who came to Canada under a certain temporary foreign worker program on or after December 1, 2006. She estimates that there are approximately 75 people in this putative class.

[5] I am advised that this is the first case in Canada to address claims of temporary foreign workers who contend that a Canadian employer is liable for breaches of obligations or duties relating to their employment in Canada. The facts

in *Kumar v. Sharp Business Forms Inc.* (2001), 5 C.P.C. (5th) 128 (Ont. Sup. Ct. J.), discussed in more detail below, are somewhat similar in that certification was sought by employees who, for the most part, were recent immigrants to Canada for claims for overtime, holiday pay and vacation pay. That case, however, did not involve allegations that the employer had systematically taken advantage of those employees as a vulnerable or disadvantaged group, as is the situation in this proceeding.

[6] The defendants do not take issue with the proposition that Ms. Dominguez has satisfied many of the requirements for certification under the *Act*. The defendants do, however, take the position that certification of this action is not appropriate for the following reasons:

a) Ms. Dominguez has failed to produce evidence that she is an appropriate representative of the non-resident putative class members so as to justify her appointment as a representative plaintiff for those class members;

b) There are no common issues in that Ms. Dominguez has failed to prove a sufficient commonality among the putative class members; and

c) A class proceeding is not the preferable procedure to determine the issues.

Background Facts

[7] The Temporary Foreign Worker Program ("TFWP") is a federal government program that is jointly administered by Human Resources and Skills Development Canada ("HRSDC") and Citizenship and Immigration Canada whereby foreign workers may be permitted to come and work in Canada on a temporary basis in areas or occupations where there are labour shortages.

[8] There is an extensive process by which these workers are allowed to enter Canada and commence employment. Most significant to this process is the requirement that an employer must first provide a written employment offer to the

prospective worker. That offer is then forwarded to HRSDC in order to obtain a positive Labour Market Opinion ("LMO") from HRSDC for each foreign worker.

[9] HRSDC requires that the employment contract submitted in support of an application for an LMO contain all of the terms and conditions of the sample contract provided by HRSDC or as described in their "Guidelines for Employers". HRSDC's stated purpose for the employment contract is to provide a written detailed description of the job, describe the terms and conditions of employment, articulate the employer's responsibilities and the worker's rights and help ensure that the worker gets fair working arrangements. Additional provisions may be added provided that they do not contradict the terms and conditions required by HRSDC.

[10] The purpose of the LMO is to ensure that the employment of the temporary foreign worker does not adversely affect the labour market in Canada. The LMOs issued in this case are all in standard form. They specifically provide that they are issued on the understanding that all legal requirements, with respect to employment, would be followed, including that all foreign workers would be protected by all relevant labour and employment laws of Canada. Those laws would, of course, include requirements under the *Employment Standards Act,* R.S.B.C. 1996, c. 113.

[11] The LMO specifically provides that if an employer does not pay wages as required, a complaint can be filed with the appropriate federal, provincial or territorial department responsible for employment standards. Each LMO also specifically provides that a copy of the employment contract must be submitted prior to the work permit being issued and that the conditions and benefits under the employment contract must be consistent with the information in the LMO re "wages, hours of work, etc.".

[12] Many temporary foreign workers go through this process in the hopes of ultimately obtaining a more permanent status in Canada, such as permanent residency or citizenship.

[13] In 2008, Ms. Dominguez was recruited by the defendants from her home in the Philippines to be a temporary foreign worker in Canada. She initiated the

application in order to join her husband, Christopher Dominguez, who had come to Vancouver through the TFWP and who had started work for the defendants in August 2008.

[14] Like her husband, Ms. Dominguez was required to send her résumé to International Caregiver Employment Agency ("ICEA") in Richmond, B.C. to begin the process to enable her to come to Canada. By letter dated July 11, 2006, ICEA had been specifically authorized by the defendants "in all aspects as it pertains to obtaining approval for foreign workers to obtain work visas to allow them to be employed within our company". ICEA in turn operated its recruitment activities in the Philippines through Luzern International Manpower Services Corporation ("Luzern") located in Manila, describing Luzern as its "counterpart agency" on its website.

[15] The majority of the putative class members were, like Ms. Dominguez, recruited from the Philippines, through ICEA and Luzern under the TFWP. The defendants' own investigations indicate that 70 individuals falling within the proposed class definition were initially recruited by ICEA and Luzern.

[16] In August 2008, Ms. Dominguez's husband dropped off his wife's résumé at the ICEA offices in Richmond. At some point, he was advised by the general manager of ICEA that in order for his wife to obtain a job, an initial amount of $3,000 had to be paid to ICEA. This amount was paid by him to ICEA.

[17] In early October 2008, Ms. Dominguez was contacted by Luzern and told to come into the office to sign an employment contract. Prior to her signing the document, she was advised that in September 2008 a positive LMO had been issued relating to her job with the defendants as a food and beverage server at $9.80 per hour for a 24 month period. The hours of work were not specified in her LMO. In the case of other putative class members, the LMO specifically provided that the hours of work would be 40 hours per week.

[18] ICEA was very involved in the process to obtain LMOs for workers coming from the Philippines to work in the defendants' restaurants. In August 2006, on an Application for a LMO for Maria Reyes, another putative class member, ICEA

specifically signed the application as a third party representative on behalf of the defendants. The defendants in turn signed the application form and also an Appointment of Representative which identified ICEA as its representative in relation to obtaining the LMO. By this document, the defendants agreed to ratify and confirm all that ICEA should do by reason of the appointment.

[19] Ms. Dominguez signed her employment contract on October 8, 2008 at Luzern's offices in Manila. The employment contract had already been executed by the defendants. The contract was in precisely the same form as the HRSDC sample contract and provided *inter alia*:

> 4. THE EMPLOYEE shall work 40 hours per week. He/she shall receive 50% more than the regular wages for any hours worked over this limit. ...
>
> 11. THE EMPLOYER shall not recoup from the EMPLOYEE, through payroll deductions or any other means, any costs incurred in recruiting or retaining the EMPLOYEE. These include, but are not limited to, any amounts payable to a third-party recruiter.
>
> 13. THE EMPLOYER agrees to assume the cost of two-way air transportation for the EMPLOYEE between the EMPLOYEE'S country of residence and the place of work, i.e. Philippines and 8855 202 St. Langley, BC (specify country of residence and the place of work). These costs are not recoverable by the employer.
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> 19. THE EMPLOYER is obliged to abide by the standards set out in the relevant provincial labour standards act and, if applicable, the terms of any collective agreement in place. In particular, THE EMPLOYER must abide by the standards with respect to how wages are paid, how overtime is calculated, meal periods, statutory holidays, annual leave, family leave, benefits and recourse under the terms of the Act and, if relevant, collective agreement. Any terms of this contract of employment less favourable to THE EMPLOYEE than the standards stipulated in the relevant labour standards act is null and void.

[20] Many of the employment contracts of the other putative class members are exactly or virtually the same as that of Ms. Dominguez in that they contain the same or similar provisions as the provisions in the sample contract provided by HRSDC set out above.

[21] I am advised that more current contracts signed between the defendants and other temporary foreign workers now provide that the employee "shall work up to" 40

hours, as opposed to the previous contracts which provided that the employee "shall work" 40 or in some cases, 37.5 hours.

[22] Following Ms. Dominguez undergoing a medical examination, a work visa was approved. At this point, she was advised by Luzern that she would have to pay an additional $2,750 to continue with the hiring process with the defendants. She arranged to pay this amount, as with the earlier payment, to ICEA as an "agency fee".

[23] It is apparent that all of the putative class members applying for positions with the defendants through ICEA and/or Luzern were also required to pay fees in order to proceed with and complete the hiring process. The amounts paid by Ms. Dominguez were not unusual in that other putative class members who gave evidence in this proceeding, including Ms. Dominguez's husband Christopher Dominguez, paid ICEA or Luzern fees ranging from $6,000 to $7,000, depending on currency conversions.

[24] Following attendance at a pre-departure orientation seminar, Ms. Dominguez purchased her airfare for travel from the Philippines to Vancouver from Luzern at a cost of approximately US$1,000. She requested a receipt for this payment, but Luzern refused to provide one. Likewise, the evidence establishes that other putative class members paid their own airfare from their home countries to Canada.

[25] Ms. Dominguez arrived in Canada on January 26, 2009 under the TFWP. Her 24 month work permit, naming her employer as that of the defendants, naming her employment as a food and beverage server, and naming her location as Vancouver, was signed that day. The work permit contained various restrictions relating to her employment, including that Ms. Dominguez was:

1. Not authorized to work in any occupation other than stated.
2. Not authorized to work for any other employer other than stated.
3. Not authorized to work in any location other than stated.

The work permits of other putative class members contain identical restrictions.

[26] A few days after her arrival in Canada, Ms. Dominguez started working as a server at the restaurant of the defendants on Davie Street in Vancouver.

[27] Ms. Dominguez contends that the defendants did not abide by the contract relating to her employment. She says that shortly after she started work there, she was often provided with less than 40 hours of work a week, and that she was not compensated for hours she did not work despite being able to do so. She says that when she complained to her general manager about her lack of hours, she found that her hours were cut further. Accordingly, she stopped complaining.

[28] Other putative class members were also given fewer hours than indicated in their contracts of employment, being either 37.5 or 40 hours per week. In the case of Charo Salazar, the lack of hours in 2009/2010 contributed to her difficult financial situation in that her income was not sufficient to meet the requirements to qualify for permanent residency status in Canada.

[29] It is suggested by the evidence of the defendants that a lack of business resulted in a scale back of the hours to be worked, as evidenced by what appeared to be yearly memos to staff dated in January 2009, 2010 and 2011. Bobby Naicker, the President of the defendant Dencan Restaurants Inc., stated that it was his understanding that such cutbacks in hours were to be borne by the foreign workers in the first instance, rather than reducing the hours of Canadian citizens or those with permanent residency status.

[30] Ms. Dominguez also alleges that she occasionally worked over eight hours in a day. On some of these occasions she was paid overtime in accordance with her contract. On others she was not, and she believes that in some instances, these overtime hours were shifted to days when she did not work a full day so as to not trigger an obligation to pay overtime. She did not complain about missing overtime pay as she was afraid that this would result in her getting fewer hours of work yet again.

[31] Other putative class members have given evidence on this application that they were not paid for overtime in accordance with their contracts of employment.

Ms. Dominguez and other putative class members provided copies of some of their pay statements which show hours worked which would have attracted payment of overtime but which do not show any overtime being paid.

[32] There is some independent evidence that in the past, the defendants have not paid overtime in accordance with the *Employment Standards Act*, which requires that time and a half be paid (s. 40(1)(a)). In late 2010, the Director of Employment Standards began investigating the operations of the defendants in relation to complaints that overtime was not being paid. In October 2010, the Director had identified that there had been various failures to pay overtime from January to July 2010. This investigation led to overtime being paid voluntarily by the defendants.

[33] Despite these actions, the Director continued his audit of records for the month of December 2010. Arising from this later audit, the Director determined that one putative class member, Marilyn Aguinaldo, had not been paid overtime for the pay periods in December 2010, just as had other employees in six restaurants investigated. This resulted in a Determination of the Director dated June 17, 2011 that the defendants pay the required overtime for December 2010 together with substantial administrative penalties.

[34] The matter of fees charged by ICEA and/or Luzern was also the subject of an investigation by the Director of Employment Standards in mid 2010 in the context of ICEA applying for an employment agency licence under the *Employment Standards Act*. On June 3, 2011, the Director accepted the evidence of 55 temporary foreign workers, including that of Mr. and Ms. Dominguez and other putative class members, that they had paid fees to ICEA and/or Luzern. In addition, the Director found that ICEA, both directly or through Luzern, requested and charged such fees to the workers seeking employment contrary to s. 10 of the *Employment Standards Act*. ICEA's application for a licence was rejected.

[35] The defendants say that they have no knowledge of these fees paid to ICEA and/or Luzern. They deny receiving any alleged employment fees from ICEA and/or Luzern.

[36] The standard form contracts also provide that the defendants were to pay return airfare for the workers. In a Determination of the Director dated June 3, 2011, the matter of the airfare was addressed by the Employment Standards Branch. At that time, the Director found that "[i]t was understood and agreed by all parties that Denny's would be responsible for the cost of the TFWs' airfare to and from Canada". On this point, the defendants say that they agreed with ICEA that ICEA would purchase the airfare for their recruits and that ICEA was to subsequently bill them for this. The defendants further say that they expected to be billed in due course and that they requested this invoicing on "several occasions", although no documents or written requests were produced by either the defendants or ICEA in that respect.

[37] I find it extremely odd that, as the defendants well knew, some 70 people were recruited by ICEA for the defendants over many years and yet at no time did ICEA bill the defendants for the airfare amounts that must necessarily have been incurred by ICEA. Despite this state of affairs, the defendants never appear to have made any real efforts to follow up in this respect to ensure that the terms of employment (i.e. the HRSDC standard clause that requires the employer to pay for airfare to Canada of the temporary foreign workers) were being met.

[38] Ms. Dominguez also addressed in her evidence what other options she considered beyond this class action proceeding. She says that she has insufficient resources to commence even a small claims court action.

[39] One of the issues that will be addressed under the preferability requirement is the defendants' contention that she should have registered her complaints with the Employment Standards Branch. In reply, Ms. Dominguez says that she was afraid to bring a complaint against the defendants with the Employment Standards Branch given the experience of another putative class member. That member, Alfredo Sales, had complained to the defendants in mid 2010 about not being paid overtime and about not being reimbursed for the agency fees and airfare costs. He subsequently filed a complaint against the defendants with the Employment Standards Branch in mid August 2010. A week after filing that complaint, Mr. Sales' employment was terminated by the defendants. Mr. Sales then filed a further

complaint under s. 83 of the *Employment Standards Act*, alleging that his termination by the defendants was in retaliation for bringing his first complaint.

[40] Upon investigation, the Employment Standards Branch found that Mr. Sales' claim in respect of the agency fees was out of time given the six month limitation under the *Employment Standards Act*. The issues relating to overtime and the airfare were settled directly between the parties in November 2010. Mr. Sales' retaliation complaint was upheld by the Director of Employment Standards in a Determination dated April 29, 2011 by which the defendants were ordered to pay the sum of $7,255.39 which included lost wages and interest, and an administrative penalty amount of $500.

[41] Another putative class member, Ms. Salazar, stated that she was afraid of getting involved in this lawsuit and that others were too because they didn't want to get fired like Mr. Sales.

[42] Ms. Dominguez also states that she was unaware of her legal rights under the *Employment Standards Act* until well after six months from her arrival in Canada, which would defeat any claim under that *Act* for the agency fees and airfare costs and also for wages for most of her employment as may be owed at this time.

[43] Just prior to the expiration of her work permit with the defendants, Ms. Dominguez obtained another work visa that allows her to stay in Canada working for another employer. Her husband remains employed by the defendants under his work permit which expires in May 2012.

[44] Ms. Dominguez filed this action on January 7, 2011.

[45] Immediately following the commencement of this action, representatives of the defendants began contacting Ms. Dominguez and various other putative class members, such as Ryan Del Rosario, Leo Baduria and Joey Nicandro, to discuss the litigation. A number of these class members felt threatened and intimidated by this contact. In at least one instance – relating to Mr. Nicandro – in the context of negotiations relating to renewing his employment, the defendants sought an

acknowledgment that no payments had been made by him as a condition of employment when in fact, he had made those payments.

[46] On the defendants' part, Mr. Naicker quite properly says that this litigation poses unique challenges for the parties in that the defendants and its employees continue to deal with each other on a day to day basis in the course of the employment of the temporary foreign workers. He indicated that, in fact, a number of the employees had approached management to express concern about how the litigation may affect them or alternatively, complain about contact from Ms. Dominguez regarding this litigation. He also indicates that in respect of Mr. Nicandro, there was no intent to release the defendants from the claims in this action through those efforts and that the acknowledgment sought only related to his prospective employment offer.

[47] Issues arising from these interactions between the parties were resolved through a Consent Order dated April 19, 2011 which governs the basis upon which the defendants and the class members may discuss the matter and address the issues. At the hearing, I was not advised that there were any remaining or outstanding communication issues arising between the parties. In light of the Consent Order and a provision in that order that there will be no repercussions against the workers if they join these proceedings, Ms. Salazar now indicates that she is no longer afraid despite the experience of Mr. Sales.

[48] In any event, the defendants have taken steps to address some of the issues raised in this litigation.

[49] In early 2011, HRSDC commenced a review of the defendants' compliance with the terms of employment as set out in the LMOs. In March 2011, the defendants committed in writing to HRSDC to repay various putative class members their one way airfare costs. On April 21, 2011, HRSDC indicated in a letter that they were satisfied that the defendants had taken certain corrective measures, including payment of wages as per the employment contracts and LMOs, repayment of

transportation costs to Canada and a commitment to pay transportation costs for a worker's return to their country of residence.

[50] On August 10, 2011, the defendants forwarded letters to the 75 putative class members (being 70 people termed as "ICEA Recruits" and 5 people termed "Other Foreign Recruits" by the defendants). In that letter, the defendants asked those persons to confirm whether they paid their own airfare to Canada and if so, the defendants have offered to reimburse them for that cost. If no receipts are available, the defendants have offered to pay the average cost effective at the time of travel. The defendants have also offered to pay for any return airfare. As of August 24, 2011, 15 people had been reimbursed for airfare to Canada and in some cases, from Canada to their home country.

[51] Accordingly, the defendants state that they are in the process of complying with the HRSDC directive regarding reimbursing airfare costs, however, the matter is complicated by the lack of invoices from the workers. They say that they are prepared to do so without the need for further legal action.

Discussion

General Principles

[52] As a starting point, counsel for Ms. Dominguez refers to various authorities which set out the principles upon which the application is to be considered. The defendants do not dispute that these principles apply.

[53] In *Endean v. Canadian Red Cross Society* (1997), 36 B.C.L.R. (3d) 350 (S.C.), rev'd on other grounds (1998), 48 B.C.L.R. (3d) 90 (C.A.), the Court stated the object of the *Act* was as follows:

> [58] ... the object of the *Act* is not to provide perfect justice, but to provide a "fair and efficient resolution" of the common issues. It is a remedial, procedural statute and should be interpreted liberally to give effect to its purpose. It sets out very flexible procedures and clothes the court with broad discretion to ensure that justice is done to all parties.

[54] The Supreme Court of Canada in *Hollick v. Toronto (City)*, 2001 SCC 68 also makes clear that the *Act* is to be construed generously (para. 14). In addition, the Court set out the three objectives and advantages of class proceedings which are important to keep in mind at the certification stage:

> [15] …. First, by aggregating similar individual actions, class actions serve judicial economy by avoiding unnecessary duplication in fact-finding and legal analysis. Second, by distributing fixed litigation costs amongst a large number of class members, class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own. Third, class actions serve efficiency and justice by ensuring that actual and potential wrongdoers modify their behavior to take full account of the harm they are causing, or might cause, to the public.... In my view, it is essential therefore that courts not take an overly restrictive approach to the legislation, but rather interpret the Act in a way that gives full effect to the benefits foreseen by the drafters.
>
> [Emphasis added.]

[55] The Court is not to assess the merits of the claims at a certification hearing; rather, the focus is on the procedural aspects towards determining whether the matter should proceed as a class action or not: *Hollick* at para. 16.

[56] Finally, the plaintiff representative must show some "basis in fact" for each of the requirements under the *Act*, other than that the pleadings disclose a cause of action. This burden has been described as not "onerous": *Hollick* at paras. 21 and 25. In contrast, if the defendants introduce evidence to challenge any of the certification requirements, it must be shown that there is no basis in the evidence for the facts asserted by the plaintiff: *Lambert v. Guidant Corp*. (2009), 72 C.P.C. (6th) 120 at para. 68 (Ont. Sup. Ct. J.); and *Stanway v. Wyeth Canada Inc*., 2011 BCSC 1057 at para. 9.

[57] The British Columbia Court of Appeal, in *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 at para. 64, leave to appeal to S.C.C. refused, [2010] S.C.C.A. No. 32, has fully endorsed that the *Act* is to be construed generously in order to achieve its objectives.

[58] The onus of satisfying the requirements for certification under s. 4 of the *Act* rests on Ms. Dominguez: *Hollick* at para. 25. Assuming that all requirements are met, the Court must certify the proceedings: *Act*, s. 4(1).

[59] The defendants take issue with Ms. Dominguez having met the requirements of ss. 4(1)(c), (d) and (e) of the *Act* relating to her ability to represent the subclass, the existence of common issues and whether the *Act* is the preferable procedure. However, for the sake of completeness, I will briefly address the other requirements.

Do the pleadings disclose causes of action?

[60] Ms. Dominguez bears the burden of showing that a cause of action has been properly pled as required by s. 4(1)(a) of the *Act*. This burden has been described as a very low one: *Brogaard v. Canada (Attorney General)*, 2002 BCSC 1149 at paras. 30-33.

[61] There is no contest between the parties in that the Notice of Civil Claim discloses causes of action and that those causes of action have been properly pled. Those causes of action include:

a) agency: that ICEA and Luzern were acting as agents of the defendants and that the defendants are 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;

b) breach of contract: that the contracts between the parties contained express or implied terms in respect of the agency fees, airfare reimbursement, hours of employment and overtime and that those obligations were breached. Breach of duty of good faith and fair dealing is not pled as an independent cause of action, but rather as part of the contractual relationship between the parties whereby the defendants were required to honour their contractual and statutory obligations to their employees, citing *Fulawka v. Bank of Nova Scotia*,

2010 ONSC 1148 (Sup. Ct. J.), aff'd 2011 ONSC 530 (Sup. Ct. J. Div. Ct.);

c) breach of fiduciary duty: that the putative class members were owed an *ad hoc* fiduciary duty, citing *Galambos v. Perez*, 2009 SCC 48 and *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24. Further, Ms. Dominguez cites *Mustaji v. Tjin* (1995), 24 C.C.L.T. (2d) 191 (B.C.S.C.), aff'd 25 B.C.L.R. (3d) 220 (C.A.), in support of her contention that this duty arose in the context of her employment and given the requirements of the TFWP such that these foreign workers were particularly vulnerable to the employment practices of the defendants; and

d) unjust enrichment: all three elements (enrichment, deprivation and absence of juristic reason) have been pled: *Garland v. Consumers' Gas Co.*, 2004 SCC 25.

[62] All of these allegations are said to arise from the shared experience of the putative class members arising from their employment with the defendants. Ms. Dominguez seeks various relief in respect of those causes of action, which is also consistent with the causes of action pled.

[63] I conclude that the Notice of Civil Claim discloses causes of action, as required by the *Act*.

Is there an identifiable class of 2 or more persons?

[64] Section 4(1)(b) provides that there must be "an identifiable class of 2 or more persons".

[65] Based on investigations completed to date by both Ms. Dominguez and the defendants, various putative class members have been identified. Other than Ms. Dominguez, other employees of the defendants have presented evidence on this application who are in substantially the same situation as Ms. Dominguez, including Ms. Reyes, Mr. Del Rosario, Mr. Dominguez, Mr. Baduria and Mr. Nicandro.

[66] In particular, the records of the defendants indicate that 70 individuals, who were or currently are employed by the defendants, were initially recruited by ICEA and Luzern from December 1, 2006 onwards (termed as "ICEA Recruits" by the defendants). Of those people, 55 are still employed by the defendants, five have left the country and ten others have stopped working for the defendants and may still be present in Canada. There are five other recruits, from India, Fiji, Mexico and Sri Lanka, all of whom remain employed by the defendants (termed as "Other Foreign Recruits" by the defendants).

[67] The total putative class members will therefore be approximately 75 people, both residing in British Columbia and elsewhere.

[68] During the course of the hearing, the proposed class definitions were clarified by Ms. Dominguez's counsel as follows:

> **Class A**
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> All current and former employees of the Defendants in British Columbia for whom there is a positive Labour market Opinion which allowed them to work in Canada under the Temporary Foreign Worker Program, on and after December 1, 2006 to the opt-out/opt-in date set by the court. ("Class" or "Class Members")
>
> **Class B**
>
> All current and former employees of the Defendants in British Columbia for whom there is a positive Labour market Opinion which allowed them to work in Canada under the Temporary Foreign Worker Program, on and after December 1, 2006 to the opt-out/opt-in date set by the court and who are no longer resident in British Columbia. ("Non-Resident Class" or "Non-Resident Class Members")

[69] I conclude that there is an identifiable class of 2 or more persons, as required by s. 4(1)(b) of the *Act*.

Is Ms. Dominguez an appropriate representative of the non-resident putative class members?

[70] One of the requirements under the *Act* is that there must be a representative plaintiff for any class. Section 4(1)(e) provides that this representative plaintiff must be a person 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.

[71] Ms. Dominquez proposes that she act as the representative plaintiff for the class. She indicates that she is Filipino, just as are the majority of the class members, and that her ability to interact within the tight knit Filipino community will assist her in her duties. She is fluent in both English and Tagalog, the native Filipino language.

[72] Ms. Dominguez indicates that she has already participated in significant steps in the action after initially retaining counsel, including preparing the Notice of Civil Claim and her affidavit in support of the certification application. She has become familiar with the normal pre-trial procedures that would be necessary to go forward in the litigation and is prepared to participate as required. She has also already taken steps to advise putative class members of the proceedings and to direct them to the available resources in respect of the litigation.

[73] In the circumstances, I am satisfied that Ms. Dominguez is in a position to fairly and adequately represent the interests of the class.

[74] Sections 6(1) and 8(2) are provisions in the *Act* which allow certification only upon the appointment of a representative plaintiff for subclasses where there are common issues not shared by all the class members. The rationale for separate representation is set out in s. 6(1) which states that it is to protect the interests of the subclass members. In this case, since the putative class members will no doubt reside in British Columbia and also outside British Columbia, a subclass for non-residents is mandated by the *Act*: s. 6(2).

[75] Ms. Dominguez also proposes that she be the representative plaintiff for not only the resident class, Class A, but also the non-resident subclass, Class B.

[76] She relies on *Pearson v. Boliden Ltd.*, 2001 BCSC 1054, varied on other grounds, 2002 BCCA 624. In that case, Mr. Justice Burnyeat certified the class and various non-resident classes. One of the issues addressed was whether certification could occur only if different representative plaintiffs were appointed for each subclass. The Court held that it was not necessary to do so at the stage of certification where the representative plaintiff could "fairly and adequately represent the interests" of all subclasses:

> [73] I am satisfied that this was not what was intended by either s.6(1) or s.8(2) of the *Act*. Rather, I am satisfied that the intent of those two subsections is to prohibit any part of the proceeding as a class proceeding unless each of the subclasses has a representative plaintiff who can "fairly and adequately represent the interests of the subclass" and who does not have "on the common issues for the subclass, an interest that is in conflict with the interest of other subclass members." I am satisfied that it is not necessary for a separate representative plaintiff to be in place before each of the subclasses is established. The "representative plaintiff" who can "fairly and adequately represent the interest of the subclass" at this stage can be a person who is the same person as the "representative plaintiff for the class".

[77] The defendants contend that while the Court may appoint a person who is not a member of the class as a representative plaintiff, the Court may only do so on the authority of s. 2(4) of the *Act* which provides:

> The court may certify a person who is not a member of the class as the representative plaintiff for the class proceeding only if it is necessary to do so in order to avoid a substantial injustice to the class.

[78] The defendants also point to s. 16(4) of the *Act* which provides that a non-resident may not opt into a class proceeding unless the subclass has a representative plaintiff in accordance with s. 6(1) of the *Act*.

[79] The defendants rely on *L. (T.) v. Alberta (Director of Child Welfare)*, 2009 ABQB 96 at paras. 6-16. I note, however, that in that case, the Court was addressing the issue *following* certification and during the process of preparing the Notice of Certification. At para. 13, the Court expressly acknowledged that it was not always necessary to appoint a representative for a subclass. The Court expressed the view that, given the present stage of that litigation, it was necessary at that time for the non-resident subclass to have its own representative plaintiff, in

accordance with the equivalent Alberta section of s. 16(4) of the *Act*: para. 14. Only at that time was a separate representative to be appointed failing a finding of substantial injustice based on evidence presented.

[80] I do not see the ratios in *L. (T.)* and *Pearson* to be at odds with each other. Both cases note that the discretion remains with the Court to allow a single representative plaintiff who meets the requirements of s. 4(1)(e) for all classes at this stage of the proceedings, if that is appropriate.

[81] It seems to make eminent sense to me that Ms. Dominguez is in the best position at this time to represent both the class and subclass given her knowledge of the issues and her involvement to date. The issues, to the extent that they are common issues, relate to all class members based on the dealings between the defendants and the putative class members while they were resident here in British Columbia. The fact that some of them may have changed their residence does not stand as a legal distinction that will dictate a difference in approach as between the class members at this time: *T. (L.)* at para. 14. In other words, the common issues here are shared by all class members, including the subclass, and separate representation is not required at this stage: *Act*, s. 6(1).

[82] In that respect, I adopt the approach of Burnyeat J. in *Pearson*.

[83] The only reason for the subclass is to meet the technical requirements of the *Act*. If, following any certification, it appears that Ms. Dominguez is no longer fairly and adequately representing the interests of the subclass, or if a conflict develops between the class and the subclass, then measures can be taken to replace her in respect of the subclass. Until or if that occurs, I am satisfied that Ms. Dominguez is the appropriate representative plaintiff for the subclass at this time.

[84] If certification does occur, I will expect that measures will be taken before the next court hearing to substitute and appoint a member of the subclass as the representative plaintiff for the subclass: *Gregg v. Freightliner Ltd. (c.o.b. Western Star Trucks)*, 2003 BCSC 241 at para. 108. That is subject, of course, to Ms. Dominguez seeking to continue in that role and provided that she produces sufficient

evidence upon which the Court can find that it is necessary to do so to avoid "substantial injustice", as intended by s. 2(4) of the *Act*.

[85] Accordingly, I am satisfied that Ms. Dominguez has satisfied the requirements of s. 4(1)(e) of the *Act* at this time.

Are there common issues?

[86] The next issue in this proceeding is whether the claims of the class members raise "common issues, whether or not those common issues predominate over issues affecting only individual members": *Act*, s. 4(1)(c).

[87] "Common issues" are defined in s. 1 of the *Act* as:

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

[88] Section 7 of the *Act* provides:

> **Certain matters not bar to certification**
>
> 7 The court must not refuse to certify a proceeding as a class proceeding merely because of one or more of the following:
>
> (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;
>
> (c) different remedies are sought for different class members;
>
> (d) the number of class members or the identity of each class member is not known;
>
> (e) the class includes a subclass whose members have claims that raise common issues not shared by all class members.

[89] Ms. Dominguez refers to various authorities which discuss the general principles adopted by the courts in deciding this issue, including *Riazi v. Vancouver School District No. 39*, 2011 BCSC 407 at paras. 41-45; *Stanway* at paras. 39-42; and *Harrington v. Dow Corning Corp.*, 2000 BCCA 605 at paras. 23-24, leave to appeal to S.C.C. refused, [2001] S.C.C.A. No. 21.

[90] As stated by this Court in *Vasquez v. United Steel Workers of America, Local No. 1-3567*, 2006 BCSC 1399 at para. 61, quoting *Endean* at para. 40, the focus at this stage of the inquiry is on the question and not its answer and the "possibility that the question will be answered differently for some members of the class does not diminish the commonality of the question".

[91] The underlying focus is whether certification of the common issues will avoid duplication of fact-finding or legal analysis. It has also been stated that the Court must consider whether there are common issues that can be resolved in a fair, efficient and manageable way that will advance the proceeding: *Riazi* at para. 24.

[92] The issue will be "common" in the sense that the issue is a "substantial ingredient" of each of the class members' claims: *Hollick* at para. 18. Of particular importance in the context of this requirement of a "substantial ingredient" are the comments from para. 53 in *Cloud v. Canada (Attorney General)* (2004), 247 D.L.R. (4th) 667 (Ont. C.A.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 50:

> [53] In other words, an issue can constitute a substantial ingredient of the claims and satisfy s. 5(1)(c) even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. In such a case the task posed by s. 5(1)(c) is to test whether there are aspects of the case that meet the commonality requirement rather than to elucidate the various individual issues which may remain after the common trial. This is consistent with the positive approach to the CPA urged by the Supreme Court as the way to best realize the benefits of that legislation as foreseen by its drafters.

[93] The approach adopted in *Cloud* was recently cited with approval in *Halvorson v. British Columbia (Medical Services Commission)*, 2010 BCCA 267.

[94] Finally, it must be kept in mind that the question of whether the individual issues predominate over the common issues is not a relevant consideration under s. 4(1)(c) of the *Act*: *Endean* at para. 35; *Vasquez* at para. 62; *Riazi* at para. 45.

[95] The proposed common issues are extensive and include issues relating to agency, breach of contract (including breach of duty of good faith and fair dealing), breach of fiduciary duty and unjust enrichment. The proposed common issues also

include those relating to appropriate remedies, if liability is found on the part of the defendants.

[96] In broad terms, the defendants say that there are no common issues in that firstly, the issues will require a consideration of the facts of each employee's particular situation and secondly, while the issues postulated may be common in the abstract, they do not advance the case sufficiently to justify certification in that they are preliminary only and do not lie at the heart of the claim. They point out that the Court must ensure that the issue is truly common, as opposed to being drafted in a way so as to appear to be common: *Mackinnon v. National Money Mart Company*, 2005 BCSC 271 at para. 11.

[97] For ease of convenience, the proposed common issues are reproduced in Schedule "A" to these reasons. I will deal with each of them separately below.

(i) Agency

[98] Ms. Dominguez alleges that ICEA and Luzern were agents of the defendants, having the express, implied or apparent authority to arrange or facilitate her employment with and on behalf of the defendants. She further says that as such, the defendants are liable for the actions of their agents in charging and receiving employment fees.

[99] Evidence has been presented which supports the contention that ICEA and Luzern were in fact acting on behalf of the defendants in recruiting the temporary foreign workers from the Philippines. This would include approximately 70 people from the putative class. This evidence includes Mr. and Ms. Dominguez's affidavits, the affidavits of other employees presented on this application and documentation from the Employment Standards Division offices.

[100] In a letter dated July 11, 1996, Mr. Naicker on behalf of the defendants wrote to ICEA stating that ICEA and its employees were authorized to work on behalf of the defendants "in all aspects as it pertains to obtaining approval for foreign workers to obtain work visa to allow them to be employed within our company". Documents

also confirm that ICEA was authorized by the defendants to obtain the LMOs through HRSDC.

[101] Ms. Dominguez primarily argues that express authority can be found in the documentation and dealings between ICEA and Luzern and the defendants: F.M.B. Reynolds, *Bowstead and Reynolds on Agency*, 18th ed. (London, UK: Sweet and Maxwell Ltd., 2006) at 105-106. According to this authority, agency, based on express authority, may exist whether or not a person dealing with the agent has knowledge of that agency.

[102] The defendants suggest, although they have not yet filed any statement of defence, that ICEA and Luzern were not authorized to charge fees in contravention of the *Employment Standards Act*. They further say that four conditions must be satisfied before any such contract may be enforced where there is no actual authority and that in particular, most relevant to this claim, Ms. Dominguez must prove that she was induced by a representation to enter into the contract: *Freeman & Lockyear v. Buckhurst Park Properties (Mangal) Ltd.*, [1964] 1 All E.R. 630 at 646 (C.A.). As such, they say that any claim of agency will require an individual assessment of each class member's experience in dealing with ICEA and Luzern.

[103] The application of the concept of ostensible or apparent authority can result in a principal being bound by any unauthorized acts of its agent. With respect to ostensible or apparent authority, Ms. Dominguez relies on the principles in *Thiessen v. Clarica Life Insurance Co.*, 2002 BCCA 501 at paras. 31-33, leave to appeal to S.C.C. refused, [2002] S.C.C.A. No. 454, which sets out an objective test. While the Court would not necessarily ignore the perspective of the employee in determining that issue, that analysis can consider the perspective of the "customer" in a general sense and does not require a detailed examination of each employee's dealings with ICEA and Luzern.

[104] In *Carom v. Bre-X Minerals Ltd.* (2000), 196 D.L.R. (4th) 344 (Ont. C.A.), the Court found that a claim for negligent misrepresentation involving agents was properly certified where the common issues related to the defendant's knowledge

and conduct, which represented two of the five components of that tort. Similarly in this case, the focus would be on the dealings between the defendants and ICEA and Luzern.

[105] The defendants rely on *Gary Jackson Holdings Ltd. v. Eden*, 2010 BCSC 273 at paras. 65, 67-68, where the defences raised issues concerning whether the plaintiffs gave actual or ostensible authority and as such, evidence of the individual plaintiffs would be required. I note, however, that the Court did consider that there were common issues, but ultimately decided that certification was not a preferable procedure in light of these defences.

[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.

[107] A similar result was reached in *Cooper v. Merrill Lynch Canada Inc*., 2006 BCSC 1905 at paras. 54-56, where the Court considered that the nature of the relationship between the defendant and the class members, including issues of agency and consideration of written agreements, were proper common issues.

[108] I consider that in all the circumstances, the agency issues are common issues. It will be an irrelevant consideration to those in the class who did not deal with ICEA and/or Luzern in that the answer to the question of liability based on agency from their perspective will inevitably be "no".

(ii) Breach of Contract, including Duty of Good Faith and Fair Dealing

[109] The principal allegation in this action is that the defendants are in breach of the employment contracts with the putative class members. There is no doubt that there are separate contracts with each class member, although s. 7(b) of the *Act* states that a Court must not refuse to certify a proceeding as a class proceeding merely because "the relief claimed relates to separate contracts involving different class members".

[110] Ms. Dominguez's contract is directly modeled after the HRSDC sample employment contract. In that contract, the four terms that are the subject of this litigation are set out in paragraph 19 of these reasons, as they relate to hours of work to be performed, payment of overtime, the nonpayment of recruiting fees and the reimbursement of return airfare.

[111] The formulation of the class, to the extent that all class members must have obtained a positive LMO, necessarily means that there will be a written contract in existence for each of the putative class members since such a contract was a requirement before any LMO could be issued.

[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.

[113] Nevertheless, the following is apparent:

a) 63 of these contracts contain all four terms identical to the HRSDC contract and of course, Ms. Dominguez's contract. They only differ in respect of term (1 or 2 years) and number of hours (40 or 37.5 per week);

b) 4 of these contracts pre-date the HRSDC standard form contract but include a provision relating to payment of overtime. These are the same form of contract as the initial contract of Ms. Reyes although in her case, it was later renewed using the HRSDC standard form contract. People who held these contracts still work for the defendants and presumably have renewal contracts in place;

c) 1 of these contracts includes the same provisions regarding working 40 hours per week and that return airfare is to be paid by the defendants;

d) 2 of these contracts related to employment in Alberta and as such, are irrelevant to this action; and

e) 5 of these contracts are renewal contracts entered into after service of the Notice of Civil Claim on the defendants. These contracts in some instances now say that the hours of work are "up to" 40 hours and that return airfare compensation is included. In three cases, airfare is expressly excluded. All of these contracts do, however, provide that the defendants shall not recoup any recruitment costs, but presumably that is of little concern given that these employees are already in Canada and still employed by the defendants.

[114] Ms. Dominguez relies on a number of certification cases involving allegations of breach of contract.

[115] In *Scott v. TD Waterhouse Investor Services (Canada) Inc.*, 2001 BCSC 1299, the Court approved the certification of certain common issues related to the interpretation of a standard form contract relating to the setting of foreign exchange rates. The common issue certified was the nature of the relationship between the parties and a determination of the express or implied terms of the contract.

[116] In *Scott*, the Court rejected the defendants' argument that the contractual obligations could only be considered by looking at the documentation and

considering the dealings, including oral dealings, between the firm and the clients on a case-by-case basis:

> [95] The defendants do not dispute the fact that they acted as broker for each class member to process the class member's securities transactions for a fee. They do not deny that there was a basic agreement as described above in the "Identifiable Class" analysis. What the defendants do say is that the contractual obligations of their many thousands of clients are not common, but rather must be determined on a client-by-client basis.
>
> [96] Even if that is so, the first step in determining their contractual obligations to each class member is to determine what rights and obligations flow from the basic agreement. Only then will it be necessary to determine whether those rights and obligations are modified in some way in individual instances.

[117] Issues concerning the interpretation of a standard form contract and whether it was breached were held to be common issues in *Glover v. Toronto (City)* (2009), 70 C.P.C. (6th) 303 at paras. 51-52, 61 (Sup. Ct. J.).

[118] Recently, Chief Justice Finch in *Lam v. University of British Columbia*, 2010 BCCA 325, considered that the resolution of the interpretation of a standard form contract did not require consideration of individual circumstances and would materially advance the litigation: paras. 55-60.

[119] In the franchise context, the courts have also found common issues relating to the conduct of franchisors where there are standard franchise agreements. In *Rosedale Motors Inc. v. Petro-Canada Inc.*, [2001] O.J. No. 5368 (Sup. Ct. J. Div. Ct.), the Court found at para. 6 that there was a “common issue, not dependent on the conduct of the individual franchisees, as to whether Petro-Canada breached its contractual obligations under the standard franchise agreements with class members to provide infrastructure and support for the System.” In the Ontario Divisional Court decision of *2038724 Ontario Ltd. v. Quizno’s – Canada Restaurant Corp.* (2009), 96 O.R. (3d) 252 at paras. 90-93 (Sup. Ct. J. Div. Ct.), aff’d 2010 ONCA 466, the Court found that significant issues that could advance the litigation included the meaning of provisions of the franchise agreement, the existence and nature of common law duties of fairness and whether the franchise agreements were breached.

[120] In *Kumar v. Sharp Business Forms Inc.*, the Court certified a class action relating to the determination of overtime, holiday and vacation pay pursuant to the Ontario legislation under certain employment contracts. The Court commented:

> [35] The determination as to what the terms of a contract are is governed by an objective test. That is, what would the reasonable employee working for this employer have understood the terms of the contract to be in respect of overtime pay, statutory pay and vacation pay? …

[121] Finally, Ms. Dominguez relies on certain cases where the Court certified issues relating to a determination of both express and implied terms of a contract: see *Fulawka*, which, following *Glover*, found that common issues relating to implied terms could be certified as they did not depend on the knowledge, understanding or circumstances of each class member; and *Cooper*, where implied terms in the context of an agency relationship were certified as common issues at paras. 57-60.

[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.

[123] Firstly, they say that every employee of the defendants was given a Handbook and that every employee signs the back of the Handbook as evidence of having received it. It is not clear from the evidence that this was intended to form the basis for the contractual relationship between the parties, although the signature page indicates that the employee "understands it is my responsibility to read and abide by its contents". In addition, this signing of the Handbook appears to have taken place after the employees arrived in Canada and commenced working.

[124] I note in any event that in relation to the issues arising from the HRSDC contract, the Handbook does not deal with agency fees or return airfare. The Handbook does not address overtime pay save for providing that any overtime must be approved by a manager. Finally, in relation to hours to be worked, the Handbook states that the work week runs from Thursday to Wednesday, but there is no provision that contradicts the provisions in the employment contracts that the

employee shall work 40 or 37.5 hours per week. As such, on the face of it, the Handbook does not alter the four basic terms which are the subject of the lawsuit.

[125] Ms. Dominguez points out that since the LMO was obtained on the basis of the contract signed by the parties and submitted to HRSDC, the defendants could not amend or alter that contract. This appears to be a very arguable point given the LMO procedures and the expressly stated intent of HRSDC in requiring the contracts be in place before any LMO is issued.

[126] In my view, since by the defendants' own evidence the Handbook was signed by each and every employee, the determination of the terms of employment between the defendants and the putative class members can also include a consideration of whether it was accepted by all employees as a term of the employment contract: *Ellison v. Burnaby Hospital Society* (1992), 42 C.C.E.L. 239 at para. 11 (B.C.S.C.). The existence of the Handbook does not require individual evaluation as contended by the defendants.

[127] The defendants also rely on *Kafka v. Allstate Insurance Co. of Canada*, 2011 ONSC 2305, where the Court refused to certify a wrongful dismissal case. In that case, however, the Court, at paras. 153 and 158 drew a distinction between focussing on the terms of employment versus focussing on whether any changes were fundamental, the latter issue having been found to lack commonality. I do not see this case as helpful to the argument of the defendants.

[128] Secondly, the defendants take the position that there were oral variations of the contracts. They say that in some instances, when their business had slowed down, they renegotiated many contracts to allow for fewer hours rather than terminate the contracts of the employees. As such, there was adequate consideration in the form of forbearance from termination: *Watson v. Moore Corporation Ltd*. (1996), 134 D.L.R. (4th) 252 (B.C.C.A.). There is no detail regarding how many renegotiations took place in terms of determining how widespread this practice may have been.

[129] In reply, Ms. Dominguez contends that modifying a contract based on a threat of termination is not permitted. In *Krieser v. Active Chemicals Ltd*., 2005 BCSC 1370, Neilson J. (as she then was) stated:

> [29] *Watson* makes it clear that continuing employment alone is not enough. The Court found that there must be forbearance or some other incentive to constitute good consideration. In *Singh v. Empire Life Insurance Co.* (2002), 4 B.C.L.R. (4th) 38, 2002 BCCA 452, the Court at para. 13 affirmed the views of the Ontario Court of Appeal in *Francis v. Canadian Imperial Bank of Commerce* (1994), 21 O.R. (3d) 75 (C.A.), that a modification to a pre-existing employment contract will not be enforced unless there is a further benefit to both parties.
>
> [30] The Ontario Court of Appeal expressed this even more strongly in *Hobbs v. TDI Canada Ltd.* (2004), 246 D.L.R. (4th) 43 at para. 32:
>
> > Francis makes it clear the law does not permit employers to present employees with changed terms of employment, threaten to fire them if they do not agree to them, and then rely on the continued employment relationship as the consideration for the new terms.
>
> [31] In *Techform Products v. Wolda* (2001), 56 O.R. (3d) 1 (Ont. C.A.), Rosenberg J.A. expressed a similar view at para. 26:
>
> > Where there is no clear prior intention to terminate that the employer sets aside, and no promise to refrain from discharging for any period after signing the amendment, it is very difficult to see anything of value flowing to the employee in return for his signature. The employer cannot, out of the blue, simply present the employee with an amendment to the employment contract say, "sign or you'll be fired" and expect a binding contractual amendment to result without at least an implicit promise of reasonable forbearance for some period of time thereafter.
>
> [32] These statements convince me that it is not enough for the defendant to simply establish that it intended to dismiss the plaintiff if he refused to sign the Contract. Some additional benefit must flow to the plaintiff from signing, beyond continued employment for an unknown period. That benefit might be greater security of employment through forbearance for a specified time, or it might be a new term beneficial to the employee in the revised agreement, but adequate consideration requires something more than the bald promise that "we won't fire you right now".

[130] This contention has not been formalized in the pleadings, since the defendants have not filed any statement of defence, which appears to be the practice in this jurisdiction prior to certification. Nevertheless, it is not proper to speculate what any such plea might be. Given the state of the pleadings, I must deal with the claim as presented in terms of considering whether the evidence establishes that there are "common issues": *Mortson v. Ontario (Municipal*

Employees Retirement Board) (2004), 4 C.P.C. (6th) 115 at para. 65 (Ont. Sup. Ct. J.).

[131] In any event, I accept the position of Ms. Dominguez that even if any renegotiations took place, the issues concerning the interpretation of the contracts remains. I do accept that any evidence of such renegotiations makes the task of the Court more difficult in terms of determining whether there was a breach of the contract. However, if any such evidence is presented, the Court may consider the evidence at that stage and decide how best to proceed. It may be that decertification in respect of those contracts may be appropriate at that time. The allegations of renegotiation relate only to the number of hours worked and do not appear to relate to overtime, payment of airfare or payment of agency fees such that this issue may relate to only one of the four major allegations.

[132] Thirdly, the defendants say that a number of factors affected the time spent by employees at work: (a) the contracts provided for different terms as to the hours to be worked, (b) the employees imposed different restrictions on their availability to work after execution of the contracts and (c) the overtime issue depends on whether it was authorized by management (the defendants contend that such authorization was required), all of which point to individual assessments on the issues relating to hours worked and overtime.

[133] It is apparent that the employment records of the defendants will be available to the Court for the purpose of calculating the numbers of hours spent or overtime hours spent. This can be easily compared to the terms of the contracts as to what hours, if any, were agreed to be worked. In addition, a calculation as to whether overtime was owed and if so, paid should readily be available from those records. It is also apparent from the defendants' own employment records that any reasons for an employee's absence from work (such as for sickness, family issues, medical appointments, moving dates and the like) are noted and will be available to the Court. Mr. Naicker points this out not so much from the contention that it detracts from a finding that there is a common issue, but that statistical sampling should not

be required. That may be the case, but at this stage, no determination has yet been made that that method of damage assessment is appropriate.

[134] As for the overtime, the evidence of Ms. Dominguez and the other employees is not that their hours were not recorded to reflect overtime hours, but that they were not paid extra for those hours in accordance with the contract or the statutory requirements. There was also the suggestion by Ms. Dominguez that her overtime hours were shifted to another day. In addition, at no time does Mr. Naicker suggest that the records do not contain evidence of when overtime was approved by management, if the Court should find that such approval was required in the case of these employees.

[135] I note in any event the comments of the Court in *Fulawka* (Ont. Sup. Ct. J.), to the effect that the duty of good faith could include taking active measures to ensure that employees are not required or permitted to work overtime or that overtime be paid for whether it was approved in advance or not: paras. 78-79.

[136] The defendants have referred to a number of cases which they say point to an assessment of contractual breaches on an individual basis. These include: *Mouhteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 at 69-71 (Ct. J. (Gen. Div.)); *McKay v. CDI Career Development Institutes Ltd.* (1999), 64 B.C.L.R. (3d) 386 at paras. 24-35 (S.C.); *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54 (Sup. Ct. J.), aff'd (2001), 152 O.A.C. 344 (Sup. Ct. J. Div. Ct.), aff'd *Kumar v. Mutual Life Assurance Co. of Canada* (2003), 226 D.L.R. (4th) 112 at paras. 46-48 (Ont. C.A.) and *Zicherman v. Equitable Life Insurance Co. of Canada* (2003), 226 D.L.R. (4th) 131 (Ont. C.A.); *Lacroix v. C.M.H.C.* (2009), 68 C.P.C. (6th) 111 at paras. 102-103 (Ont. Sup. Ct. J.); *Nadolny v. Peel (Region)* (2009), 78 C.P.C. (6th) 252 at paras. 49-50 and 83-85 (Ont. Sup. Ct. J.); *Davis v. Canada*, 2007 NLTD 25 at paras. 93-95; and *Huras v. Com Dev Ltd.* (1999), 36 C.P.C. (4th) 31 at para. 19 (Ont. Sup. Ct. J.).

[137] I do not find any of these cases of assistance on this issue. Many of the cases deal with allegations of misrepresentations which are distinguishable from the

facts here. Where allegations of breach of contract were made (*Williams*, *Nadolny*, *Huras*), it was clear that the Court found that substantial oral evidence was required to determine the terms of those contracts.

[138] The primary focus here is on what were the terms of the employment agreements between the parties. While the terms are not in all instances in each and every contract, there is sufficient commonality among these written contracts to raise the same issues, such that a decision on the interpretation of these terms will be of assistance in understanding the scope of the contractual undertakings of the defendants in relation to the putative class members. That would also include any contract renewals entered into after the Notice of Civil Claim was filed insofar as any of the allegations can be brought within the terms of those contracts during the term of those contracts.

[139] The essence of the contract issues here are that: (a) the defendants promised certain hours of work and did not provide that work in contravention of the contracts; (b) the defendants did not pay for overtime in contravention of the contracts and also the applicable employment legislation; (c) the defendants improperly charged, through their agent, recruitment fees, in breach of the contracts; and (d) the defendants did not reimburse the employees for airfare, in breach of the contracts.

[140] There is sufficient evidence or a basis “in fact” in support of each of these allegations to support a certification of those issues. The allegations of Ms. Dominguez are that these breaches were not only suffered by her, but were suffered by the other temporary foreign workers, and that as such, they were systemic breaches.

[141] The defendants concede that these workers may not have been given their full allotted weekly hours, and point to economic necessity. In addition to evidence as to their own personal experiences in not being paid overtime, Ms. Reyes attested to being told by a representative of the defendants that “we don’t pay overtime here”. The Employment Standards Branch’s report regarding overtime may suggest a

breach situation that goes beyond the temporary foreign workers to all employees, but that is beyond the scope of this litigation.

[142] Evidence from Ms. Dominguez and other foreign workers and investigations from the Employment Standards Branch support that the agency fees were required to be paid to ICEA and Luzern, who are alleged on the evidence to have been acting as agents of the defendants in that respect. Finally, the requirement to pay the airfare has essentially been conceded by the defendants not to have been complied with, although this alone does not prevent certification: *Fulawka* at paras. 134-139 (Ont. Sup. Ct. J.).

[143] The allegations here are that the defendants treated the putative class members in a consistent or systemic way. The allegations are that the temporary foreign workers were in a vulnerable position given their employment and immigration status and that the defendants, including their agents, took advantage of that status for their own benefit by ignoring various contractual terms. Allegations of systemic wrongs have been certified in the past: *Cloud*; *Rumley v. British Columbia*, 2001 SCC 69; and *Fulawka.*

[144] It is in the context of allegations of systemic wrongs that the common issues relating to the contracts include an allegation that the defendants owe a duty of good faith and fair dealing to the putative class members. In that regard, Ms. Dominguez relies on *Fulawka*. The defendants dispute the application of the law in *Fulawka* in that respect and say that the correct statement of the law is that employers only owe their employees a limited duty of good faith and fair dealing with respect to the manner of an employee's termination. In that regard, the defendants cite *Wallace v. United Grain Growers Ltd. (cob Public Press)*, [1997] 3 S.C.R. 701 and its application in other jurisdictions, including British Columbia, in *Babcock v. Canada (Attorney General)*, 2005 BCSC 513 and *Albert v. Conseil Scolaire Francophone de la Colombie-Britannique*, 2009 BCCA 19 at para. 75. In *Babcock*, D.M. Smith J. (as she then was) at para. 200 expressly rejected the contention that the implied obligation of good faith went beyond the manner of dismissal.

[145] There is no conflict on the authorities that there is no free standing or stand alone duty of good faith. What the Court in *Fulawka* says, however, is that such a duty can be considered within the context of the employment relationship and can be implied with a view to securing the performance of the terms of a contract: *Fulawka* at paras. 75-81 (Ont. Sup. Ct. J.); *Fulawka* at paras. 42-53 (Ont. Sup. Ct. J. Div. Ct.). The *Wallace* principle was fully acknowledged by the Courts in *Fulawka* and distinguished on that basis. Certification of a similar plea was recently considered to be tenable in the context of an employment relationship in *McCracken v. Canadian National Railway Company*, 2010 ONSC 4520 at paras. 235-245.

[146] This is exactly the way that Ms. Dominguez has framed the common issue on this application and I consider the reasoning in *Fulawka* supports that approach. Whether or not Ms. Dominguez establishes that duty in the context of these employment relationships is another question that will be addressed at the trial. Further, if there is a question as to whether or not such a duty exists in the context of these employment relationships here in British Columbia, given the recent development of the law in Ontario in *Fulawka*, that is certainly an issue that is common to all putative class members and its determination will assist in advancing the litigation.

[147] There is no doubt, based on what may be anticipated in the defendants' pleadings, that individual assessments may be necessary in terms of deciding some of the issues. For example, detailed examination of payroll records may be necessary in terms of weekly hours worked or if not worked, why. Those records will disclose overtime worked which was possibly unpaid. The defendants have already acknowledged in their evidence that they did not reimburse the employees for certain airfares incurred to this time and have suggested a means by which those amounts can be calculated. There may also be records in the possession of the defendants and ICEA/Luzern regarding the payment of agency fees. These issues relate more to the damage claims (which is not a reason to refuse to certify per s. 7(a) of the *Act*).

[148] The fact that there are numerous issues that may require individual resolution does not undermine the commonality conclusion. They do not in any event overwhelm the basic issues relating to interpretation of the contracts between the defendants and the putative class members, the determination of which will assist the parties and the Court in deciding how best to proceed as the matter goes forward. What is required is that the Court takes a positive outlook and sees what *can* be resolved on a common basis towards advancing the litigation in a fair and efficient manner: *Cloud* at paras. 54-58.

[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. I would, however combine the proposed common issues in B. and D. under Contract Terms to make clear that any duty of good faith and fair dealing is to be addressed within the context of the contractual relationship and not as a separate cause of action, as follows:

> **B. Contract Terms (Including Duty of Good Faith & Fair Dealing)**
>
> a) What are the relevant terms (express, implied or otherwise) of the Class' contracts of employment with the Defendants respecting:
>
> i. regular and overtime hours of work;
>
> ii. the recording of hours worked;
>
> iii. Employment Fees; and
>
> iv. payment of two-way air transportation?
>
> b) Did the Defendants or their agents owe a duty of good faith and fair dealing to the Class in the performance of its contractual and/or statutory obligations to the Class?
>
> c) Did the Defendants or their agents breach any of the forgoing contractual terms or duties? If so, how?

(iii) Fiduciary Duty

[150] Ms. Dominguez asserts this is a common issue and again, this assertion is made in the context of the vulnerability of the temporary foreign workers and allegations that the defendants took advantage of that vulnerability. She points to the terms of the work permits which restricted the workers to working only for the defendants and only in the specified occupation. It is acknowledged that generally

speaking, the workers were seeking a more permanent status here in Canada and that getting the hours and resulting income they felt they were entitled to affected their ability to do that.

[151] As such, Ms. Dominguez says that the situation conferred upon the defendants a significant power and discretion over the workers' legal and practical interests which resulted in the defendants owing fiduciary duties to the workers. That a fiduciary duty can be found in the context of an employment relationship is beyond question: *Galambos*.

[152] The defendants say however that they never expressly agreed to act as a fiduciary to the temporary foreign workers and that otherwise, the determination as to whether a fiduciary duty exists in any particular relationship must be based on a review of the relevant factual circumstances on an individual basis: *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 412-414; and *Dopf v. Royal Bank of Canada* (1998), 46 B.C.L.R. (3d) 66 at paras. 62-64 (C.A.). They point to cases such as *Mustaji*, where the British Columbia Supreme Court discussed the basis for the finding that a fiduciary relationship existed between an employer and employee:

> 33 The nature of the relationship between the parties is an important consideration in determining the scope of the duty owed. In this case, the parties' relationship was primarily contractual, flowing from an agreement to provide domestic services by the plaintiff in exchange for compensation. The employment contract created a number of reciprocal rights and obligations. However, the substance of the parties' relationship cannot be captured adequately within a strict employment framework. In the particular circumstances of this case, the plaintiff was not simply an employee under the terms of the employment agreement; she was also the beneficiary of certain fiduciary obligations imposed on the defendants by virtue of their power and discretion over her, relating to matters both within and outside the scope of their employment relationship. While principally one of employment, the parties' relationship can be more accurately described as being part-contractual and part-fiduciary.
>
> 34 In any mixed contractual-fiduciary relationship, the contractual and fiduciary aspects of the relationship may be distinct, giving rise to different duties, or overlapping, in whole or in part, giving rise to substantially the same duties but from distinct legal and equitable sources. Where the fiduciary and contractual duties give rise to separate, distinct duties, the breach of those obligations gives rise to independent causes of action. Where the fiduciary and contractual duties give rise to substantially similar duties, albeit in equity and in law respectively, the breach of one duty is the breach of the other.

> Recovery in such circumstances is properly permitted in law or in equity, but not both.
>
> 35 Contractual duties and fiduciary duties may exist in the same relationship at the same time. *International Corona Resources Ltd. v. LAC Minerals Ltd.*, (supra). The co-existence of contractual and fiduciary duties in the same relationship was also recognized in *Hodgkinson*, (supra), at p. 174, where La Forest J. observed that:
>
> > ...the existence of a contract does not necessarily preclude the existence of fiduciary obligations between the parties. *On the contrary, the legal incidents of many contractual agreements are such as to give rise to a fiduciary duty*. The paradigm example of this class of contract is the agency agreement, in which the allocation of rights and responsibilities in the contract itself gives rise to fiduciary expectations... (emphasis added)

[153] *Nishina v. Azuma Foods (Canada) Co., Ltd.*, 2010 BCSC 502 and *Babcock* are also cases where the factual circumstances of the employment relationship were considered in the determination that no such fiduciary duty was owed.

[154] There is substantial authority that in appropriate circumstances, the issue of whether a fiduciary duty exists can be certified as a common issue. In *Dutton v. Western Canadian Shopping Centres Inc*., 2001 SCC 46, the Court found that the fiduciary duty issues were common to all of the class members:

> 55 The defendants' contention that the investors should not be permitted to sue as a class because each must show actual reliance to establish breach of fiduciary duty also fails to convince. In recent decades fiduciary obligations have been applied in new contexts, and the full scope of their application remains to be precisely defined. The fiduciary duty issues raised here are common to all the investors. A class action should not be foreclosed on the ground that there is uncertainty as to the resolution of issues common to all class members. If it is determined that the investors must show individual reliance, the court may then consider whether the class action should continue.

[155] Allegations of breach of a fiduciary duty were also certified in *Rumley* and *Cloud* where there were allegedly systemic breaches: see also *Lieberman v. Business Development Bank of Canada*, 2009 BCSC 1312 where there were allegations that pension benefits were improperly diverted.

[156] In *Gary Jackson Holdings Ltd*., Mr. Justice Hinkson (as he then was) recognized the potential difficulty in certifying a breach of fiduciary duty claim where

the particular circumstances of the parties would have to be considered. He stated that in the circumstances of that case, the matter could be circumscribed to address that issue:

> [45] With respect to the common issue of breach of fiduciary duty, while this assertion will usually require an assessment of the individual relationship between the fiduciary and the beneficiary of the duty, the plaintiff on this application argued that the fiduciary obligations upon which it and the proposed class members rely are contained entirely within the various joint venture agreements. The plaintiff thus argued that an individual examination of the relationship and dependency of the individual class members to the defendants against whom the allegations of breach of fiduciary duty are made is unnecessary.
>
> [46] In *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 at 406, the Supreme Court of Canada found that fiduciary law is more concerned with the position of the parties that results from the relationship that gives rise to the fiduciary duty (the agreement), rather than with the respective position of the parties before they enter the agreement.
>
> [47] In *Sharbern* at para. 85, Wedge J. held that despite issues of trust and fiduciary relationships existing in that action, the restriction of those allegations only to statements in the common documentation relied upon by all class members would permit the certification of the action under the *Act*. Her Ladyship concluded:
>
> > I am satisfied the issues of trust and fiduciary relationship are common issues arising from the pleadings. The relationship is alleged to have arisen under the HAMA, an agreement to which all Owners are party. At a minimum, determination of the existence of fiduciary duty as a common issue will assist in narrowing the scope of individual discoveries. More broadly, its determination is necessary to both the successful prosecution of the claim and its defence. As such, its resolution will move the litigation forward significantly.
>
> [48] I conclude, as did Wedge J. in *Sharbern*, that the claim of breach of fiduciary duty in this case, if arising exclusively from the common wording of the various joint venture agreements, will not, if certified, require an assessment of the individual relationships as between the proposed class members and the defendants who are alleged to have breached fiduciary duties. I find that breaches of fiduciary duties are common issues which, if resolved, could move the litigation forward. The question remains whether the class proceeding is the preferable procedure within which to do so.

[157] In *Elms v. Laurentian Bank of Canada*, 2001 BCCA 429 at paras. 40-45, the Court agreed that where there was no need to consider individual differences in relation to whether or not a fiduciary duty existed, and where the matter could be extrapolated amongst all class members, there was a common issue that could be certified.

[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.

[159] While the facts in *Mustaji* were extreme in the sense of the degree of control exercised by the employer, the comments of the British Columbia Supreme Court concerning the circumstances of the Foreign Domestic Movement Program (FDMP) have some relevance to the TFWP in this case in terms of assessing vulnerability and dependence in these employment relationships:

> 36 This case is another paradigmatic example of a situation where the legal incidents of a contract give rise to a fiduciary duty. In the same way that an employee having access to confidential information within a company may, as a legal incident of his employment contract, have imposed upon him or her a fiduciary obligation of confidentiality and trust with respect to the company's trade secrets, the defendants here assumed certain fiduciary obligations toward the plaintiff incidental to their employment contract with her by virtue of the provisions and requirements of the FDMP.
>
> 37 The continuing validity of the plaintiff's work permit depended upon her maintaining employment exclusively as a domestic worker with the defendants and continuing to reside in their home. Her occupational and physical mobility was severely restricted under the terms of the FDMP. These requirements contributed significantly to the plaintiff's vulnerability and vested significant power in the hands of the defendants.
>
> 38 A principal benefit of the FDMP, from the perspective of the worker, is the ability to ultimately obtain landed immigrant status in Canada. An application for such a status could be made under the FDMP after the domestic worker had worked in Canada for two years. To obtain the status, the foreign domestic worker had to meet certain program requirements, one of which was the achievement of a proscribed level of social adaptation.
>
> 39 The requirements of the FDMP, superimposed upon the parties' contractual relationship, placed the plaintiff in a position of vulnerability and dependence vis-a-vis the defendants, and conferred upon the defendants significant power and discretion over the plaintiff's legal and practical

> interests. It is in the exercise of that power and discretion, both in respect of matters covered by their employment contract with the plaintiff and in other matters, which imposed fiduciary obligations on the defendants.
>
> 40 By withholding wages, requiring the plaintiff to work excessive amounts of unpaid overtime, and by threatening to return the plaintiff to Indonesia, the defendants can be said to have used their power over the plaintiff to promote their interests in the employment relationship in a manner that conflicted with their overriding duty not to take advantage of her vulnerability. While most employees could simply have exercised their right to withdraw their labour in the face of unreasonable demands from their employer by resigning their employment, the plaintiff could not do so without jeopardizing her broader interests beyond the employment relationship. As the plaintiff could not reasonably have been expected to have protected her own interests in these circum-stances, equity imposes on the defendants an obligation not to abuse their contractual rights to the detriment of the plaintiff. These same allegations can also be characterized as instances of the defendants profiting at the expense of the plaintiff.
>
> 41 Finally, by withholding wages, depriving the plaintiff of reasonable time off work, insisting she have no recreational or social life, and depriving her of contact with others, in person or by telephone, the defendants can be said to have breached the trust vested in them by the plaintiff that they would not act in a manner nor exercise their contractual rights in a manner that would adversely affect the plaintiff's ability to qualify for landing under the FDMP. By engaging in the conduct alleged, the defendants effectively deprived the plaintiff of the opportunity to fulfil the social adaptation requirements of the FDMP, potentially threatening her legal and practical interests under the FDMP.

[160] Accordingly, I conclude that the issues relating to breach of fiduciary duty are common issues.

(iv) Unjust Enrichment

[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.

[162] In the proposed common issues of Ms. Dominguez, there is no reference to a determination as to whether or not there was juristic reason for the enrichment. I am

going to assume that this was simply an oversight on counsel's part given that the Notice of Civil Claim does plead that no juristic reason exists.

[163] Ms. Dominguez cites various authorities in support.

[164] In *Halvorson* at para. 30, following *Pro-Sys Consultants Ltd*., the British Columbia Court of Appeal indicated that a claim for unjust enrichment may be determined as a common issue. see also *Alberta* at paras. 82-96.

[165] In *Bodnar v. The Cash Store Inc.*, 2005 BCSC 1228, aff'd 2006 BCCA 260, the Court certified a class action based on unjust enrichment where the class members asserted that the interest charged on payday loans was at a criminal interest rate and was therefore unlawful. On appeal, the defendants challenged the certification of the unjust enrichment issues. They argued that the Court must necessarily consider the individual circumstances and that therefore, there were no common issues. The Court of Appeal upheld the finding of the chambers judge:

> [15] The appellants also challenge the unjust enrichment issues certified by the Chambers judge on the ground that they require the court to consider circumstances of individual transactions. The test for claims of unjust enrichment laid down by the Supreme Court of Canada in *Peter v. Beblow,* [1993] 1 S.C.R. 980 at paras. 6 to 9, in addition to the enrichment of the defendant and the corresponding deprivation of the plaintiff, requires an absence of juristic reason for the enrichment. The appellants argue that this third element requires individualized assessment and the unjust enrichment issues as certified cannot be determined as common issues; they rely on the two-stage analysis for juristic reason set out in *Garland v. Consumers' Gas Co.* [2004] 1 S.C.R. 629 (*Garland No. 2*). If at the first stage of this analysis the plaintiff shows that there is no established category of juristic reason to deny recovery, the *de facto* burden moves to the defendant at the second stage to show that "all of the circumstances of the transaction" provide a reason to deny recovery.
>
> [16] The appellants submit that this allows them to explore the circumstances and test the knowledge of each individual plaintiff. They rely on *Bon Street Developments Ltd. v. Terracan Capital Corp.* (1992), 76 B.C.L.R. (2d) 90 (S.C.). In rejecting that argument the Chambers judge relied on the proposition stated in *Garland No. 2* at para. 65: "Where a defendant has obtained the enrichment through some wrongdoing of his own, he cannot then assert that it would be unjust to return the enrichment to the plaintiff." She also relied on the judgment of this Court in *Elms v. Laurentian Bank of Canada* (2001), 90 B.C.L.R. (3d) 195, 2001 BCCA 429 at para. 44 as authority that the absence of juristic reason can be determined on a group basis.

> [17] *Bon Street* involved a negotiated agreement by sophisticated borrowers with legal advice. The borrowers failed to recover the interest paid, conceded to be at an illegal rate, on a balancing of the equities between the parties. Here there were standard terms and small borrowers. In that context, I do not think there was any error in the Chambers judge's conclusion that the question of juristic reason did not require individual assessment. The respondents' claims will all stand or fall on the general effect of illegality, assuming they succeed in establishing a breach of the *Code* or the *TPA* or *BPCPA*. The judicial discretion and spectrum of remedies recognized for s. 347 claims in *Transport North American Express Inc. v. New Solutions Financial Corp.*, [2004] 1 S.C.R. 249, should be capable of determination on a common basis for these standard form transactions.

[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.

[167] I conclude that the claims of unjust enrichment are common issues with the proviso that a further question be added under E(f) as follows:

> If the answer to any of E(e) above is "yes", is there any juristic reason for the enrichment?

(v) Systemic Defects

[168] Flowing from the allegations under the contract issues regarding systemic breaches, Ms. Dominguez proposes certain common issues relating to whether the defendants had a duty to monitor and accurately record hours worked by the putative class members to ensure that they were compensated and to implement and maintain an effective and reasonable system, procedure and practice to ensure that these duties were satisfied. She says that this was attributable to systemic conditions, as opposed to individual circumstances.

[169] Again, I accept that Ms. Dominguez has satisfied the low evidentiary burden to suggest that hours were not recorded properly and even if recorded, overtime was not paid. She and other putative class members have given their own evidence in that regard, including Ms. Reyes relaying the comment from a management employee of the defendants that "we don't pay overtime here". In addition, I note the

determination of the Director of Employment Standards dated June 17, 2011 regarding the nonpayment of overtime of various employees, including at least one putative class member, despite earlier admonitions from the Branch some months before.

[170] As earlier discussed in these reasons, there is ample authority in the case law to support certification of common issues where there are systemic breaches: *Fulawka*; *Quizno's*; *Cloud*; *Rumley*; and *W.W. v. Canada (Attorney General)*, 2002 BCSC 1164, aff'd 2003 BCCA 53.

[171] The defendants cite *L. (T.) v. Alberta (Director of Child Welfare)*, 2006 ABQB 104, in support of their contention that just saying that there are "systemic defects" does not necessarily lead to the conclusion that there are common issues. In that case, the Alberta Court was asked to certify an action against a child welfare agency for not prosecuting actions against tortfeasors on behalf of minors under its care. The proposed common issue was whether the defendant breached its duty to sue by reason of failing to take reasonable measures in its operations and management.

[172] At paras. 97-109, the Court discussed the issues and stated at para. 103 that the systemic breach issues should not be stated so generally that the answer to the systemic breach issue is unlikely to be of much practical assistance. The Court also stated:

> [109] … a significant amount of divergence is possible within the class. In some cases it will be possible to certify systemic negligence as a common issue. But the more divergent the class, and the more varied the circumstances giving rise to the alleged breach of duty, the less likely it will be that a workable systemic breach common issue will be possible. In this case the class is very divergent. The individual breaches of duty alleged raise polycentric and individual considerations that go far beyond the generalized "policies and operations" of the Defendant. In this case "breach of the standard of care" is essentially an individual issue that must be decided in the second phase of the proceedings, and attempting to frame it as an issue of "systemic negligence" is really an attempt to bootleg individual issues as a common issue. The appearance of commonality is an artificial result of the generality of the question. The proposed systemic breach common issue is not fair or workable in this case.

[173] Nevertheless, I am satisfied in this case that the focus of the common issue here – whether the defendants had the duty to record hours accurately to ensure proper compensation and maintain a system to do so – is specific enough such that the answer to the question will advance the litigation. Unlike the situation in *L. (T.)*, this is not a case where there is great divergence within the class. All of the temporary foreign workers could arguably have expected that the defendants would properly record time and that systems would be maintained for that purpose. The existence of these systems and the conduct of the defendants go to the very root of the issue – i.e. whether the class members were properly compensated under the terms of their contracts.

[174] The focus of the enquiry will be on the defendants, not the class members.

[175] In my view, this approach is consistent with that taken by the Court in *Quizno's*, where the Ontario Divisional Court stated:

> [141] In this case, with respect to the Quizno's respondents, declaratory relief in relation to breach of the *Competition Act*, liability for breach of contract and, if permitted, breach of the statutory duty of fairness where applicable, would be common issues. Given the systemic nature of the claims, these common issues are central components of the entire litigation even if loss and damages remained as individual issues. In our view, there is no question that resolution of these common issues would substantially advance the litigation against the Quizno's respondents in the context of the overall action. In addition to the legal issues, there are extensive factual commonalities among the class members. Avoidance of duplication of fact-finding and legal analysis would result in judicial economy. This is particularly so given our finding that all the proposed issues are common issues and only the individual assessment of damages may remain as individual issues.

[176] It is also consistent with the approach of the Court in *Fulawka* at paras. 124, 133-144, where the Court certified an action involving allegations that the defendant had systematically failed to pay overtime to its employees, which was upheld on appeal by the Divisional Court at paras. 100-116.

[177] I conclude that the proposed issues relating to systemic defects are proper common issues.

(vi) Aggregate Assessment of Damages

[178] Under the heading of "Remedy and Damages", one of the common issues is that assuming that liability is established, Ms. Dominguez seeks to impose liability on a class-wide basis and that damages be assessed on an aggregate basis.

[179] Ms. Dominguez relies on ss. 29(1) and 30(1) of the *Act*:

> **Aggregate awards of monetary relief**
>
> 29(1) The court may make an order for an aggregate monetary award in respect of all or any part of a defendant's liability to class members and may give judgment accordingly if
>
> (a) monetary relief is claimed on behalf of some or all class members,
>
> (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability, and
>
> (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members.
>
> **Statistical evidence may be used**
>
> 30(1) For the purposes of determining issues relating to the amount or distribution of an aggregate monetary award under this Act, the court may admit as evidence statistical information that would not otherwise be admissible as evidence, including information derived from sampling, if the information was compiled in accordance with principles that are generally accepted by experts in the field of statistics.

[180] The British Columbia Court of Appeal has affirmed the appropriateness of certification of an aggregate monetary award as a common issue: *Knight v. Imperial Tobacco Canada Ltd.*, 2006 BCCA 235 at paras. 37-41; *Pro-Sys Consultants Ltd.* at paras. 35-45; and *Steele v. Toyota Canada Inc.*, 2011 BCCA 98 at paras. 70-75.

[181] Ms. Dominguez contends that she has met the requirements of s. 29(1) of the *Act*. Since she has claimed monetary relief, the requirement under s. 29(1)(a) is met. The test under s. 29(1)(b) is met "where potential liability can be established on a class-wide basis, but entitlement to monetary relief may depend on individual assessments": *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 48, leave to appeal to S.C.C. refused, [2007] S.C.C.A. No. 346; and *Cassano v. Toronto-*

Dominion Bank, 2007 ONCA 781 at para. 47, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 15.

[182] If the defendants are found to have breached the putative class members' contracts of employment (including any duties of good faith and fair dealing) or to have breached fiduciary duties or to have been unjustly enriched, liability for the entire class will have been established and the only remaining issue will be the amount of the monetary relief. Whether that can be done on a class-wide basis or whether individual assessments are required remains to be seen. Nevertheless, the requirement in s. 29(1)(b) is met in either circumstance: *Cassano* at para. 50; *Fulawka* at para. 130 (Ont. Sup. Ct. J. Div. Ct.).

[183] With respect to s. 29(1)(c), Ms. Dominguez intends to pursue an aggregate damage award pursuant to s. 30(1) of the *Act*. Ms. Dominguez has provided an affidavit by a statistician, Professor R. H. Zamar, who has opined that random sampling can be used to obtain an accurate and reliable estimate of the putative class members who worked less than 40 hours per week, worked overtime, paid employment fees and paid their own transportation to British Columbia. Accordingly, Ms. Dominguez believes that there will be a basis for determining the claims of the putative class members without engaging in a detailed examination of each person's employment history and experience with the defendants.

[184] As the Court said in *Pro-Sys Consultants Ltd.* at paras. 66-68, it is only required that a "credible or plausible methodology" be shown at this time. The Court is not to subject any expert evidence to exacting scrutiny in terms of discerning whether that is the case or not. Here, I have no expert evidence from the defendants to contest the proposition of Professor Zamar. In the circumstances, I conclude that what he proposes is sufficiently credible or plausible such that it is possible to formulate an aggregate damage award on this basis.

[185] It is evident that certain issues may arise about how the calculations of damages, if liability is established, will be made if the statistical evidence is not accepted as a proper methodology. For example, one particular difficulty is that

class members were not provided with any receipts regarding their payments of agency fees and air transportation. There may also be issues relating to the recordkeeping of the defendants regarding hours worked and overtime. An aggregate damage award may be considered to be appropriate in this case in these circumstances.

[186] It should be noted that with respect to the airfare, the defendants themselves have already implemented a similar system. Where receipts for actual payments are not available, they have offered to pay the average airfare cost for that particular travel at that time.

[187] Ms. Dominguez asserts that the Court must be reluctant, at this stage, to foreclose how she litigates the issue of aggregate damages. That position has support in the comments of the British Columbia Court of Appeal in *Knight*:

> [40] Although there may be elements of novelty and difficulty with the proposed methodology of damages calculation advanced by the respondent, it seems to me that it is appropriate for this issue to be left to be worked out in the laboratory of the trial court. Then, if and when the issue reaches this Court, we will have the benefit of a full record upon which to assess the appropriateness of any damages award that may be made pursuant to the proposed methodology.
>
> [41] I would be reluctant at this stage of this proceeding to foreclose the respondent from litigating this issue as he proposes before the trial court. Accordingly, I would afford deference to the decision of the learned chambers judge to permit this damages issue to be litigated as a common issue.

[188] In my view, Ms. Dominguez has met the requirements in s. 29(1)(c) of the *Act*.

[189] I conclude that the proposed issues concerning the assessment of damages on a class-wide basis and the aggregate damages are proper common issues that will advance the litigation.

(vii) Punitive Damages

[190] This issue was recently addressed in *Stanway* where the Court certified the claim for punitive damages as a common issue. The Court reviewed the law applicable in British Columbia as follows:

> [58] The courts in British Columbia endorse a bifurcated approach to punitive damages as a common issue in class action proceedings. The Court of Appeal stated in *Chalmers* at para. 31:
>
> > [31] Although the ultimate determination of the entitlement and quantification of punitive damages must be deferred until the conclusion of the individual trials, it does not follow, in my opinion, that no aspect of the claim of punitive damages should be certified as a common issue. It is my view that the question of whether the defendants' conduct was sufficiently reprehensible or high-handed to warrant punishment is capable of being determined as a common issue at the trial in this proceeding where the other common issues will be determined. The focus will be upon the defendants' conduct and there is nothing in this case that will require a consideration of the individual circumstances of the class members in order to determine whether the defendants' conduct is deserving of punishment. The ultimate decision of whether punitive damages should be awarded, and the quantification of them, can be tried as a common issue following the completion of the individual trials.
>
> [59] At para. 35, the court formulated the questions as follows:
>
> > …..
> >
> > (c) If either or both of the Defendants breached a duty of care owed to class members, was either or both of the Defendants guilty of conduct that justifies punishment?
> >
> > (d) If the answer to common issue 7(c) is "yes" and if the aggregate compensatory damages awarded to class members does not achieve the objectives of retribution, deterrence and denunciation in respect of such conduct, what amount of punitive damages is awarded against either or both of the Defendants?
>
> [60] I am satisfied, based on the court's comments in *Chalmers,* that the plaintiff's claim for punitive damages should be certified as a common issue.

[191] The following cases also support this approach: *Fakhri v. Alfalfa's Canada, Inc. (cba Capers Community Market)*, 2003 BCSC 1717 at paras. 60, 71-73; *Rumley* at para. 34; and *Endean* at para. 48.

[192] I adopt the approach of the Court in *Stanway* and find that the issues relating to punitive damages are common issues.

Is a class proceeding the preferable procedure?

[193] The final issue arising under s. 4(1)(d) of the *Act* is whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues.

[194] Section 4(2) provides:

> (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.

[195] Again, a review of general principles is of assistance.

[196] Ms. Dominguez relies on *Elms* where at para. 53, the B.C. Court of Appeal referred to Winkler J.'s comment in *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 at 239 (Sup. Ct. J.) for the analysis on when a class proceeding is the preferable procedure:

> ... A class proceeding is the preferable procedure where it presents a fair, efficient and manageable method of determining the common issues which arise from the claims of multiple plaintiffs and where such determination will advance the proceeding in accordance with the goals of judicial economy, access to justice and the modification of the behaviour of wrongdoers.

[197] The defendants emphasize the aspect of fairness, citing *Abdool v. Anaheim Management Ltd.* (1993), 15 O.R. (3d) 39 at 49-51 (Ct. J. (Gen. Div.)), aff'd (1995), 121 D.L.R. (4th) 496 (Ont. Ct. J. (Gen. Div.) Div. Ct.). In that case, at 49, the Court stated that it is imperative to have a scrupulous and effective screening process, so

that the Court does not sacrifice the ultimate goal of a just determination between the parties on the altar of expediency.

[198] The interplay between the common issues and the individual issues is very much a factor in considering the preferability requirement. The defendants cite *Hollick* as authority for the proposition that on this question the Court must take into account the importance of the common issues in relation to the claims as a whole: paras. 29-30.

[199] In addition, it is clear that the factors outlined in s. 4(2) of the *Act* have no hierarchy in terms of their importance. As stated by this Court in *Riazi*:

> [88] The court must consider all of these factors in determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues. No single factor is determinative. The "preferability" inquiry should be conducted through the lens of the three principle procedural advantages of class actions: judicial economy, access to justice, and behavioural modification: *Hollick* at para. 15.

[200] I will now consider the factors set out in s. 4(2) of the *Act*.

s. 4(2)(a) Do the questions of fact or law predominate?

[201] Ms. Dominguez contends that at its core, this case involves an interpretation of standard contractual terms, which raise common issues. She further contends that if she is successful on these common issues, then damages can be assessed on an aggregate basis and no individual assessment will be necessary. If it is not appropriate to assess damages on that basis, then there will be a need for individual assessments.

[202] It must be kept in mind that there will typically be some individual issues to be determined and that factor is not determinative. In *Bodnar*, at para. 59, this Court adopted the comments of the Court in *Metera v. Financial Planning Group*, 2003 ABQB 326:

> [69] It should be noted that it would be extremely rare for a class proceeding to contain only common issues, with no individual issues to be determined. Class proceedings are usually bifurcated. First there is a hearing or trial to determine the common issues, and then a procedure must be

> devised to resolve the individual issues. This is the normal situation, and the presence of individual issues should not be overemphasized, the question always being whether a class proceeding is the preferable way to resolve what common issues there are. ….

[203] The Court in *Metera* continued at para. 69 by stating:

> …As the Court noted in Western Canadian Shopping Centres at para. 54, there are bound to be differences between investors, and if "material differences emerge, the court can deal with them when the time comes." I would suggest, with respect, that this issue was overemphasized in Abdool at para. 130 and Moyes at paras. 32, 33 and 38, where the need to investigate the position of every class member on the reliance issue was discussed. That factor is common to a mass misrepresentation action, whether it be prosecuted as a class action or as a multi-party action, or as a series of individual actions. There are still economics to be had in deciding the common issues together.

[204] Ms. Dominguez relies upon the comments of the Court in *Fakhri* at paras. 85-89 where the Court notes that even if the individual issues predominate, it is not fatal to the application. Further, Madam Justice Gerow discusses in that case that where common issues are at the heart of the litigation, individual issues can be dealt with under s. 27 of the *Act* where the Court may consider the simplification and management of those individual issues as contemplated by the *Act*.

[205] The defendants say that the common issues will not just predominate, they will dominate these proceedings. I disagree.

[206] The common issues here go to the heart of the litigation, just as was found in *Fakhri*. That is, what is the correct interpretation of the standard contract terms, what is the status of the agency relationship between the defendants and ICEA/Luzern and did fiduciary duties arise in the circumstances of their employment.

[207] As I have already stated, a resolution of these issues will materially advance the litigation. After a resolution of those issues, the Court can consider how best to deal with any individual issues that will remain. That might involve an aggregate damage award or some other process, such as a claims process that might streamline a determination of those issues.

[208] Even if these individual issues predominate, I do not consider that predominance so controlling such that the preferability decision is to be decided on that factor alone.

s. 4(2)(b) Do significant class members have an interest in individually controlling separate actions?

[209] There was no evidence presented that any other class members wished to control separate actions against the defendants.

[210] The defendants did present some evidence that some class members may not have any interest in these proceedings. That may be so, but those individuals resident in British Columbia will have the opportunity of opting out of these proceedings or if a non-resident, of choosing not to opt in. At that time, they have the opportunity to proceed independently against the defendants if they wish, and in that respect, choosing their own counsel, their own forum and their own litigation strategies.

[211] I would also note that it may well be the case that any present position communicated from these workers to their employer, the defendants, may be materially different once certification occurs and they have the ability to participate independently of their relationship with the defendants. The past actions of the defendants in cutting hours of complaining workers or even firing them may be of less concern once certification occurs and these workers can participate in an appropriate forum where the risk of such tactics will be less severe.

s. 4(2)(c) Would the class proceedings involve claims that are or have been the subject of other proceedings?

[212] The only other possible claim that was the subject of another proceeding was the *Employment Standards Act* complaint filed by putative class member Mr. Sales. As noted in the facts above in paras. 39 and 40, prior to the filing of this proceeding Mr. Sales filed a complaint with the Employment Standards Branch with respect to overtime, the agency fees and the airfare costs. The fee issue was found to be out of time, but the other matters were ultimately settled between the parties.

[213] I do not therefore see that there are any other proceedings in progress that could be adversely affected by this proceeding.

s. 4(2)(d) Are there other means of resolving the claims that are less practical or less efficient?

[214] The defendants contend that this factor weighs heavily against any finding that a class action is the preferable procedure on the basis that the regime under the *Employment Standards Act* provides a complete and effective administrative structure for granting and enforcing rights of employees. They further say that the preferability analysis is an objective one and does not depend on any choice Ms. Dominguez or any other class members may have made to not invoke the procedures under that *Act*. In other words, they say that a procedure does not become less preferable simply because a particular complainant does not make herself aware of her legal rights and avail herself of remedies that are available.

[215] The defendants rely on the analysis in *Hollick*, where the Supreme Court of Canada declined to certify the action on the basis that there were other reasonable means of resolving the environmental claims, including seeking redress and payment from a Small Claims Trust Fund. The Court considered this issue in the context of the three objectives of class action proceedings:

> [31] I think it clear, too, that the court cannot ignore the availability of avenues of redress apart from individual actions. As noted above, the preferability requirement was intended to capture the question of whether a class proceeding would be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on": see *Report of the Attorney General's Advisory Committee on Class Action Reform*, *supra*, at p. 32; see also Cochrane, *supra*, at p. 27; M. A. Eizenga, M. J. Peerless and C. M. Wright, *Class Actions Law and Practice* (loose-leaf), at para. 3.62 ("[a]s part of the determination with respect to preferability, it is appropriate for the court to review alternative means of adjudicating the dispute which is before it"). In my view, the preferability analysis requires the court to look to all reasonably available means of resolving the class members' claims, and not just at the possibility of individual actions.
>
> [32] I am not persuaded that the class action would be the preferable means of resolving the class members' claims. Turning first to the issue of judicial economy, I note that any common issue here is negligible in relation to the individual issues. While each of the class members must, in order to recover, establish that the Keele Valley landfill emitted physical or noise pollution, there is no reason to think that any pollution was distributed evenly

across the geographical area or time period specified in the class definition. On the contrary, it is likely that some areas were affected more seriously than others, and that some areas were affected at one time while other areas were affected at other times. As the Divisional Court noted, "[e]ven if one considers only the 150 persons who made complaints – those complaints relate to different dates and different locations spread out over seven years and 16 square miles" (p. 480). Some class members are close to the site, some are further away. Some class members are close to other possible sources of pollution. Once the common issue is seen in the context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action.

[33] Nor would allowing a class action here serve the interests of access to justice. The appellant posits that class members' claims may be so small that it would not be worthwhile for them to pursue relief individually. In many cases this is indeed a real danger. As noted above, one important benefit of class actions is that they divide fixed litigation costs over the entire class, making it economically feasible to prosecute claims that might otherwise not be brought at all. I am not fully convinced, however, that this is the situation here. The central problem with the appellant's argument is that, if it is in fact true that the claims are so small as to engage access to justice concerns, it would seem that the Small Claims Trust Fund would provide an ideal avenue of redress. Indeed, since the Small Claims Trust Fund establishes a no-fault scheme, it is likely to provide redress far more quickly than would the judicial system. If, on the other hand, the Small Claims Trust Fund is not sufficiently large to handle the class members' claims, one must question whether the access to justice concern is engaged at all. If class members have substantial claims, it is likely that they will find it worthwhile to bring individual actions. The fact that no claims have been made against the Small Claims Trust Fund may suggest that the class members claims are either so small as to be non-existent or so large as to provide sufficient incentive for individual action. In either case access to justice is not a serious concern. Of course, the existence of a compensatory scheme under which class members can pursue relief is not in itself grounds for denying a class action – even if the compensatory scheme promises to provide redress more quickly: see *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, 2001 SCC 69, at para. 38. The existence of such a scheme, however, provides one consideration that must be taken into account when assessing the seriousness of access-to-justice concerns.

[34] For similar reasons I would reject the argument that behaviour modification is a significant concern in this case. Behavioural modification may be relevant to determining whether a class action should proceed. As noted in *Western Canadian Shopping Centres, supra*, at para. 29, "[w]ithout class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery". This concern is certainly no less pressing in the context of environmental litigation. Indeed, Ontario has enacted legislation that reflects a recognition that environmental harm is a cost that must be given due weight in both public and private decision-making: see *Environmental Bill of Rights, 1993*, S.O. 1993, c. 28, and *Environmental Protection Act.* I am not persuaded,

> however, that allowing a class action here would serve that end. If individual class members have substantial claims against the respondent, we should expect that they will be willing to prosecute those claims individually; on the other hand if their claims are small, they will be able to obtain compensation through the Small Claims Trust Fund. In either case, the respondent will be forced to internalize the costs of its conduct.
>
> [35] I would note, further, that Ontario's environmental legislation provides other avenues by which the complainant here could ensure that the respondent takes full account of the costs of its actions. While the existence of such legislation certainly does not foreclose the possibility of environmental class actions, it does go some way toward addressing legitimate concerns about behaviour modification: see *Environmental Bill of Rights, 1993*, ss. 61(1) (stating that "[a]ny two persons resident in Ontario who believe that an existing policy, Act, regulation or instrument of Ontario should be amended, repealed or revoked in order to protect the environment may apply to the Environmental Commissioner for a review of the policy, Act, regulation or instrument by the appropriate minister") and 74(1) (stating that "[a]ny two persons resident in Ontario who believe that a prescribed Act, regulation or instrument has been contravened may apply to the Environmental Commissioner for an investigation of the alleged contravention by the appropriate minister"); *Environmental Protection Act,* s. 14(1) (stating that "[d]espite any other provision of this Act or the regulations, no person shall discharge a contaminant or cause or permit the discharge of a contaminant into the natural environment that causes or is likely to cause an adverse effect"); s. 172(1) (stating that "[w]here a person complains that a contaminant is causing or has caused injury or damage to livestock or to crops, trees or other vegetation which may result in economic loss to such person, the person may, within fourteen days after the injury or damage becomes apparent, request the Minister to conduct an investigation"); and s. 186(1) (stating that "[e]very person who contravenes this Act or the regulations is guilty of an offence").
>
> [36] I conclude that the action does not meet the requirements set out in s. 5(1) of Ontario's *Class Proceedings Act, 1992*. Even on the generous approach advocated above, the appellant has not shown that a class action is the preferable means of resolving the claims raised here.
>
> [Emphasis added.]

[216] As is made clear by the *Hollick* analysis above, the focus is on what is *preferable* – the fact that other means of resolving the dispute are available is not determinative: *LeFrancois v. Guidant Corp*. (2008), 56 C.P.C. (6th) 268 at para. 93 (Ont. Sup. Ct. J.). Nor is it necessary to conclude that class proceedings are a *superior* means of resolving the dispute.

[217] The *Employment Standards Act* does provide an administrative regime to resolve employment issues. The purposes of that *Act* are set out in s. 2 and as

germane to this case include: (a) ensuring that employees receive basic standards of compensation and conditions of employment; (b) promoting fair treatment of employees and employers; and (d) providing fair and efficient procedures for resolving disputes over the application and interpretation of that *Act.* On the last point, the procedures under the *Employment Standards Act* are intended to provide a simplified method of resolving disputes between employees and employers without the need for expensive litigation.

[218] Concerning the allegations in this action, the defendants say that provisions of the *Employment Standards Act* apply to the issues raised:

a) with respect to the allegation that sufficient hours were not made available, they point to s. 27 which provides that employers must provide a written wage statement for any pay period;

b) with respect to the allegation that overtime was not paid, they point to s. 40 which provides that employers must pay the overtime rate to employees who work over eight hours a day;

c) with respect to the allegation regarding the airfare, they point to s. 21 which provides that employers must not require an employee to pay any of the employer's business costs except as permitted by the regulations (which do not apply here);

d) with respect to the allegation regarding the agency fees, they point to s. 10 which provides that a person must not request, charge or receive, directly or indirectly from a person seeking employment, a payment for employing or obtaining employment for the person seeking employment. They note that Ms. Dominguez specifically relies on s. 10 of the *Employment Standards Act* in her Notice of Civil Claim as the basis for her seeking recovery of the agency fees; and

e) with respect to all of the allegations, they point to s. 8(d) which provides that an employer must not induce, influence or persuade a

> person to become an employee, or to work by misrepresenting the conditions of employment.

[219] Part 10 of the *Employment Standards Act* also provides a comprehensive process through which complaints from employees can be addressed: complaints can be made to the Director (s. 74), investigations may be made by the Director, whether or not a complaint has been made (s. 76), the Director may make determinations and require the employer to remedy any breach of that *Act* (s. 79) and appeals from a decision of the Director may be made to the Employment Standards Tribunal (s. 112).

[220] The defendants rely on various authorities where other procedures were held to be a more practical and efficient means by which to resolve certain claims: *McKay* at para. 46 (administrative process available to ensure compliance with standards by educational institutions); and *S.R. Gent (Canada) Inc. v. Ontario (Workplace Safety and Insurance Board)* (1999), 45 O.R. (3d) 106 at 107-112 (Sup. Ct. J.) (judicial review available to challenge legality of program of Workplace Safety and Insurance Board).

[221] The defendants also cite *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182, which addressed the appropriate forum to enforce payment of overtime in the absence of an employment contract. The Court held that the enforcement of statutorily conferred benefits that arise under the *Employment Standards Act* must be through the statutory regime which provides a complete and effective administrative structure for granting and enforcing rights to employees: paras. 85-92.

[222] The defendants say that given the efforts and expense incurred by the Province in establishing the Employment Standards Branch and the Employment Standards Tribunal, and the specialized knowledge that both possess regarding these issues, the administrative mechanism within the *Employment Standards Act* should be accepted as preferable to a complex class court action. It should be

noted that the defendants do not suggest that the procedures under that *Act* are the only available means of determining this dispute, such as was found in *Macaraeg*.

[223] In reply, Ms. Dominguez asserts that the focus of the enquiry must be on the nature of the claims put forward – that is, not simply enforcement of statutory benefits, but allegations of breach of contract, breach of fiduciary duty and unjust enrichment.

[224] The *Employment Standards Act* has been said to be a mechanism for the enforcement of *minimum* benefits and standards applicable to all employees regardless of any other factors, including employment contracts: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 36. This distinction between enforcement of these statutory rights and enforcement of contract and other obligations is discussed in *Taiga Building Products Ltd.*, [2007] B.C.E.S.T.D. No. 59:

> [39] In any event, I do not accept the "entire contract doctrine" is a proper adjudicative tool in proceedings under the *Act*. The objective of the Courts adjudicating the common law contractual rights between an employer and an employee and that of the Director determining the respective statutory rights and obligations of an employer and an employee under the *Act* are significantly different. The main objective of the common law is to adjudicate a breach of contract and to provide appropriate relief for that breach, depending on the Court's view of the circumstances and factors in each case. The main objective of the Director is to administer a legislative scheme within a framework of statutory purposes that have found expression in several Court and Tribunal decisions, including *Machtinger v. HOJ Industries Ltd.*, (1992) 91 D.L.R. (4th) 491 (S.C.C.), *Helping Hands v. Director of Employment Standards*, (1995) 131 D.L.R. (4th) 336 (B.C.C.A.) and *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27. These decisions, among other things, recognize the remedial nature of the *Act* and correspondingly endorse a large and liberal construction and application of its provisions. They were specifically referred to and recognized in the Determination as providing support for a broad approach to interpreting the *Act* in the circumstances of this case.

[225] Section 118 of the *Employment Standards Act* also addresses the interplay between enforcement of rights under that *Act* and actions outside of that regime:

> Subject to section 82, nothing in this Act or the regulations affects a person's right to commence and maintain an action that, but for this Act, the person would have had the right to commence and maintain.

[226] The Court in *Macaraeg*, however, also confirmed at paras. 96-97 that s. 118 of the *Employment Standards Act* addresses actions to enforce rights that exist apart from the provisions of that *Act*.

[227] Thus, in a situation where an employment contract provides for the same minimum standards set out in the *Employment Standards Act*, or alternatively sets out superior rights and obligations, an employee has the option of pursuing a remedy either under that *Act* or by civil action: *Fuggle v. Airgas Canada Inc.*, 2002 BCSC 1696 at para. 30.

[228] Ms. Dominguez also relies on *Kumar v. Sharp Business Forms Inc.* which addressed certification by certain employees regarding claims that the employer had failed to pay overtime, holiday and vacation pay as required by the *Employment Standard Act*, R.S.O. 1990, c. E. 14. The Court rejected the submission that procedures under the Ontario Act would be a preferable way to resolve the issues:

> 40 The defendant argues that a class proceeding is not the preferable procedure for the resolution of the common issues. Sharp relies upon *Halabi v. Becker Milk Co.* (1998), 39 O.R. (3d) 153 (Ont. Gen. Div.). *("Halabi")*. In that case, the proposed representative plaintiff sought certification in an action for the recovery of wages under the *ESA.* The court denied certification on the basis that the *ESA* provided a procedure that was quick and economic. Therefore, it was held that the *ESA* provided a procedure other than by way of a class action that would be preferable for the resolution of the common issues. (at 154)
>
> 41 I do not apply that reasoning in the case at hand. First, in my view, if the legislature provides expressly (s. 64.3) for a civil action being available as an alternative to the administrative procedure of the *ESA.* I am reluctant to find that an employee's right to pursue a civil action can be removed via s. 5(1)(d) of the *CPA.* The *CPA* is a *procedural* statute to enhance access to civil justice, not to restrict it. I note as well that s. 64.4(1) of the *ESA* provides that an employee who "commences" a civil action for wages is then *not* entitled to file a complaint under the *ESA.* Thus, to disallow certification on the basis of a class action not being the preferable procedure for resolving the common issues paradoxically is to result in no alternative procedure for a civil remedy.
>
> 42 Second, a class action generally involves a number of putative class members (estimated in the case at hand to be about 50). A class proceeding, as recognized in *Halabi,* serves the policy objectives of access to justice, judicial economy and behaviour modification. See *Scott v. Ontario Business College (1977) Ltd.,* [1999] O.J. No. 3441 (Ont. S.C.J.) at para. 2(d). Under the *ESA* there is no provision for a consolidation of complaints by employees in respect of the determination of claims by an employment standards officer.

> (Section 68(16) of the *ESA* and Reg. 591/91 do allow for consolidations of hearings at the review by a referee stage.)
>
> 43 Third, in the instant situation, the proposed representative plaintiff employee does not meet the s. 82.3 (1) test. He left his employment in October, 1999 and the action was not commenced until June 14, 2000. To deny certification means that the plaintiff cannot proceed with a complaint under the *ESA.* Assuming that s. 82.3(1) does not apply to a civil action, as discussed above, then the present action is the *only* procedure available for the plaintiff and similarly-situated class members in respect of their grievances for alleged unpaid wages.
>
> [Emphasis in original.]

[229] Denying relief to Ms. Dominguez and the other putative class members on the basis that rights could or should have been pursued under the *Employment Standards Act* poses some difficulty.

[230] Firstly, there are questions concerning the application of the *Employment Standards Act* to all of the issues raised in this action. There is no statutory requirement under that *Act* regarding the numbers of hours to be worked, since this aspect of the claim arises solely under the employment contracts in question. There clearly are provisions in the contracts relating to overtime which parallel those of that *Act*. Those provisions were enforced by the Employment Standards Branch in relation to the defendants but not necessarily for the benefit of the class members in accordance with the Determination dated June 17, 2011. Similarly, the agency fees charged are arguably in contravention of s. 10 of that *Act* and again were addressed by the Director in accordance with the Determination dated June 3, 2011 which required that ICEA (not the defendants) reimburse one employee for the agency fee charged. The relevance of that *Act* to the airfare issue is less clear. The defendants argue that they would be recoverable under s. 21 of that *Act*, however, it remains to be seen whether or not in these circumstances they could be characterized as "business costs", such as was found in *Glacier Park Lodge Ltd. (Re)*, [2009] B.C.E.S.T.D. No. 59, reconsidered [2009] B.C.E.S.T.D. No. 94. Mr. Sales' initial complaint included a claim relating to the airfare, but that matter was settled before the matter went forward. The defendants also say that misrepresentation arguments may be made under s. 8 relating to the minimum hours and airfare issues, however, Ms. Dominguez has asserted no claim relating to misrepresentation.

[231] Secondly, even if such claims were within the purview of the *Employment Standards Act*, claims under ss. 8 and 10 must be brought within six months (s. 74(4)) and the amount of "wages" (defined in s. 1 and would include overtime, agency fees and possibly the airfare) that can be ordered by the Director is limited to those payable in the six months before the complaint or termination of employment (s. 80(1)). Given that many, if not most, of the putative class members will have been recruited beyond any such six month period, denial of certification would result in no effective remedy for any breaches: *Kumar v. Sharp Business Forms Inc.* at para. 43. In fact, the Determination dated June 3, 2011 against ICEA relating to agency fees specifically limited recovery only to Mr. Baduria since he came within this time period, despite the finding that 21 employees (including Mr. Sales and Mr. and Ms. Dominguez) had made similar payments.

[232] The limitations under the *Employment Standards Act* are a far cry from the usual limitations on bringing actions for the enforcement of contract rights and other duties, being six years under the *Limitation Act*, R.S.B.C. 1996, c. 266, s. 3(5). To deny certification in these circumstances would clearly be contrary to the objective described in *Hollick* relating to access to justice and parenthetically, would also be contrary to the objectives under the *Employment Standards Act* which, being benefits-conferring legislation, are to be interpreted in a broad and generous manner for the benefit of employees (and others): *Rizzo* at para. 36; *Kumar v. Sharp Business Forms Inc.* at para. 30.

[233] One must also be cognizant of the environment in which any such claims under the *Employment Standards Act* may have been made. Mr. Sales filed a complaint with the Director on August 3, 2010 relating to the airfare issue. Seven days later, on August 10, 2010, his employment was terminated. In his Determination dated April 29, 2011, the Director specifically found that the termination was motivated, at least in part, by Mr. Sales taking such action. It is not difficult to conclude that this reaction on the part of the defendants would have caused other employees to fear similar retribution had they filed similar complaints. In these circumstances, it would be unfair in the extreme to, as suggested by the

defendants, fault these employees for not taking steps to file these claims under the *Employment Standards Act*.

[234] Thirdly, there are issues of judicial economy relating to any procedures under the *Employment Standards Act*. There is no provision in that *Act* which provides a mechanism to consolidate complaints. Nevertheless, the defendants contend that in the past, the Director has consolidated the claims of employees making similar claims: *Digital Accelerator Corp*. (Re), [2002] B.C.E.S.T.D. No. 401 at para. 6. The case of *Prince George Nannies and Caregivers Ltd.* (Re), [2009] B.C.E.S.T.D. No. 55 is also an example of the application of s. 76(2) of that *Act* where the Director conducted an investigation based on information from a former nanny, but went on to issue a determination relating to 14 other nannies who had not filed complaints. While I accept that such a mechanism could be employed by the Director, any decision on the part of the Director would be at his discretion and the complainants would have no guarantee that such a procedure would be used.

[235] Behavior modification is the last concept that must be considered. The defendants point to the fact that they are already responding to an administrative order issued by Service Canada relating to the airfare and that they have taken steps to repay airfare costs. They say that some employees have been repaid. Such alternative remedies, which can succeed without having to invoke the complexities of the class action procedure (or the payment of a contingency fee to a lawyer), have been found to be preferable to class litigation in some cases: *Bittner v. Louisiana-Pacific Corp.* (1997), 43 B.C.L.R. (3d) 324 at paras. 63-67 (S.C.) (where there was a formal claims process that would have avoided substantial issues if the trial had proceeded); *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54 at paras. 47-50 (Sup. Ct. J.), aff'd (2001), 152 O.A.C. 344 (Sup. Ct. J. Div. Ct.), aff'd *Kumar v. Mutual Life Assurance Co. of Canada* (2003), 226 D.L.R. (4th) 112 (Ont. C.A.) and *Zicherman v. Equitable Life Insurance Co. of Canada* (2003), 226 D.L.R. (4th) 131 (Ont. C.A.).

[236] Despite the defendants taking these steps to remedy the issue, it remains a relevant consideration that certification may serve to reinforce the underlying policy

under the *Act* to modify behavior. As was noted in *Fulawka* at paras. 134-139 (Sup. Ct. J.), admissions by a defendant do not necessarily result in a refusal to certify an issue. Otherwise, a defendant may simply try to "buy" their way out of a lawsuit and avoid any penalties that may be found to be appropriate in the circumstances. As was stated in *Scott*:

> [79] Finally, a common issues trial cannot be avoided because the defendants admit certain facts or issues. Class members do not become parties to the litigation until after certification. Therefore, a public statement admitting issues at a certification hearing or in the originating proceeding cannot be a legal admission. It is a bare promise to admit: *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172, (Ont. Gen. Div.).

[237] I am satisfied that there are no other reasonable means of resolving the claims that are more practical or efficient than a class proceeding.

s. 4(2)(e) Do class proceedings create greater difficulties than individual proceedings?

[238] Ms. Dominguez contends that class proceedings will not create greater difficulties than individual proceedings. She cites *Riazi*:

> [102] …The common issues will impact a large group. A trial of the common issues would significantly advance the litigation and has the potential to determine the entire case. Pursuant to s. 27 of the *CPA,* if appropriate, simplified structure and procedures can be implemented for determination of any individual issues.

[239] As stated by the Court in *Fakhri* at paras. 95-96, this proceeding will allow the claims to be managed in a "controlled procedural environment".

[240] The defendants submit that the small size of this class (75) also weighs against certification. They say that the claims can be dealt with individually without overwhelming the resources of either the Employment Standards Branch or the courts. They submit that traditional case management tools could be invoked, including joining cases and employing simplified small claims court rules. They cite *Gary Jackson Holdings Ltd.* at paras. 69-72 and *Aston v. Casino Windsor Ltd.* (2005), 42 C.C.E.L. (3d) 190 at paras. 10-15 (Ont. Sup. Ct. J.).

[241] I have no hesitation in concluding that some 75 individual actions would not be the preferable manner of resolving the issues in this case. The Court in *Stanway* recently summarized many of the benefits of a class procedure:

> [68] The advantages of a class procedure are discussed in *Bouchanskaia* at para. 150:
>
> > [150] There are numerous advantages to class actions for plaintiffs. Mr. Branch suggested that they include the following:
> >
> > (a) Whatever limitation period is found to be applicable to the claim is tolled for the entire class (s. 39);
> >
> > (b) A formal notice program is created which will alert all interested persons to the status of the litigation (s. 19);
> >
> > (c) The class is able to attract counsel through the aggregation of potential damages and the availability of contingency fee arrangements (s. 38);
> >
> > (d) A class proceeding prevents the defendant from creating procedural obstacles and hurdles that individual litigants may not have the resources to clear;
> >
> > (e) Class members are given the ability to apply to participate in the litigation if desired (s. 15);
> >
> > (f) [omitted in the original]
> >
> > (g) The action is case managed by a single judge (s. 14);
> >
> > (h) The court is given a number of powers designed to protect the interests of absent class members (s. 12);
> >
> > (i) Class members are protected from any adverse cost award in relation to the common issues stage of the proceeding (s. 37);
> >
> > (j) In terms of the resolution of any remaining individual issues, a class proceeding directs and allows the court to create simplified structures and procedures (s. 27);
> >
> > (k) Through the operation of statute, any order or settlement will accrue to the benefit of the entire class, without the necessity of resorting to principles of estoppel (ss. 26 & 35).

[242] In this case, it is expected that most of the claims will be of a low dollar value and that the class members will have limited resources with which to pursue legal action, even should they be able to find counsel willing to take on such claims. The class procedure provides the very mechanism that will allow the Court to simplify the procedures towards a resolution of the issues and allow the flow of information regarding the litigation to all participants.

[243] I would also adopt the approach of the Court in *Rumley* at para. 39 in recognizing the particular vulnerability of the class members to prosecute actions. These are all recent immigrants to Canada and while no specific evidence was adduced on the point, one can expect that they are not particularly sophisticated parties in the conduct of litigation. Allowing this matter to proceed by way of a class action will allow them to have counsel who can assist in marshalling their evidence.

[244] I also do not see joinder or joint management of the 75 claims to be realistic in the circumstances of this case.

[245] I accept the contention of Ms. Dominguez that resolving the claims through a class proceeding is practical and efficient. It will save judicial resources, and provide access to justice and promote behaviour modification.

[246] I conclude that a class proceeding is the preferable procedure.

American Case Law

[247] Ms. Dominguez also relies on recent case law from the United States which she says supports certification in this case. Both cases involve circumstances which are very similar to the facts involved in this case. In both cases, the Courts had no difficulty in finding common issues and held that a class action was the preferable procedure.

[248] Before considering those cases, it is important to recognize that while similar legislation applies in that jurisdiction under Rule 23 of the *Federal Rules of Civil Procedure*, 28 U.S.C.A., the American approach is more restrictive in the sense that a case may be certified only if the Court finds that the questions of law or fact common to class members *predominate* over any questions affecting only individual members (Rule 23(b)(3)): *Hollick* at paras. 29-30; *Bendall v. McGhan Medical Corp*. (1993), 106 D.L.R. (4th) 339 at paras. 36-38, 61 (Ont. Ct. (Gen. Div)). This is in contrast to the requirement under s. 4(2)(a) of the *Act* which states that it is but one factor to be considered in the preferability analysis.

[249] Before considering these authorities, it is useful to reproduce Rule 23(a) and (b):

> **Rule 23. Class Actions**
>
> (a) PREREQUISITES. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.
> (b) TYPES OF CLASS ACTIONS. A class action may be maintained if Rule 23(a) is satisfied and if:
> (1) prosecuting separate actions by or against individual class members would create a risk of:
> (A) inconsistent or varying adjudications with respect to individual class members that would establish incompatible standards of conduct for the party opposing the class; or
> (B) adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests;
> (2) the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole; or
> (3) the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
> (D) the likely difficulties in managing a class action.
> .....

[250] The first case is *Rosiles-Perez v. Superior Forestry Service, Inc.,* 250 F.R.D. 332 (M.D. Tenn. 2008) which involved over 3,000 temporary foreign workers mostly from Mexico who went to work in the U.S. in agricultural jobs between 2000 and 2006, mostly planting trees. This class action lawsuit involved allegations that the defendant took advantage of the workers' indigence, inability to speak or understand

English and ignorance of the laws of the U.S. to underpay them and breach their working arrangements (including failing to reimburse for certain work visa and transportation expenses from wages), in violation of certain laws including the *Fair Labour Standards Act of 1938*, 29 U.S.C.A. ("*FLSA*"). There were also allegations that the defendant maintained inaccurate and insufficient documentation relating to wages and payroll information and that false and misleading information was provided.

[251] The class action was certified. The Court held that the four factors under Rule 23(a) had been met. These factors have been summarized by the United States Supreme Court as: 1) numerosity; 2) commonality; 3) typicality; and 4) adequacy of representation: *Amchem Prods. Inc. v. Windsor,* 521 U.S. 591, 613 (1997).

[252] Furthermore, the Court held that under Rule 23(b)(3), the predominance requirement was satisfied, as issues raised by the proceeding related to allegations that the rights of the foreign workers under certain statutes were systematically violated and that, as such, there were common issues that applied to the class as a whole.

[253] Unlike our legislation, the Court was required to consider whether a class action is "superior" to other available methods to resolve the matter. The Court specifically stated (*Rosiles-Perez* at 17):

> ... the Plaintiffs are vulnerable workers with extremely limited resources rendering separate actions highly unlikely. The putative class members, indigent, foreign nationals whose lack of understanding of the English language and the laws of the United States pose substantial barriers to individual actions. The Court concludes that class certification here is a vastly superior method of adjudication because the common issues will only have to be heard and decided once, thereby promoting judicial efficiency. Separate actions would run the risk of inconsistent judgments. Thus, the Court finds that certification of the claims for nonincidental damages is appropriate under Rule 23(b)(3).

[254] The second case is *Perez-Benites v. Candy Brand, LLC,* 267 F.R.D. 242 (W.D. Ark. 2010). In that case, a class action lawsuit was brought on behalf of over

3,000 Mexican migrant workers who harvested and packed peppers and tomatoes and performed other agricultural work in Arkansas from 2003 to 2007. The workers came to the United States on temporary work visas and were employed by Candy Brand, one of the Southeast's largest employers of foreign workers.

[255] The lawsuit alleged that Candy Brand violated the workers' rights as set forth in certain uniform employment contracts. Specifically, the allegation was that Candy Brand, acting through its agents, breached those contracts with respect to payment of wages, payment of federally-mandated overtime wages for work in its packing sheds and the prevailing wage for work in the fields and payment of transportation expenses. There was also an allegation that the defendant had refused to reimburse the workers for recruitment expenses, return transportation and other fees.

[256] The class action lawsuit was certified pursuant to Rule 23 of the *Federal Rule of Civil Procedure*. The Court first decided that it was no answer to the claim that they should proceed under the *FLSA*, even though the plaintiffs alleged breaches under that statute.

[257] Secondly, again the Court held that the plaintiffs had satisfied the four requirements enumerated in Rule 23(a): *Candy Brand* at 8. In addressing numerosity and commonality in particular, the Court found that: 1) most members of the class were indigent persons who would not have the financial means to bring individual litigation against the defendants; 2) the class members had standardized employment contracts with the defendants; and 3) all class members had common questions concerning fact and law that were susceptible to common sources of proof.

[258] Once those requirements were met, the plaintiffs then successfully argued the requirement under Rule 23(b)(3), which allows for certification when common questions of law or fact predominate over individual questions. In particular, they contended that the common claims for all class members related to Candy Brands' violation of standard employment contracts that they had with all class members and

Candy Brands' unlawful pay practices which were uniform throughout their operations.

[259] While the defendants argued that a class action was inappropriate in these circumstances as the "disparity in dollar amounts, along with the variances in each individual Plaintiff's memory and credibility should preclude class certification", the Court disagreed and held that the "Defendants' potential liability pertaining to their alleged unlawful pay practices overshadows any individual damage issues": *Candy Brand* at 8-9.

[260] The approach taken in the U.S. cases above is urged upon me by Ms. Dominguez. As I stated earlier in these reasons, the thrust of this action is a consideration of standard contracts with foreign workers in an environment where it is alleged that the defendants took advantage of the vulnerability of those workers for their own financial gain. That is very similar to the allegations in these cases; in that all three cases – this case, and both the U.S. cases – involve allegations that regular wages and overtime were not paid as agreed or required by statute and that various expenses relating to these workers were not reimbursed, again as agreed or required by statute. In my view, the conclusions reached in those American cases lend support to the conclusions reached by me in this case.

[261] In reply, the defendants rely on two U.S. cases – *Alix v. Wal-Mart Stores, Inc*., 838 N.Y.S. 2d 885 (Sup. Ct. 2007) and *Cutler v. Wal-Mart Stores, Inc*., 927 A. (2d) 1 (Ct. Spec. App. Md. 2007). Both cases involved allegations that Wal-Mart had systematically deprived hourly workers of wages and overtime for work done. In both cases, certification was denied because the Courts found that the individual issues dominated over the common issues. Since the *Act* does not similarly provide for that result in the event of a similar finding here, these cases are of little relevance to the determination of this application.

Conclusion

[262] I am satisfied that Ms. Dominguez has satisfied all the statutory requirements under the *Act*, including the contested issues on this application relating to the

appointment of a representative plaintiff, whether there are common issues and whether a class action is the preferable procedure.

[263] A class proceeding will substantially advance this litigation in terms of an overall resolution of the common issues which addresses the need for judicial economy in its approach. In addition, recognizing the vulnerable situation in which these temporary workers find themselves, a class proceeding will provide the access to justice that they require in an environment that will be of assistance to them. Finally, behaviour modification is no doubt required if these claims are ultimately proven. One allegation, that relating to the airfare issue, has already been conceded by the defendants and to that extent, the proceedings are promoting that objective in the preliminary stages. It bears repeating that the investigations by the Employment Standards Branch in late 2010 and early 2011 had little effect on the practices of the defendants regarding payment of overtime and despite efforts to ensure that overtime was being properly paid, further breaches were recorded which resulted in a Determination on June 17, 2011 with penalties.

[264] Accordingly, the relief sought in paragraph 1 of the Notice of Application certifying the action is granted. The classes will be as set out in these reasons. Ms. Dominguez is appointed representative plaintiff for the classes, subject to my comments concerning her continuing in her representation of Class B after the next court hearing. Finally, the issues set out in Schedule "A" are certified as common issues, subject to the reformulation of the issues concerning the allegations of breach of contract under Issue B and the addition of Issue E(e) relating to whether there is a juristic reason for any enrichment, as set out above.

[265] Counsel did not speak to the relief sought in paragraph 5 of the Notice of Application to approve the form and the method of notice to be given to the class members and who should bear that cost. If the parties cannot agree, that matter can be spoken to.

[266] The relief sought in paragraphs 6 and 7 of the Notice of Application (relating to the defendants preserving their payroll records and providing information

concerning class members to Ms. Dominguez's counsel) were not specifically addressed by the parties in argument and I will assume that there was no opposition in the event of a decision to certify. Accordingly, subject to this being a misunderstanding on my part, that relief is granted.

[267] In general, counsel are at liberty to reschedule a hearing to deal with the terms of the Order, in the event that they are unable to agree.

"The Honourable Madam Justice S.C. Fitzpatrick"

Schedule "A"

Proposed Common Issues

A. Agency

a) Were International Caregiver Employment Agency ("ICEA") and/or Luzern International Manpower Services Corporation ("Luzern") acting as agents of the Defendants in obtaining employment for Class Members with the Defendants and facilitating their entry into Canada for that purpose?

b) If the answer to A(a) is "yes", are the Defendants thereby liable for their agents charging and receiving Employment Fees from Class Members?

B. Contract Terms

a) What are the relevant terms (express, implied or otherwise) of the Class' contracts of employment with the Defendants respecting:

i. regular and overtime hours of work;

ii. the recording of hours worked;

iii. Employment Fees; and

iv. payment of two-way air transportation?

b) Did the Defendants or their agents breach any of the forgoing contractual terms? If so, how?

C. Fiduciary Duty

a) Did the Defendants or their agents owe a fiduciary duty to the Class?

b) If the answer to C(a) is "yes", has there been a breach of that duty?

D. Duty of Good Faith & Fair Dealing

a) Did the Defendants or their agents owe a duty of good faith and fair dealing to the Class?

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

E. Unjust Enrichment

a) Were the Defendants enriched by not having to pay the Class Members their requisite 40 hours of work per week?

b) Were the Defendants enriched by failing to pay the Class Members appropriately for all their hours worked?

c) Were the Defendants or their agents enriched by having the Class Members pay the Employment Fees?

d) Were the Defendants or their agents enriched by not paying the cost of two-way air transportation for the Class Members?

e) If the answer to any of E(a-d) above is “yes”, did the Class Members suffer a corresponding deprivation?

F. Systemic Defects

a) Did the Defendants have a duty (in contract or otherwise) to monitor and accurately record all hours worked by the Class Members to ensure that the Class was appropriately compensated?

b) If the answer to F(a) is “yes”, did the Defendants breach that duty?

c) Did the Defendants have a duty (in contract or otherwise) to implement and maintain an effective and reasonable system, procedure and practices which ensured that the duties set out in F(a) above, were satisfied for the Class Members?

d) If the answer to F(c) is “yes”, did the Defendants breach that duty?

G. Remedy & Damages

a) If the answer to any of the common issues is “yes”, what remedies are Class Members entitled to?

b) If the answer to any of the common issues is “yes”, are the Defendants potentially liable on a class-wide basis?

c) If the answer to G(b) is “yes”, can damages be assessed on an aggregate basis?

d) If “yes”:

i. can aggregate damages be assessed in whole or part on the basis of statistical evidence, including statistical evidence based on random sampling?

ii. What is the quantum of aggregate damages owed to the Class?

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

e) Is the Class entitled to an award of aggravated or punitive damages based upon the Defendants' conduct? If "yes",

i. Can the award of aggravated or punitive damages be determined on an aggregate basis?

ii. What is the appropriate method of procedure for distributing any aggregate aggravated or punitive damages to the Class Members?