

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Basyal v. Mac's Convenience Stores Inc.*,
2026 BCSC 961

Date: 20260528
Docket: S1510284
Registry: Vancouver

Between:

**Prakash Basyal, Arthur Gortifacion Cajés, Edlyn Tesorero
and Bishnu Khadka**

Plaintiffs

And

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

Defendants

Before: The Honourable Justice Matthews

Reasons for Judgment

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L. Betsworth

Place and Dates of Hearing:

Vancouver, B.C.
September 15–19, 22–26 & 29,
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Place and Date of Judgment:

Vancouver, B.C.
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Table of Contents

OVERVIEW.....	5
THE PARTIES AND THE TEMPORARY FOREIGN WORKERS PROGRAM	8
The Class and Subclass.....	8
Mac's	9
Overseas and Trident.....	10
Mac's Use of the Temporary Foreign Workers Program with Overseas.....	11
The Experiences of the Representative Plaintiffs	27
Prakash Basyal.....	27
Bishnu Khadka.....	31
Edlyn Tesorero	36
Credibility.....	41
The Representative Plaintiffs	41
Geoff Higuchi	41
Doug Hartl.....	44
Kuldeep Bansal.....	44
BREACH OF CONTRACT ALLEGED AGAINST MAC'S BY THE SUBCLASS	47
Common Issue A1: What are the relevant terms (express, implied or otherwise) of the subclass members' employment contracts with the Mac's?	47
Common Issue A2: Did Mac's breach any of the foregoing contractual terms? If so, how?	48
Common Issue A4: Did Mac's breach its duty to honestly perform the terms of the employment contract by misleading subclass members about the availability of employment?	48
Legal Principles	50
The Alleged Dishonesty	51
Commonality	56
The Alleged Dishonesty is Pre-contractual and in the Context of a Conditional Contract that Mac's was Not Called Upon to Perform.....	58
Whether the Employment Contracts Contained True Conditions Precedent.	60
Whether There is a Duty of Honesty in Contractual Performance in a Binding Contract when Performance Obligations are Suspended	62
Whether Mac's Rescinded the Employment Contracts Before the Conditions were Satisfied.....	63
Subjective Dishonesty	64

Whether a Finding on the Breach of the Duty of Honesty in Contractual Performance is Superfluous.....	66
Conclusion on the Breach of the Duty of Honesty in Contractual Performance	69
Common Issue A5: Are subclass members able to recover damages in excess of the minimum notice period in the employment contracts?.....	69
COMMON ISSUE B1: THE NATURE OF THE FEES CLASS MEMBERS PAID TO OVERSEAS AND TRIDENT	70
Legal Principles	70
Discussion	71
Conclusion on Common Issue B1	75
UNJUST ENRICHMENT ALLEGED AGAINST OVERSEAS AND TRIDENT.....	76
Common Issue C1: Was there any juristic reason for Overseas and Trident to charge the recruitment fees?.....	76
Common Issue C2: Were Overseas and/or Trident unjustly enriched by having the class members pay the recruitment fees?	76
BREACH OF FIDUCIARY DUTY ALLEGED AGAINST OVERSEAS AND TRIDENT	76
Common Issue D1: Did Overseas and Trident have a fiduciary duty to the class members as Regulated Canadian Immigration Consultants?.....	77
Undertaking	78
Vulnerability	79
Conclusion on Whether a Fiduciary Duty was Owed	80
Common Issue D2: Did Overseas and Trident breach this fiduciary duty?	80
REMEDY	81
Common Issue E1: If the answer to any of the common issues is yes, what remedies are class members entitled to?	81
Common Issues A1, A2 and A5.....	81
Common Issue C2–Unjust Enrichment.....	83
Common Issue D1–Breach of Fiduciary Duty	84
Common Issue E2: If the answer to any of the common issues is yes, are the defendants liable on a class-wide basis?	84
Common Issue E3: What is the appropriate method of procedure for distributing the damages award to the class?	85
Common Issue E4: Is the class entitled to an award of aggravated or punitive damages based on the defendants’ conduct, and, if so, in what amount?	88
Aggravated Damages	88
Punitive Damages.....	90

E5: If the answer to E4. is yes, what is the appropriate method or procedure for distributing any aggravated or punitive damages to the class? 96

DISPOSITION..... 96

Common Issue A1..... 96

Common Issue A2..... 96

Common Issue A4..... 96

Common Issue A5..... 97

Common Issue B1..... 97

Common Issue C1..... 97

Common Issue D2..... 97

Common Issue C2..... 97

Common Issue D1..... 97

Common Issue E1..... 98

Common Issue E2..... 98

Common Issue E3..... 98

Common Issue E4..... 99

Common Issue E5..... 99

Overview

[1] This class action common issues trial is about persons who were recruited by the defendants Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd., (together, "Overseas"), and/or Trident Immigration Services, under the Temporary Foreign Workers Program ("TFWP") and entered into employment contracts with the defendant Mac's Convenience Stores Inc.

[2] The representative plaintiffs allege that Overseas charged the class members fees for jobs, and that those fees were paid to Overseas and/or Trident. The representative plaintiffs assert that fees for jobs are prohibited by statute, and in charging the fees, Overseas breached fiduciary duties to the class members and were unjustly enriched by the illegal fees for jobs.

[3] There is also a subclass of persons who came to Canada to work but Mac's did not provide the jobs contracted for in the employment contracts. The subclass alleges both breach of contract and breach of the duty of honesty in contractual performance. The basis for the latter claim is that Mac's did not actually have the jobs available when it entered into the employment contracts or knew when entering into the employment contracts that the job was unlikely to be available and did not advise the subclass members that Mac's was not committed to providing the jobs.

[4] The common issues to be addressed at this trial include issues pertaining to breach of contract for the subclass, including: the terms of the contract; whether the contract was breached; whether Mac's breached the duty of honesty in contractual performance; and damages for breach of contract.

[5] Mac's concedes that it breached the contracts with subclass members by not providing any employment or providing employment different from that agreed upon. Mac's takes the position that the issue of a breach of the duty of honesty in contractual performance cannot be decided commonly because it depends on oral representations and interactions between Mac's, Overseas and the subclass members. Mac's submits that it was not subject to a duty of honesty in contractual performance at the time of the alleged dishonesty because there were true condition

precedents that had not been met, such that neither party had an obligation to perform. In addition, it submits that it directed Overseas to tell the subclass members not to travel to Canada until jobs were confirmed, and by doing so, discharged its duty of honesty if any was owed. Mac's submits that the subclass has not proved Mac's acted with subjective dishonesty and so the claim must fail. Finally, Mac's asserts that the remedy sought by the representative plaintiffs is not available for breach of the duty of honesty in contractual performance and therefore, there is no point in analyzing this common issue.

[6] A further common issue pertaining to the claims of the subclass is whether the subclass members are entitled to recover damages in excess of the minimum notice period in the employment contract. Mac's concedes that the answer to this question is yes, and the appropriate notice period must be considered at individual issues trials. The representative plaintiffs assert that under the umbrella of this common issue, the court can and should determine that, subject to the duty to mitigate, the appropriate notice period for subclass members who tried but failed to find replacement work is the 24-month term of work provided for in the contract.

[7] As against Overseas and Trident, the common issues are whether the fees charged to and paid by class members were fees for jobs and if so, whether they amount to unjust enrichment or breach of fiduciary duty.

[8] The representative plaintiffs assert the class members were charged fees for jobs and not for immigration or settlement services, because Overseas told them that Overseas would find them jobs, and that is what Overseas did. They submit that Overseas did nothing towards the necessary immigration steps except provide a checklist and provide insufficient temporary housing on arrival. Overseas asserts that they charged the class members for immigration and settlement services. They submit that the evidence shows that they guided the class members through the TFWP immigration requirements and provided settlement services on arrival.

[9] There is no dispute that class members paid fees. The unjust enrichment issues are whether there is a juristic reason for the fees charged, and if not, whether

Overseas and Trident were enriched by their receipt. The representative plaintiffs argue that if the fees are found to have been charged for jobs, there can be no juristic reason because such fees are unlawful and therefore Overseas and Trident were unjustly enriched by their receipt. Overseas argues the fees were not for jobs and were paid for legitimate services rendered.

[10] With regard to breach of fiduciary duty, the representative plaintiffs argue that a fiduciary duty was owed based on the power imbalance between Overseas and Trident, on one hand, and the vulnerable class members on the other, supported by the professional obligations of immigration consultants, analogous to the relationships between lawyers and clients. Overseas did not engage specifically with the question of whether a fiduciary duty was owed but argued that some of the regulatory professional requirements were not applicable during the class period. The representative plaintiffs argue that Overseas and Trident breached their fiduciary duties by charging an unlawful fee. Overseas and Trident dispute that unlawful fees were charged and so dispute that this can amount to a breach.

[11] There are common issues pertaining to remedies which depend on the answers to the liability common issues, including: what remedies the class and subclass members are entitled to; whether the defendants are liable on a class-wide basis; the appropriate procedure for distributing the damages to the class; whether the class is entitled to an award for aggravated or punitive damages, and if so, the appropriate method for distributing that award.

[12] Other common issues were tried by summary trial. Those were common issue A3, pertaining to whether subclass members were required to mitigate their losses; common issue A6, whether, regardless of a duty to mitigate, earnings during the two-year term of the employment contracts will be taken into account in assessing damages; and common issue D2, whether Overseas were acting as agents of Mac's when they allegedly breached their fiduciary duties and, if so whether Mac's is liable for the actions of its agents. These common issues were decided by me in reasons indexed as *Basyal v. Mac's Convenience Stores Inc.*, 2024 BCSC 2007 [Summary

Trial Reasons]; and overturned in part on appeal: *Mac's Convenience Stores Inc. v. Basyal*, 2025 BCCA 284 [2025 Court of Appeal Reasons].

[13] After appeal of the common issues summary trial, the answers to those questions are that subclass members were required to mitigate their losses, any earnings during the two-year term employment contracts are to be taken into account, and Overseas were not Mac's agents, such that the question of whether Mac's is liable for Overseas' actions is not applicable.

[14] During these reasons, where evidence is disputed on a point on which I must make a determination, I will state the dispute and state the determination. Where I state facts without describing a dispute, the evidence was not in dispute.

The Parties and the Temporary Foreign Workers Program

The Class and Subclass

[15] The class is defined as:

All persons who, on or after December 11, 2009 to the opt-out date set by the Court, made payments to Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd. (collectively, "Overseas") and/or Trident Immigration Services Ltd. ("Trident Immigration") in exchange for employment at Mac's and who were thereafter provided with employment contracts offering employment at Mac's Convenience Stores operated by Mac's Convenience Stores Inc. in British Columbia, Alberta, the Northwest Territories and Saskatchewan ("Western Canada") under Canada's Temporary Foreign Worker Program, which offer they accepted.

[16] The subclass is defined as:

All persons who, on or after December 11, 2009, to the opt-out date set by the Court, made payments to Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd. and/or Trident Immigration Services and who thereafter:

- i. entered into binding contracts (i.e. contracts in respect of which all conditions precedent were satisfied or waived) of employment with Mac's Convenience stores to work in Western Canada under Canada's Temporary Foreign Worker Program;
- ii. obtained a valid work permit and (where required) travel visas to enter Canada to undertake such employment;

- iii. validly entered Canada and reported to work as required by their contracts of employment, and
- iv. were not provided by Mac's with work at all, or were not provided with work in the amount specified in the contract of employment or in respect of whom Mac's failed to pay expenses related to accommodation or travel costs which Mac's was obligated to pay under such employment contracts.

[17] The representative plaintiffs assert there are about 880 class members and about 125 subclass members. The defendants dispute these numbers.

Mac's

[18] Mac's owns a chain of convenience stores. The stores that are involved in this case are in the Western Region, which comprises British Columbia, Alberta, Saskatchewan, and the Northwest Territories.

[19] Mac's does not operate all Western Region convenience stores. For many of them, a number which varies, the stores are operated by independent dealers. The dealers employ the store workers. These are referred to as dealer stores. On occasion, there is a dealer vacancy, and Mac's will operate the store pending placing a new dealer. In such cases, Mac's employs the senior person running the store and the other persons working in the store. Stores that Mac's operates generally, or while a dealer is not in place, are called corporate stores.

[20] Mac's also operates food services operations in some of the convenience stores. All of the employees in the food services operations are employed by Mac's directly, even when the food services are located in a dealer store.

[21] Geoff Higuchi was Mac's Senior Recruitment and Training Manager and then Operations Manager between 2012 and 2014. Mr. Higuchi testified that a typical convenience store operated 24 hours a day and required three to five workers, including the dealer.

[22] Mac's employs market managers to oversee the dealer stores, the corporate stores, and the food services operations.

Overseas and Trident

[23] Mr. Bansal, the principal of both Overseas entities, testified that one of the entities was an immigration consultancy and the other was an employment agency. He testified that they operated as one business and the names were used interchangeably.

[24] At the trial, I was told that Overseas Immigration Services Inc. has been dissolved, and that Overseas Career and Consulting Services Ltd. is now known as Sterling Immigration. Because Mr. Bansal testified that they acted as a single entity, and the witnesses referred to them together as Overseas or OSI, I will refer to them as Overseas. I make no finding as to their existing corporate status or names since no evidence was led on that topic.

[25] Mr. Bansal testified that Overseas provide immigration services including for the TFWP and permanent residency applications.

[26] Mr. Bansal is a Regulated Canadian Immigration Consultant ("RCIC"). Overseas employed other RCICs including Ajay Mann. It also employed Cynthia Hirak, whose emails state that she was a paralegal, although Mr. Bansal stated that she became an RCIC at some point, but he was not sure when. Immigration professionals were regulated by the Federal Immigration Consultants of Canada Regulatory Council when the events in this case occurred, was. That body became the College of Immigration and Citizenship Consultants in 2021.

[27] Minakshi Bala was the principal of Trident and an RCIC.

[28] Overseas were represented by counsel during this proceeding up to and including the summary trial. At this trial, on some days, Mr. Bansal, a director and officer of both Overseas entities, attended. He gave evidence. All other days, Leah Betsworth, an employee of Overseas Career and Consulting Services Ltd., and a lawyer in Washington State, attended. She did not seek leave of the court to self-represent the Overseas entities until prompted to do so by an objection made by the representative plaintiffs when she sought to cross-examine one of the representative

plaintiffs. The representative plaintiffs objected on the basis that she was not a proper person to “self-represent” Overseas and because she is a lawyer, but not called in any Canadian jurisdiction, she was engaged in the unauthorized practice of law. I told Ms. Betsworth that Overseas would have to address the appropriateness of her representing Overseas and would have to do so when there was a director and officer of Overseas present to address the Court.

[29] Overseas did not seek to address the issue further until it opened its case. Accordingly, Overseas did not cross-examine the witnesses called by the representative plaintiffs or by Mac's. When Overseas opened its case, Mr. Bansal was present and Ms. Betsworth tendered documentation showing that she had become a director and officer of Sterling Immigration Services, which she advised is the current name of Overseas Career and Consulting Services Ltd. I permitted Ms. Betsworth to lead Mr. Bansal's evidence for Overseas and to make Overseas' closing submissions.

[30] Trident attended the summary trial with counsel but did not attend trial.

Mac's Use of the Temporary Foreign Workers Program with Overseas

[31] Mr. Higuchi testified that in 2012, Mac's was having problems recruiting dealers, employees for the corporate stores, and employees for food services operations. He testified that Mac's retained Overseas to assist with solving that problem by recruiting foreign workers through the TFWP.

[32] The TFWP is run by the Federal government through a department called Service Canada. Through the TFWP, employers can hire foreign workers if qualified Canadians or permanent residents of Canada are not available to do the work.

[33] During the class period, employers in certain sectors could seek a labour market opinion, known as an LMO, from Service Canada. LMOs were, at some points called labour market impact assessments, and referred to as LMIA's. I will generally refer to them as LMOs, but where a witness described an LMIA, I will use the witness' terminology.

[34] In the LMO application, the employer was required to show that it had marketed the position and was unable to fill the role with citizens or permanent residents. If an employer received a positive LMO, it could hire a foreign worker to fill the demonstrated temporary need.

[35] An LMO was either single and named or unnamed or a blanket LMO. The latter did not describe specific positions, but rather stated positions within a region. Workers' names were added to blanket LMOs after they were obtained.

[36] The LMOs for lower-skilled occupations contained attestations which Mac's made when it signed a given LMO. They included:

I will provide the foreign worker(s) I employ with the wages, working conditions and employment in an occupation that are substantially the same as those described in the positive Labour Market Opinion letter and annex, and the employment contract.

...

I have a reasonable need to fill a vacant or new position and I am offering the foreign worker(s) the position(s), job descriptions and duties that are directly related to my main business activities.

...

I can demonstrate that my business is able to fulfill the terms and conditions related to the employment of the foreign worker(s), the subject of this application, for the duration of employment indicated in this application. The job offered is for full time employment (a minimum of 30 hours per week), is consistent with the job description provided with this application and meets acceptable employment standards.

[37] The LMOs for higher-skilled occupations (such as retail store supervisor or manager) included the first attestation but not the others set out above.

[38] If an employer had a positive LMO and hired an employee to fill the position, the employee would use the LMO (either named or a blanket LMO to which the worker's name had been added) to apply for a visa through a Canadian embassy. This application took place before the employee came to Canada to work. Once the employee had the visa, the employee could travel to Canada and apply for a work permit from Canadian Border Services Agency (CBSA) upon entry to Canada.

[39] Mr. Higuchi testified that Mac's had worked with other recruiting companies to find employees to come to Canada through the TFWP, but the other TFWP recruiting firms had not worked out for various reasons, including that one of the companies was charging the employees for the jobs. Mr. Higuchi was referred to Overseas by a Mac's market manager in Alberta.

[40] Mr. Higuchi testified that in July 2012, Mac's started working with Overseas to recruit persons for Mac's dealer training program and to later become convenience store dealers. Mr. Higuchi testified that he formed the impression that Overseas would be above board and would do things according to the guidelines. He formed this impression because Overseas told him they had a commissioner of oaths full time, because he met Ms. Hirak who was a paralegal and told him that she had been involved in the creation of the TFWP, and because Overseas told him that they had a legal team with over 25 years of experience in the industry.

[41] Mac's primary goal was to recruit dealers. However, it was not possible to recruit dealers through the TFWP because persons brought to Canada through that program had to come as employees. Prospective dealers were not Mac's employees, and they had to be citizens or permanent residents. Persons coming to Canada under the TFWP had to come as employees for a two-year period and could only apply for permanent residency after they arrived.

[42] From mid-2012 when Mac's started working with Overseas until mid-2013, its intention was to recruit dealers who would not become employees of Mac's. Mr. Higuchi testified that he did not "entirely" explain that to the people he interviewed in Dubai. After mid-2013, Mac's used Overseas to recruit employees on the theory that they might later be able to train as dealers. Mac's also used Overseas to recruit employees for stores being temporarily operated as corporate stores due to dealer vacancies.

[43] Mac's agreed to pay Overseas a fee for every successful candidate that became an employee at Mac's. The fees were \$1,500 for each supervisor hired and \$500 for each cashier or food counter attendant hired. In the Summary Trial

Reasons at paras. 133-137, I found that the services that Mac's agreed to pay Overseas these fees for were as follows:

- a) pre-screening candidates;
- b) recruiting qualified candidates;
- c) video-conferencing for personal interviews;
- d) settling selected candidates;
- e) completing all business and immigration documents required federally and provincially;
- f) obtaining LMOs for Mac's acting as Mac's representative;
- g) organizing job fairs where a representative of Mac's could meet and interview foreign workers for the purpose of offering them jobs under the TFWP; and
- h) facilitating communications between Mac's and foreign workers that Mac's decided to hire under the TFWP.

[44] In the 2025 Court of Appeal Reasons, the majority held I erred in determining that Overseas were Mac's agents in part because I placed too much significance on the fact that Overseas' acted as Mac's representative in obtaining LMOs. However, the Court of Appeal's reasons do not call into question the findings I made about the services Mac's retained Overseas to provide.

[45] The evidence of both Mr. Bansal and Mr. Higuchi at this trial was consistent with these findings including that Overseas pre-screened the candidates, selected the candidates to be interviewed, and arranged for the interviews. Mr. Bansal testified that Mac's did not pay for any of the job fair costs such as renting the hotel rooms, etc., and that Overseas agreed to provide settlement services to the foreign workers for the fee that Mac's paid.

[46] I incorporate those findings into these reasons.

[47] With regard to the fees charged to class members, Mr. Higuchi and Mr. Bansal both testified that Overseas told Mac's that it did not charge fees to workers who held passports from countries that were visa-exempt but if a worker's passport was a country that was not visa-exempt, then they would charge the worker a fee. It is not necessary to determine if any class members were from visa-exempt countries because the class is defined as persons who paid fees to Overseas and Trident.

[48] Each of the representative plaintiffs testified that they were required to pay an initial fee when they provided their resume to Overseas to start the process of getting a job in Canada, and a second fee after they obtained their visas and were ready to travel to Canada for their jobs.

[49] Mr. Bansal testified that they set the fees they charged to class members based on a full application taking 35-40 hours at \$250 per hour, for a total of \$7,000–\$8,000. He testified that the payment schedule was based on the progress of the application. On cross-examination, he agreed that the first installment had to be paid before any immigration or settlement services were provided. He did not contradict the evidence of the representative plaintiffs that the first installment was required to start the process. He testified that the second installment had to be paid when the worker submitted an application for a work permit. I pause to note that I assume Mr. Bansal meant an application for a visa submitted to the Canadian embassy, because the uncontroverted evidence was that the class members would apply for a visa while still abroad (and therefore at the Canadian embassy) and for work permits at the port of entry to Canada.

[50] Mr. Bansal testified that he issued refunds when Overseas did not continue with the second phase, and although he was not specific about what that was, he did refer to settlement services when referring to the second phase. On cross-examination he agreed that if Overseas did not find a job for the person, and if the person did not want to switch from the TFWP to another program like a tourist visa or a study visa, Overseas would refund the money.

[51] Mr. Bansal testified that the second portion of the fee – usually \$6,000 – was payable by the worker when they submitted their application to the Canadian embassy. The representative plaintiffs testified that they were required to pay the second portion of the fee to Overseas after they received their visa but before they travelled to Canada. There was evidence about one class member who had a visa, and Mr. Higuchi inquired to Overseas about whether there was a hold up on travel to Canada for that person. Mr. Bansal responded that the problem could be that the person had not paid the fee to Overseas.

[52] I find that Overseas required the class members to pay the first portion of the fee before Overseas to pre-screened them for a prospective employer and the second portion of the fee after the worker had an LMO, job offer, and signed employment contract with Mac's, but before the worker came to Canada.

[53] The class members were recruited in Dubai, UAE. Mr. Higuchi went to Dubai on four occasions and interviewed workers, the first of which was in August 2012. Mr. Higuchi described these events as job fairs. Mr. Bansal of Overseas described them as immigration seminars. Some of the representative plaintiffs gave evidence that at the first event they attended, Mr. Bansal or Mr. Mann talked to attendees about jobs in Canada, and the process of obtaining them, including LMOs. There is also evidence from the representative plaintiffs and from Mr. Higuchi that persons who had been pre-screened by Overseas had interviews with Mac's at these events.

[54] I conclude these events had elements of job fairs and elements of immigration seminars.

[55] The working theory was that Mr. Higuchi, or someone from Mac's, interviewed every person who was sent a job offer and an employment contract. After interviews, Mac's prepared a list of those persons who were considered candidates to be hired. However, in April 2013, Mac's had a number of positive blanket LMOs that were going to expire. Accordingly, Mac's permitted Overseas to prepare job offers on Mac's letterhead and employment contracts for persons whom Mac's had not interviewed. Mr. Bansal wrote to Mac's confirming that they agreed that Mac's

“would not be liable” for “offering employment” to these workers if it later decided not to employ them. In the letter, Mr. Bansal stated that he was confident that the candidates would be able to find other employment if “not selected by your company”. When Mr. Bansal was asked whether this proposal was legal under the TFWP, he testified that it should not have been done because Mac’s wanted to hire these people but not promise them jobs.

[56] Mr. Higuchi attributed this no-interview, no-liability scheme to Overseas and Mr. Bansal attributed it to Mr. Higuchi. It does not matter whose idea it was. They agreed to proceed in this fashion.

[57] Mr. Higuchi testified that despite his agreement to this and the no-liability letter, 11 of the candidates had already been interviewed and five had already been hired when Mr. Bansal suggested the plan. Mr. Higuchi testified that Mac’s had already decided not to make job offers to some. He testified that he believes that Mac’s did attempt to interview all of the people whose names were on the no-interview list “before they came over” but he cannot account for three of them. He testified that Mac’s interviewed all of them before job offers were issued. When asked whether job offers were issued to the three people he could not account for, he replied “not that I am aware of”. However, Mr. Higuchi also testified that he did not keep a list or otherwise track the names of persons to whom job offers and employment contracts had been issued and that Overseas did not tell him who had accepted job offers. So, on his own evidence, he would not have the ability to determine whether job offers were issued and therefore his evidence that he is not aware of issuing them job offers is meaningless.

[58] I note that this no-interview, no-liability process was for a limited period of time and applies to a limited number of class members and subclass members.

[59] Regardless of this no-interview, no-liability process, for each class member who was offered a position, Overseas prepared the applications for LMOs on behalf of Mac’s and prepared the job offers and the employment contracts for those employees for Mr. Higuchi to sign. Mr. Higuchi testified that he was to review and

sign each job offer and employment contract that Overseas sent to a prospective employee in advance of Overseas submitting it to Service Canada in support of the LMO application. Service Canada, which ran the TFWP, would contact Mr. Higuchi with any questions about the LMOs.

[60] Despite his evidence that he was to sign every candidate's job offer and employment contract, Mr. Higuchi agreed that he signed a blank employment contract which he provided to Overseas. He testified that he could not recall how that happened. In his answer, as he was musing on how that happened, he testified about a progression from the contracts he signed at the beginning, when Overseas provided him a full package of supporting documents, but over time just provided the signature pages to him and as long as a signature page was stapled to the official Mac's job offer letter, he would sign it.

[61] The blank contract was dated July 12, 2012. The early approved LMOs were in August 2012. The evidence does not support that the signed blank contract was as a result of a matured, trust-endowed relationship between Mac's and Overseas. Indeed, the evidence demonstrates that the beginning of the relationship was the high point of Mac's regard for Overseas, and that Mac's trust of Overseas diminished as it gained experience with Overseas.

[62] If Service Canada approved the LMO, Overseas sent the signed job offer, employment contract, and LMO to the candidate. Mr. Higuchi testified that Overseas rarely advised him when a job offer was accepted. Mr. Higuchi testified about lists that were made by Overseas with input from Mac's. The list included candidates who had been interviewed and others who had not been interviewed. It included available positions. It indicated which candidates were to fill which positions, and whether they had arrived in Canada and were working. The list did not include information about to whom job offers were made, which employees accepted them by sending back signed contracts, what the timelines for those contracts to proceed to the point where an employee was in a store working, and what job offers or accepted employment contracts were outstanding at any given time.

[63] If the foreign worker signed the contract and returned it, there were steps that had to be completed before that class member could come to Canada and start work. That included obtaining a visa, which required background criminal checks, tax returns, birth certificates, marriage certificates, a health check and evidence of ties to the class member's home country. Mr. Bansal testified that Overseas did not have the authority to collect the necessary documents for the class members due to their nature, e.g. police record checks and bank statements, so Overseas provided the class members with a checklist of documents they needed to collect after the class member signed the employment contract. He testified that Overseas would sit down with the class members and check that everything was correct. Mr. Bansal testified that once everything was in hand, the application for the visa could be made online or in person at a Canadian embassy.

[64] If the class member received a visa, the class member was in a position (immigration-wise) to come to Canada. In order to be able to work, the foreign worker had to obtain a work permit, which could be done on entry to Canada.

[65] The evidence demonstrates an inherent time lag between when the job offers were made and accepted and when the worker was ready to come to Canada for the job. Overseas asserted that this time lag was a complexity that was not known to either company when they started working together. Mr. Higuchi testified that when Mac's first started working with Overseas, there were no problems like this because Overseas was populating Mac's LMOs with workers who were already in Canada.

[66] It is not clear why either Mac's or Overseas was surprised that this timing problem occurred when they were recruiting workers from abroad. It would seem foreseeable that it would take weeks or months after Mac's received a positive LMO to put the job offer and employment contract package together, send it to the foreign worker, for the foreign worker to accept the job, for the worker to obtain a visa, and for the worker to travel to Canada. Mr. Bansal that the visa application process alone took between at least one month and sometimes six months, depending on the Canadian embassy issues.

[67] Mac's initially had Overseas apply for individual LMOs but found them to be too time consuming, and on Overseas' advice, moved to blanket LMOs. Mac's sought blanket LMOs for positions in dealer stores and corporate stores, despite that Mac's did not hire or employ the staff in any dealer stores. At his examination for discovery, Mr. Higuchi explained that Mac's applied for blanket LMOs for positions in dealer stores on the basis that any dealer store, at any time, could go corporate.

[68] There is no evidence that supports the supposition that Mac's thought it was even remotely likely that Mac's would be in a position to need to hire workers for all dealer stores in any given region. Yet that was the basis for the LMO applications, because Mac's attested that Mac's had "a reasonable need to fill a vacant or new position". Mr. Higuchi testified he was not aware that such an attestation meant that hypothetical jobs were not permitted to be the basis for an LMO application. I consider this evidence to be disingenuous. I do not accept it.

[69] I conclude that Mac's was putting dealer store positions on blanket LMOs so that it could demonstrate to Service Canada that the positions for which it was seeking LMOs were positions that existed in a Mac's store even though some of them were not positions that Mac's needed to fill or anticipated needing to fill. In relation to the claims made in this case, the problem is that after Mac's received them, they assigned class member names to them, made employment offers and signed employment contracts for those jobs. Mac's was contracting with the class members for jobs when it did not anticipate being in a position to fulfill the contract by providing the jobs to its contracting partners.

[70] In addition, regardless of the characterization of the fees charged by Overseas, Overseas was collecting fees when the class members were neither going to be provided those jobs nor be able to lawfully be able to work in Canada because their work permits obtained on entry to Canada were tied to the jobs on the LMOs.

[71] The representative plaintiffs read in Mr. Higuchi's examination for discovery evidence where he testified that he instructed Overseas to tell the class members to

not do a single thing, including quitting their jobs, applying for visas, or coming to Canada “until it’s confirmed that the job offer is valid”.

[72] Mr. Higuchi testified that he never signed a job offer or employment contract for a job that was not available. If Mr. Higuchi meant, by this evidence, that every job offer that Overseas sent to a class member on behalf of Mac’s was actually vacant and needed to be filled, then I do not believe him because such an assertion is not in accordance with the preponderance of probabilities.

[73] The preponderance of probabilities is informed by Mr. Higuchi’s own evidence that Overseas was to tell the class members to wait until a valid job offer had been confirmed. In addition, as I explained above, some of the job offers were for hypothetical jobs in dealer stores that were not actually anticipated to be jobs that Mac’s had to fill in corporate stores. Even where the jobs were in a corporate store with an actual vacancy, other than food services positions, the evidence is that the person filling the position would only be able to do so as long as the store remained corporate, and that was usually at most a few months or a year. The contracts were for 24 months, and so it was highly unlikely that Mac’s would be able to employ anyone in a corporate store open position for the term of the contract.

[74] Mr. Higuchi’s evidence that he only signed job offers for jobs that were actually available cannot be squared with his conduct in dealing with subclass members. For example, on December 13, 2013, Mr. Higuchi received an email from Ms. Hirak identifying candidates that were available for placement immediately, including one named Patricia Win and another named Edlyn Tesero, one of the representative plaintiffs. Mr. Higuchi responded that the candidates should not be in Canada because Overseas had told him that they should not come unless Mac’s identified a need.

[75] Mr. Higuchi subsequently received an email from Ms. Win saying that she had been hired by Mac’s and she was there to work but had not been given a job. She said she was out of money and had no place to stay and expressed concerns about the weather in Calgary. Mr. Higuchi wrote back, stating that his concern was “why

you are here in Canada at this point". He stated that while she had been given a job offer, "you took too long to come here and your position was filled with someone else", and that she should have verified this before she came. Leaving aside that Mr. Higuchi had the ability to know when Ms. Win was coming to Canada because he had made Ms. Win a job offer and Mac's could have stayed in touch with the class members who accepted job offers or required Overseas to keep them apprised, Mr. Higuchi knew why Ms. Win was there because a week previous Ms. Hirak had told Mr. Higuchi that Ms. Win was available for immediate placement.

[76] As will be described below, Ms. Tesorero also sent Mr. Higuchi an email about not being given a job to do despite her employment contract and the hardships that was causing her, and Mr. Higuchi also blamed her and asked her why she was in Canada.

[77] Arthur Cajes is a former representative plaintiff who ceased to hold that role by a consent order made between certification and the summary trial. Before Mr. Cajes travelled to Canada, he emailed Mr. Higuchi who told him that he was not on his list and to not travel to Canada until Mr. Higuchi confirmed there was a position for him. Mr. Cajes wrote to Mr. Bansal and Ms. Hirak about his \$6,000 second payment and asking them to clarify what Mr. Higuchi said. Neither Overseas person responded to the request for clarification of what Mr. Higuchi said.

[78] Mr. Bansal's evidence on the topic of whether Overseas was telling class members that their jobs had vanished, might vanish, or might not ever have existed, varied. He testified that jobs might vanish quickly and described that in one month, seven corporate stores in Calgary became three corporate stores. He testified that sometimes they did not have time to tell the class members that their jobs had vanished. He gave an example of an unnamed person who was already on a flight when the store he was coming to work at went from corporate to dealer, so there was no job for the inbound worker. When confronted with the evidence of the representative plaintiffs that none of them were told that their jobs had vanished before they arrived, he did not respond substantively. He said that Mr. Khadka did

not tell him he was coming; he just showed up. For reasons I set out below, I accept Mr. Khadka's evidence that he told Overseas he was coming.

[79] Mr. Higuchi testified about aspects of the relationship that did not go well for which he blamed Overseas, including Overseas' failure to communicate to the employees to whom Mac's had made job offers that those positions might not exist by the time the employees were ready to come. In April 2013, Mr. Higuchi wrote to Ms. Hirak of Overseas about a subclass member who wrote to Mr. Higuchi complaining that his LMO and employment contract was for a retail supervisor, but he was being paid the cashier rate of pay. Mr. Higuchi said as follows to Ms. Hirak:

Here is the problem with allowing people to come here on our LMO's as they are expecting the job and/or the pay regardless of our situation.

I can see their frustration as well since they have uprooted themselves under false pretences.

[80] Despite Mr. Higuchi's statement to Ms. Hirak that he could see the worker's frustration, Mr. Higuchi replied to this worker that he was on a customer service representative, or cashier LMO, thereby disputing the complaint that the pay was too low. At trial, Mr. Higuchi admitted that he did not look up the worker's LMO and agreed that the worker's LMO was for a position as a retail supervisor and therefore his complaint about the pay was valid.

[81] In the emails with the subclass member, Mr. Higuchi told him that the reason he was working as a cashier was because of the length of time it took the worker to come, so the role of retail supervisor was not available. During cross-examination, Mr. Higuchi agreed that the worker was named to a blanket LMO for 20 retail supervisor positions in Edmonton. Mr. Higuchi agreed that there were never 20 retail supervisor positions in Edmonton.

[82] During the communications with the unhappy cashier subclass member, Mr. Higuchi suggested that Overseas could find him another job and he could be removed from Mac's LMO. The worker said he would do that if another job could be found quickly, as he could not afford to not work. Mr. Higuchi responded that was between the worker and Overseas, but he would inform his market manager that the

worker was giving his notice. The worker begged Mr. Higuchi to allow him to continue working, saying "I humbly request to be given an opportunity to grow."

[83] In mid-2013, Mr. Higuchi sent the emails described below pertaining to workers whose LMO described positions in Maple Ridge and Summerland, but who were actually in Yellowknife and if "anyone asked, the "official story" was that they were training in Yellowknife. On cross-examination, Mr. Higuchi was asked if Mac's was concerned that the workers might get in trouble, and he replied that none of the many Mac's persons to whom he sent the "if anyone asks" email raised concerns about the consequences for the workers.

[84] Mr. Bansal was asked about these Yellowknife workers in his examination for discovery and he testified that it was not proper, that Overseas told the employers the rules, but the employers do what is convenient for them. At another point in his examination for discovery, on a different topic, he testified that RCICs have a professional obligation to tell an employer when they are doing something illegal in the sphere of employment immigration rules and to withdraw their services if the client continues to act illegally.

[85] In mid-June 2013, Mac's became aware that CBSA was investigating persons working for Mac's who did not have work permits matching their LMOs. In his report to the vice president of the western region for Mac's, Mr. Higuchi described it as a paperwork issue on which Mac's had made a mistake but also blamed Overseas for telling Mac's that they could put this worker to work before they could.

[86] Mr. Higuchi testified about an email he sent to the vice president and Doug Hartl, Mac's Manager of Security, Public Relations and Government Relations, on June 21, 2013, in which he outlined a plan to end ties with Overseas by the end of August 2013. Mr. Hartl testified that he did not know why the plan was not implemented but also testified that up until 2014, he thought the 2013 issue was an administrative error that was cleared up and things were back on track. Mr. Higuchi testified that they did not end the relationship by August 2013, because by that time,

he was satisfied that the problem was clerical errors on the part of Overseas and Mac's. He testified that he discussed this with Mr. Hartl.

[87] Mr. Higuchi testified that it was not that easy to cut off working with Overseas because Mac's had "job offers" out there. As I will explain below, what Mac's had "out there" were job offers that had been issued with an employment contract signed by Mac's. Mr. Higuchi testified that he did not have a list of persons to whom job offers (and employment contracts signed by Mac's) had been issued.

[88] In any event, Mr. Higuchi testified that he decided they would "work towards fulfilling those job offers" but they were not going to apply for any more LMOs, and he was going to cancel the open LMOs. His plan was that they would be "finished" by the end of August 2013.

[89] Mr. Higuchi testified that near the end of 2013, he was frustrated with Overseas due to numerous calls he received from CBSA about persons at the border and asking if Mac's was expecting the person. He testified that he told Overseas that they were incompetent, and Ms. Hirak would say enough to calm him down. He testified that in Mac's business, if there is a problem, and you do not hear any more about it, that is great.

[90] In 2014, Mr. Higuchi required Overseas to deal with the LMO applications in a manner that allowed Mr. Higuchi to know what LMOs had been requested. Overseas continued to handle the communications with the workers including sending the job offers and employment contracts. Mr. Higuchi testified that Overseas never provided him with contact information for the persons to whom job offers had been sent.

[91] Between December 2013 and the summer of 2014, Mac's was also having increasingly worrying interactions with CBSA. Mac's understood that CBSA was investigating Overseas. On June 12, 2014, Mr. Higuchi wrote to his boss and said he would "stop all communication" with Overseas by the end of the month. On June 17, 2014, Mr. Higuchi wrote to CBSA and confirmed that it had agreed to "retract" all job offers with one exception.

[92] On July 7, 2014, Mr. Higuchi sent an email advising Mac's personnel that Mac's was no longer using the TFWP, was ending its association with Overseas and all outstanding LMOs and job offers were rescinded. Mr. Higuchi also stated that some workers may have arrived in Canada "without authorization from Mac's". He stated that it was illegal for them work for an independent store operator or a corporate store. There is no evidence to confirm that Mac's took steps to "rescind" job offers or exactly what Mr. Higuchi meant by that.

[93] On July 9, 2014, there were emails between Mr. Higuchi, Mr. Hartl, and Ms. Hirak pertaining to workers sent to Mac's in Terrace, where their work permit job descriptions did not match the positions they were sent to work at. Ms. Hirak responded that Mr. Higuchi had been made aware of the candidates in various conversations. Mr. Bansal stated that Overseas was ceasing to act as Mac's representative for the TFWP effective June 27, 2014. Mr. Higuchi testified that this marked the end of the relationship between Mac's and Overseas, but he did not know why Mr. Bansal asserted that he stated the June 27, 2014 date 17 days after it had passed.

[94] Notwithstanding these "it's over" statements from both Mac's and Overseas, the evidence demonstrates that in September 2014, February 2015, July 2015, three times in August 2015, and September 2015, Mr. Higuchi communicated with Ms. Hirak and/or Mr. Bansal about temporary foreign workers or positions that Mac's was trying to fill. In one of the August 2015 communications, Mr. Higuchi wrote to Ms. Hirak and asked her to help him find people with "open work permits" to work at the Mac's Terrace and Kitimat locations. In another August 2015 communication with Ms. Hirak, Mr. Higuchi wrote that there could be "no ties" to Overseas in the assistance he was seeking.

[95] At trial, Mr. Higuchi described this as a "bad move" on his part. He testified that he made the "no ties" request because he was not supposed to be working with Overseas any longer and he told no one else in Mac's that he was doing so. He testified that he was desperate to fill the spots.

The Experiences of the Representative Plaintiffs

Prakash Basyal

[96] Mr. Basyal was born and raised in Nepal. When he met with Overseas and then Mac's, he was working at Baskins-Robbins in Dubai, United Arab Emirates and using his earnings to support his parents, his grandmother, his three sisters and his brother.

[97] Mr. Basyal testified that he wanted to come to Canada to work because he had heard it offered the opportunity to bring his family with him, and he could not do that in Dubai. He testified that the work in Dubai did not offer overtime and they were required to work six days a week.

[98] Mr. Basyal testified that he came into contact with Overseas at an event at the Flora Creek Hotel where Mr. Bansal talked to those there about opportunities to work in Canada. He testified that Mr. Bansal told them to make a payment of \$2,000 and give him a resume and Overseas would find them jobs according to their resumes. He testified that Mr. Bansal did not provide much information about how to immigrate to Canada, except that they would know there was an opportunity to work when they were sent an LMO by Overseas.

[99] Mr. Basyal testified that he brought the local currency equivalent of \$2,000 and his resume with him to the event because friends had told him to do so. He gave both to Mr. Bansal. He testified that he did not receive a receipt for the \$2,000 nor did he receive any written agreement of the services Overseas was going to provide. He testified that Mr. Bansal told him that after he received the LMO and a job offer, he had to pay an additional \$6,000

[100] Mr. Basyal testified that in November 2012, he received an email that Overseas was coming to Dubai to conduct interviews at the Flora Creek Hotel. Mr. Basyal testified that he went to the Flora Creek Hotel and Ms. Hirak gave him a flyer with information and then he had an interview with Geoff Higuchi from Mac's.

[101] Mr. Basyal agreed that when he was at the job fair hosted by Overseas, he was looking for a job in the field of customer service or hospitality. He agreed that he would have accepted a job from any employer in that field and the most important thing to him was to come to Canada.

[102] Mr. Basyal testified that in February 2013, he had a call from Geoff Higuchi for a second interview which was done over the phone. He testified that about a week after that, Overseas sent him an LMO and a job offer and employment contract to work as a cashier at a Mac's Convenience Store in Edmonton. Mr. Basyal testified that the job offer he received was for 37.5 hours of work per week, at the rate of \$11.40 per hour plus overtime. The duration of the contract was two years. It also provided for the employer to pay round-trip airfare from UAE to Canada and back to Mr. Basyal's "home country".

[103] Mr. Basyal testified that he signed the employment contract. When he did so, he did not have discussions with anyone at Mac's. Mr. Basyal testified after he received the LMO and job offer in October 2012, he was very happy because it was his dream to provide proper support to his family.

[104] Mr. Basyal testified that he then undertook the steps to get a visa which included obtaining police security certificates from UAE and Nepal, school transcripts and medical clearance. He testified that he received a checklist from Overseas which he used. He testified he did not receive any other assistance from Overseas. Mr. Basyal testified that he gathered all the documents with the help of family and friends, filled out the application form himself and paid the fee to submit the application at the Canadian embassy. He informed Overseas when he submitted his application to the Canadian embassy. In December 2013 he received his visa.

[105] When asked whether Overseas completed the visa application process for Mr. Basyal, Mr. Bansal replied that it is like an accountant doing a tax return, that Overseas advises the clients to have all the documents, the client fills out the application, and Overseas reviews it. There is no evidence that Overseas reviewed Mr. Basyal's visa application. Mr. Bansal did not testify that Overseas did.

[106] Mr. Basyal testified that he received another communication from Mr. Bansal to meet him at the Flora Creek Hotel in December 2013 which he did. He testified that they discussed that he had received his visa and he was going to visit his family in Nepal. He gave Mr. Bansal the equivalent of \$6,000, the remaining fees to be paid. He understood that because he had got the job, the fees had to be paid. Mr. Bansal testified that he met Mr. Basyal in Dubai and Mr. Basyal paid a fee to obtain his work permit to come to Canada. When asked what that entailed, he described the process for obtaining a visa. Mr. Basyal already had his visa when he met Mr. Bansal for the second time. Mr. Bansal's evidence is not accurate on this point.

[107] Mr. Basyal testified that he went to Nepal to see his family, and while in Nepal, he expected to receive an airline ticket to travel to Canada in accordance with the contract. He testified that he did not hear anything, so he emailed Overseas. He still did not hear anything, so he called Overseas but the person he talked to was confused about whether he had paid the second part of the fee. He testified that eventually he was told by an employee of Overseas to purchase his airline ticket and he would be reimbursed. He did so and sent Ms. Hira his ticket. Mr. Basyal testified that he did not have any communications with Mac's after signing the employment contract and before travelling to Canada.

[108] On April 18, 2014, Mr. Basyal travelled to Canada, landing in Vancouver. While at the airport, he received his work permit from CBSA. The work permit stipulated that he was able to work as a cashier in Edmonton at Mac's Convenience Store and he was not permitted to work at any other occupation other than as stated.

[109] Mr. Basyal arrived on a Friday. On Monday, he went to Overseas, expecting to be sent to Edmonton to report for his job. Instead, he was taken to a residence for local accommodation. The residence had two or three bedrooms and there were seven or eight people staying there. Mr. Basyal testified that it appeared to him that it was run by Overseas. He testified that he stayed there for two to three weeks, at first sleeping in the living room and then moving to a bedroom when others left.

[110] Mr. Basyal testified that he went to Overseas every day to see about his job. He testified that he was confused, surprised, and began to doubt that he was going to be sent to work at the job.

[111] Mr. Basyal testified that eventually Mr. Bansal told him the original plan was not working and they were going to send him to work on a farm. Mr. Basyal told him that he would not go to work on a farm. Mr. Bansal offered him work at a bottle depot in Calgary. Mr. Basyal testified that Overseas gave him a bus ticket to Calgary and someone named Pradeep picked him up and took him to his residence. The next day, Pradeep's parents took him to a bottle depot in Lethbridge, and he lived in a room in Pradeep's parents' residence. He worked from 8 am to 5 pm in the bottle depot, six days a week. He was not paid. He was told he would be paid \$11 per hour but he was not. He complained and Pradeep's parents gave him \$100. He testified that he was worried because he did not know what was going on.

[112] Mr. Basyal testified that while working at the bottle depot in Lethbridge, CBSA personnel arrived and asked him for his work permit. Mr. Basyal responded that he did not have a work permit for this company. He was handcuffed and taken away by the CBSA. He testified that he was distraught, felt like a criminal but he had not done anything wrong.

[113] Mr. Basyal testified that he was taken to a detention centre, given a uniform to wear, and left there. Mr. Basyal testified that he thought he was in jail because he was locked in a room with one other person and an open toilet. The next day, the CBSA took him to a homeless shelter in Calgary where he stayed for a month. He got a bus back to Vancouver where he lived in a homeless shelter on Homer Street for three to four months.

[114] Mr. Basyal testified that he was upset and scared. He did not tell his family he was living in a homeless shelter because he did not want to upset them. Eventually, with the help of the CBSA and a non-governmental organization, Mr. Basyal obtained a new work permit in August or September of 2014.

[115] Mr. Basyal became a Canadian citizen in 2023.

Bishnu Khadka

[116] Mr. Khadka is from Nepal, where he worked in his family's restaurant. He has also worked in India and Dubai, UAE. In Dubai, he worked in a restaurant as a server and in the kitchen. He worked nine hours a day, six days a week. He was supporting his family in Nepal, including his wife, his parents, and his sister. He has a son who was born in September 2014.

[117] While working in Dubai, Mr. Khadka heard from his work supervisor that there were better opportunities in Canada. He understood the hours of work were less onerous in Canada, there is less class structure between workers, and more respect for those working at labour jobs.

[118] On May 23, 2012, Mr. Khadka attended an event at the Flora Creek Hotel and met Ajay Mann, an employee of Overseas. He testified that there was a crowd gathered around Mr. Mann who told them that they could apply for a work permit, a labour market impact assessment, and a visa to settle in Canada if they gave him their C.V. and a \$2,000 fee. Mr. Khadka testified that Mr. Mann said the \$2,000 was a processing fee. Mr. Khadka testified that the next day, he went back and gave Mr. Mann the equivalent of \$2,000 in Dubai currency and his C.V.

[119] Mr. Khadka testified that Mr. Mann gave him a document that had Overseas Career & Consulting name and address on the top and information that Overseas was holding work permit seminars and interviews in Dubai from November 18 to 23, 2012. The flyer listed job types that Overseas was "recruiting" for and asserted "guaranteed job placement". Mr. Khadka testified that he understood that Overseas could introduce him to employers offering the type of jobs on the flyer.

[120] Mr. Khadka testified that Mr. Mann told him that it would take six months to get an LMO and an LMIA and then he could apply for a visa. He testified that Mr. Mann told him that once he got a visa, he would need another \$5,500 for the job. Mr. Khadka testified that he did not get a receipt because he had to believe

Mr. Mann to pursue his dream of coming to Canada. He believed that in Canada, there were better opportunities and better jobs for him to support his family.

[121] Mr. Khadka did not hear anything after the May 2012 visits to the Flora Creek Hotel, so he went back in November 2012 and met Mr. Bansal. He testified that he told Mr. Bansal he had given Mr. Mann \$2,000 and not heard anything for six months. He testified that Mr. Bansal told him that he was going to go back to Canada and personally try to find a job for Mr. Khadka and if he did not, he would give him back \$1,000. Mr. Bansal told him he did not need to do a job interview, and he did not have one.

[122] Mr. Khadka testified that in December, Overseas sent him an LMO, a job offer, and an employment contract as a cashier for Mac's in Edmonton. He had not had an interview with Mac's. The position was for two years, paying \$11.40 per hour, five days a week, 37.5 hours a week, and overtime after 44 hours per week. I note that the job offer was for "full-time employment" at "one of our locations in Alberta", while the LMO states that the position is in Edmonton.

[123] Mr. Khadka testified he signed the employment contract and then took steps to obtain a visa. He testified that Overseas sent him a checklist, he obtained and submitted all the documents on the checklist to the Canadian embassy. He testified that he did it himself without any assistance. He paid the fee to submit the application, which was about \$100.

[124] Mr. Khadka testified that his visa was issued in July 2013, but he did not learn about it until November 2013. He testified that when he received the visa, he contacted Cynthia Hirak at Overseas and told her he had received his visa and asked when he could come to Canada. He testified that Ms. Hirak told him to send \$5,500 and wait a little while. Mr. Khadka sent the \$5,500 to Trident on Ms. Hirak's instructions to do so. Mr. Khadka arranged to borrow some of the money from his brother and the rest he paid out of his savings. On cross-examination, Mr. Khadka agreed that he understood the job at Mac's might not be available, and if that happened, Overseas would find him another job.

[125] Mr. Khadka resigned from his job in Dubai and went home to Nepal to visit his wife and the rest of his family. He testified that while there, he tried to communicate with people at Overseas, including Mr. Mann, Mr. Bansal and Ms. Hirak, initially without success. Mr. Khadka testified that eventually, in April 2014, Overseas told him he could come to Canada. Overseas told him not to bring any payment records of the money he had paid them to find him a job.

[126] Mr. Khadka arrived in Vancouver on April 13, 2014. He obtained a work permit when he entered the country, which described his permitted work as “cashier” in the location “BC NES”, which he understood to mean that his job might be anywhere in BC.

[127] Mr. Bansal testified that Mr. Khadka communicated to Overseas that he had his visa approved. When Mr. Bansal was asked whether Overseas communicated to Mr. Khadka that Overseas needed to hear from Mac’s about Mr. Khadka’s job availability and start date, Mr. Bansal deflected the question by responding that Mr. Khadka was out of touch for months, then suddenly showed up in Vancouver, stating that he had a motorcycle accident.

[128] The evidence about a several month gap in communications, a motorcycle accident and showing up in Vancouver without notice was not put to Mr. Khadka in cross-examination. Counsel for Mr. Khadka objected to Mr. Bansal’s evidence. I ruled that the failure to cross-examine Mr. Khadka was not a matter of admissibility, but I would take into account how much weight to put on Mr. Bansal’s evidence given the lack of cross-examination of Mr. Khadka on the topic.

[129] Mr. Bansal’s evidence contradicts Mr. Khadka’s evidence that he tried to communicate with Overseas after receiving his visa, and that eventually Overseas told him to come to Canada and that is when he came. Mr. Bansal’s evidence that Mr. Khadka showed up without notice was undermined by an email, sent by Ms. Hirak to Mr. Higuchi and copied to Mr. Bansal, 12 days before Mr. Khadka arrived, stating the details about Mr. Khadka’s pending arrival, including the airline, flight number and flight arrival time.

[130] Given that Overseas did not give Mr. Khadka an opportunity to address the suggestion that he did not communicate for months and then showed up with no notice and given my credibility concerns about Mr. Bansal's evidence described below, I prefer Mr. Khadka's evidence.

[131] When he arrived, Mr. Khadka stayed at a house in Surrey that was occupied by several other people who had come to Canada to work at jobs arranged by Overseas at various companies including Mac's, Pizza Hut and Fat Burger. There were two beds in the house and always at least seven other people there, sometimes up to 10 other people there. Mr. Khadka slept on the floor. There were no blankets or pillows, so Mr. Khadka bought a blanket.

[132] Mr. Bansal testified that he could not remember if Overseas helped Mr. Khadka get a cell phone. He did not testify about any of the other services he described that Overseas would do as part of the settlement, including getting set up with MSP, a social insurance number and card.

[133] On April 19, 2014, Mr. Khadka went to Kitimat. He stayed at the home of a person named Jaswinder, who was his boss at the Mac's store where he went to work. The next day he and a co-worker, Amil Liyanage, whom he met in the Lower Mainland, found an apartment that they rented together. However, they were not assigned full-time shifts as they had contracted for. They did not have enough money to eat, and the apartment had no furniture. They were sleeping on the floor.

[134] Mr. Khadka emailed Ms. Hira about the situation. A few days later she replied and stated that he should have contacted her immediately but did not offer a solution.

[135] Mr. Khadka testified that he sent two letters to Mac's but did not get a response. Despite not responding to Mr. Khadka's communications, Mr. Higuchi described the situation with Mr. Khadka and Mr. Liyanage in a report that Mr. Higuchi made to Mac's vice president, to whom he reported. That was because CBSA had become involved and determined that one of their work permits was not

appropriate. Mr. Higuchi had to explain that to his boss but did not also address the fact that the individuals contracted for full-time work for two years and were provided with, according to Mr. Higuchi, “a total of 4 days”.

[136] Mr. Khadka and Mr. Liyanage went to Kitimat Community Services, which tried to help by providing them with food and an airbed. An employee of Kitimat Community Services contacted Mr. Bansal and told him that Kitimat Community Services was willing to buy them flights back to Vancouver so that they could be provided with jobs in accordance with their LMOs. Mr. Khadka testified that there was no reply to the email.

[137] Mr. Khadka testified that he felt helpless and sad. He did not want to tell his family about what was happening because he wanted to give them a better life but that was not happening.

[138] Mr. Khadka and Mr. Liyanage flew back to Vancouver. Mr. Khadka testified that they went to the Overseas office. He testified that Mr. Bansal shouted at him, asked him why he was there because he should be working and asked him if he wanted to be a farm worker or go back to Nepal.

[139] Mr. Bansal testified that Mr. Khadka came in with another person and complained that it was cold in Kitimat and about “some other issues”. Mr. Bansal testified that he told them he could change their employment if they were not happy with the cold weather. He testified that he gave them three job options, one of which was farm work, and two others which he did not describe. He testified that Mr. Khadka left and never came back. To the extent this differs from Mr. Khadka’s evidence, this version of events was not put to Mr. Khadka in cross-examination, and I put no weight on the differences from his evidence.

[140] Mr. Khadka testified that one of the people at Kitimat Community Services gave Mr. Khadka the name of someone he referred to as Uncle Chuck. Mr. Khadka testified that Uncle Chuck helped him find a place to stay and eventually, he went to

a homeless shelter on Homer Street in Vancouver. He testified that Uncle Chuck gave him money for food. He testified that he was just surviving there.

[141] Uncle Chuck introduced Mr. Khadka to the Community Legal Assistance Society which helped Mr. Khadka file a complaint with the Employment Standards Branch against Mac's and Overseas. Mr. Khadka received compensation of \$2,145 for damages pertaining to his claim against Mac's.

[142] Mr. Khadka obtained an open work permit and worked for a number of restaurants. He is now a permanent resident and is applying for citizenship.

Edlyn Tesorero

[143] Ms. Tesorero was born in the Philippines. Prior to coming to Canada to work for Mac's, she was living and working in Dubai, UAE.

[144] Ms. Tesorero left the Philippines in search of long-term stable work. In Dubai, she worked a number of companies in food services.

[145] In 2011 or 2012, Ms. Tesorero heard about Overseas through friends. She testified that she met with Ajay Mann who told her that if she wanted to secure a job, she needed to pay \$2,000 to start the process. She did not have the money, so she did not go through with it. Some time later, she had the money, and she sent an email to Mr. Mann in which she said as follows:

I was interviewed by you last time when you came here in Dubai, and you explained to me how would be the procedure for hiring people for Canada but that time I was not ready financially and need some time to thing whether to go through the process or not.

I would like to know when will the next time you will be around in Dubai as this time I would like to apply and hope to pass all the requirements needed for working in Canada. Kindly also let me know if there are any changes to the procedure.

Attached is my updated CV for your kind reference.

[146] Mr. Mann responded that he did not know when he would next be in Dubai. He suggested that she send the money to them and he would start the process. Ms. Tesorero testified that she understood that the \$2,000 she sent was for

Overseas to start the process of securing a job for her in Canada. Ms. Tesorero testified that she was interested in Canada because in UAE, she could not obtain permanent residency or citizenship. She thought Canada was a better place for the long term and that she would earn more money in Canada.

[147] Ms. Tesorero testified that after about three or four months, she received an email that Overseas was coming to Dubai, and she would have an interview. Ms. Tesorero attended an interview with Geoff Higuchi of Mac's, who told her that someone from Overseas would tell her whether she got the job.

[148] A few months later, Ms. Tesorero received an email from Overseas attaching an offer of employment from Mac's as a food service supervisor in Calgary and an employment contract. Ms. Tesorero signed the employment contract. Ms. Tesorero agreed that the contract did not contain a start date and she never discussed the timeframe for starting work with Mr. Higuchi.

[149] Ms. Tesorero testified that when she received the email with the job offer, she was very excited and very happy because her goal and dream was about to come true.

[150] The email attaching the offer directed her to apply for a visa as soon as possible. The email also attached a Government of Canada checklist of documents that she would require to apply for a visa. The email asked her to send Overseas the application for review before submitting it to the Canadian embassy. Ms. Tesorero testified that she did not need help with the application; she gathered the required documents on her own in accordance with the checklist and she sent everything to Overseas for review as directed but did not receive a response. She submitted the application to the Canadian embassy.

[151] On September 17, 2013, Ms. Tesorero received her visa. She advised Overseas and asked when she could travel to Canada. She quit her job and the terms of her status in the UAE was that she could only stay for 30 days. She made a \$5,500 payment to Trident, which she understood was the recruitment fee that she

had to pay before she flew to Canada. She testified that she sent it to Trident because Ms. Hirak told her to send it to a bank account and that was the account.

[152] On cross-examination, Ms. Tesorero agreed that she never talked to Mac's about the fees she paid to Overseas.

[153] Ms. Tesorero testified that Overseas told her to close all of her social media accounts and delete all conversations with Overseas and she did. When she arrived in Canada, she obtained a work permit permitting her to work for Mac's Convenience Stores Inc. as a food service supervisor in Calgary. Overseas directed Ms. Tesorero to take a cab to a Best Western Hotel, where she found a hotel room rented by Overseas with two other people staying in the one room.

[154] Ms. Tesorero testified that the Best Western was a few blocks from the Overseas office. She went there every day to ask when she was going to start her job. Eventually, Mr. Bansal put her on a bus to Calgary. Once in Calgary, she stayed with another woman named Khate, whom she described as a good Samaritan who allowed her to stay with her even though Ms. Tesorero could not pay for the accommodation. But still, Ms. Tesorero did not go to work. She testified that she was put in contact with someone named Kamaljit at Mac's. Ms. Tesorero sent multiple texts to Kamaljit asking for updates. Kamaljit told her she was waiting for the "company" to say yes. Eventually, Kamaljit stopped responding to Ms. Tesorero.

[155] Ms. Tesorero also texted Mr. Bansal, stating that there had been a miscommunication because Kamaljit could not take her without approval from a brand manager. She asked how Mr. Bansal could send her there without a job and stated that she had paid him to get her a job. Mr. Bansal responded, "Just relax, you paid for immigrant services and I am already talking to a brand manager". Ms. Tesorero responded that was not how she understood it when Overseas was recruiting people in Dubai.

[156] Next, Ms. Tesorero contacted Geoff Higuchi at Mac's.

[157] On December 19, 2013, Ms. Tesorero wrote:

Dear Sir Geoff

Good evening.

I'm Edlyn Tesorero, I was interviewed by you in Dubai last November 2012 I'm hoping you still remember me because I will never forget that interview, longest one I ever had in my life. I was selected. And I sign a contract to work for macs subway as food service supervisor for Calgary upon successful entry in Canada, I arrived December 1, 2013 but until now still haven't started working and still waiting when will I start the job I was expecting, I'm very thankful that because of overseas immigration help and you believing that I could do the job I was able to reach here but I was given information that there is no vacancy which puts me in a very uncertain situation, I have no idea what really happened in between, I'm hoping for your understanding and just wanted you to know that in the middle of this I'm the one who's really suffering. I quit my job in Dubai after working there for six years with high hopes for a better future for me and my family here in Canada. There's nothing to go back for in Dubai and even to go back, to my country as I don't have a source of income there, now I'm left with nothing even the money I bring with me was just enough for me to survive till I get out of everything, I was fortunate to meet someone in Calgary who's kind enough to let me stay at her house without asking anything till my problem gets resolved. I also understand that overseas immigration is trying their best and I, myself, tried to check in some stores if they can take me in. I'm really hoping and praying that you could lend a helping hand about this.

The holidays are coming and apart from being far away from my loved ones I can't even give anything to them especially this Christmas.

Hoping for your kind consideration.

With best regards,

Edlyn Tesorero

[158] On December 20, 2013, Mr. Higuchi responded:

Hi

I am very concerned as the job offer was canceled due to the length of time it took for you to come

We cannot hold spots for that long in our business

I also concerned that you came here without validating there was a job

I have copied OSI but there is little I can do for you

Sorry

Sent from Samsung Mobile

[159] In his evidence at trial, Mr. Higuchi testified that Ms. Tesorero's position was filled while they were waiting for her to arrive in Canada, so Mac's rescinded the job offer and took back her LMO. Below, I will discuss rescission, a term and concept

that Mr. Higuchi frequently used during his testimony. Regardless of whether Mac's could "rescind" Ms. Tesorero's contract, there is no evidence that it did so other than Mr. Higuchi's statement, which I do not accept without corroboration for reasons I will articulate shortly.

[160] Ms. Tesorero testified that she stayed with Khate for two to three weeks and then went to stay with friends who accommodated her. She testified that she was hoping that she would be able to get in touch with Mr. Bansal or Mac's. She was also communicating with Ms. Hirak at Overseas. Ms. Tesorero testified that Ms. Hirak told her that she had communicated with Mr. Higuchi at Mac's and that Mac's would confirm employment.

[161] By May 2014, Ms. Tesorero testified that she was still being told that she would have a job, but she had given up hope, was anxious, depressed and was having trouble sleeping and eating. She had resorted to working at cash jobs to survive. She told her family in the Philippines what was happening, and they were worried about her.

[162] On May 20, 2014, Ms. Tesorero sent Mr. Higuchi another text asking for help. She explained that her work permit limited her to working for Mac's. She explained that she had talked to store managers, but they said they could not do anything without Mr. Higuchi's approval. She explained that she could not reach Ms. Hirak. She ended the text saying that "...this is my last resort my future is at stake ..im not looking for trouble but humbly asking for your help..thank you".

[163] Mr. Higuchi did not respond to Ms. Tesorero's May 20, 2014 text.

[164] Ms. Tesorero left Canada in June 2014. She said on the one hand she was afraid to leave because she was worried about what would happen when went through immigration, but on the other hand, she did not feel like she was in a safe situation in Canada because she was working illegally. Ultimately, she returned to Dubai and after a few weeks, got a job. She remains living and working there doing the type of work she was doing when she left to fulfill her dream to come to Canada.

[165] Ms. Tesorero testified that her time in Canada was one of the darkest times of her life. She testified that she knows that Canada is a good place, but she still relives the nightmare of what happened to her and does not want to go through it again. She lost money and it was a lot of money to her. She testified that it is not good for her to even talk about it.

Credibility

The Representative Plaintiffs

[166] The representative plaintiffs each gave evidence in a manner that justified confidence being placed in it. None of them appeared to exaggerate what were clearly extremely difficult experiences they had when they came to Canada. None of them skewed the evidence in their favour. For example, they each conceded on cross-examination by Mac's that they wanted to come to Canada and no employer was particularly important to them in that endeavour. Mr. Khadka agreed that he understood that the Mac's job might not be available but if it was not, Overseas would get him another job.

Geoff Higuchi

[167] Mr. Higuchi testified about events that occurred over 10 years ago and he did not have perfect recall of all of things that happened during the course of Mac's working with Overseas to hire temporary foreign workers. Allowing for that, his evidence was shown to be unreliable and his veracity was wanting.

[168] An example on reliability is as follows. During cross-examination, Mr. Higuchi testified that Mac's "plan A" for this project was to bring in foreign workers who would become store dealers and never become employees of Mac's. He testified that plan A did not work the way he thought it would because he did not fully understand the TFWP when Mac's started working with Overseas. However, he testified that they did bring in two people who went straight into training as dealers and then became dealers, so were never employees. During his cross-examination the next day, he recanted this when confronted with the work permits of those workers which showed they entered Canada as employees of Mac's.

[169] With regard to veracity, Mr. Higuchi was defensive and deflected blame while testifying. Although he did not have anything personally at stake in this litigation since he is not a named defendant and he does not work for Mac's any longer, he constantly deflected blame to Overseas and he was defensive about his own conduct, repeatedly stating that he did not know very much about how the TFWP worked and he was relying on Overseas to get it right. When, for example, he was questioned about whether he had concerns when Ms. Hirak explained to him how a blanket LMO would allow Mac's to apply for four LMO positions when they only needed two, he said that was Ms. Hirak's proposal, and he believed she knew all the ins and outs and had checked it out with Service Canada.

[170] The essence of Mr. Higuchi's evidence about blanket LMOs is that they were applied for on the basis that Mac's was entitled to seek LMOs to bring in temporary foreign workers to fill every position existing in a region even though Mac's did not have the authority or need to fill them when it made the application because the positions were either not open or not open to Mac's to fill. This is despite that the language of the attestations Mac's was required to make when applying for LMOs required the applicant to attest that it had a reasonable need to fill a vacant or new position. Mr. Higuchi testified that he did not read the attestations, he just signed the forms that Overseas sent him. This demonstrates that Mr. Higuchi just doing what he needed to do to recruit foreign workers in a way that met Mac's needs.

[171] With regard to both deflection and veracity, in May 2015, Mr. Higuchi wrote an email to several people about a situation in their Yellowknife store. Mac's did not have any LMOs for Yellowknife. They had workers who had come in on the TFWP based on British Columbia LMO positions. He sent an email in which he stated:

We don't have an LMO for this site, and we're currently in the advertising stage.

Mr. Higuchi described the foreign worker in the Yellowknife store and said:

She came in on a BC LMO and should anyone ask, she's 'in training' for store 1181 and in Yellowknife temporarily,

[172] In these communications, Mr. Higuchi set out an inaccurate talking point to avoid trouble with Service Canada over Mac's employment of a temporary foreign worker when they did not have an LMO for the place at which she was working. Not only did he create a false narrative, but he also directed the persons to whom the email was sent to use it. When Mr. Higuchi was asked about this at his examination for discovery, he asserted Ms. Hirak "came up with all this" and that by "should anyone ask" he meant that Ms. Hirak said it was legal and he was just reciting what Ms. Hirak told him. He pointed out that the people to whom he sent the email did not comment negatively on what he set out.

[173] At his examination for discovery, Mr. Higuchi testified that this approach was not dishonest because it benefited the store operator and it would benefit the employee because she would end up in the Yellowknife store which was a "better" store than the store on her LMO.

[174] For another employee referenced in the same email, who had a Summerland LMO but was also working in Yellowknife, Mr. Higuchi wrote "The official statement will be she's in training in Yellowknife." When asked, during his examination for discovery, whether the official statement was different from the truth, Mr. Higuchi said "Based on the way you're presenting it, I guess". When counsel pointed out to him that she was presenting it the way he had written it, he said it was just a way to get the worker to fill the need because there was an emergency. He said it might seem dishonest to counsel, but to them it was "perfectly legal". He said it would be dishonest if Mac's had made it up, but since Overseas designed it, it was not.

[175] By trial, Mr. Higuchi had reconsidered the wisdom of not acknowledging the obvious dishonesty described in these communications. On cross-examination, he agreed that he told the people to whom he sent the communications to give a false explanation about what those workers were doing in Yellowknife and was telling them to give a false explanation to a government authority. He testified that he was comfortable with it because Overseas told him to do it. He testified that as far as he knew, no one talked to the workers about it, and he did not consider what would

happen to them if the government authority discovered they were working at a place for which they did not have a work permit.

[176] I find that Mr. Higuchi's testimony cannot be relied on to be truthful or accurate unless it is not in dispute. I also conclude that where his evidence does not make sense or conflicts with other evidence, objective evidence or corroborative evidence is necessary.

Doug Hartl

[177] Mr. Hartl's evidence provides narrative information with regard to Mac's responses to the CBSA investigations which is not directly relevant to the common issues. While he could and did testify that when problems with the work that Mac's was doing with Overseas came to the attention of Mac's through communications with the CBSA, Mac's cooperated with the CBSA, he did not have any personal knowledge of what the problems were or Mac's role in creating them.

[178] The common issues to be determined do not require me to decide whether what Mac's was doing was offside of the TFWP or justified investigation by the CBSA. This case is about the claims made by the class and the subclass against Mac's, Overseas and Trident. Mr. Hartl did not have any personal knowledge about the matters raised by the class members' and subclass members' claims.

[179] For its limited utility, Mr. Hartl's evidence did not raise any serious issues with credibility or reliability. There were a few times his answers indicated that he did not have an actual memory of the events, and on other occasions he clearly did not have personal knowledge but was repeating what he had learned from others during his involvement.

Kuldeep Bansal

[180] Mr. Bansal's evidence was given at a level of generality that was not helpful. He gave a lot of evidence about Overseas' practices generally, and not specifically what they did in relation to the class members.

[181] For example, he testified that Overseas sent a visa checklist to every person who accepted a job offer. He testified that they also sat down with the people and guided them through the process. He did not testify about “sitting down” with any specific class member, including any of the representative plaintiffs. They each testified that, other than the checklist, they completed the visa process without the assistance of Overseas.

[182] When testifying about Mr. Basyal, Mr. Bansal testified that he could not remember “this file” when asked about the steps taken to obtain the visa, whether he knew that Mr. Basyal was coming to Canada when he arrived, and whether he told Mac’s that Mr. Basyal was arriving. Mr. Bansal testified that he thought Mr. Basyal stayed at the Best Western. Mr. Basyal testified that he stayed in a residence where there were more people than beds.

[183] When he was asked whether Overseas took Mr. Basyal to get a social insurance card, etc., he testified that Overseas did but did not say how he remembered that. Mr. Basyal described that every day after he arrived in Canada, he went to the Overseas office. He did not testify that anyone took him to do anything. He was not cross-examined on that topic.

[184] Mr. Bansal testified with specifics about Mr. Basyal working at a Mac’s store in Kitimat, which switched from a corporate store to a dealer store. Mr. Bansal testified that Mr. Basyal complained that he did not like the cold weather in the interior. There was no evidence from Mr. Basyal that he went to work in Kitimat. He testified that he never went to work for Mac’s; rather Mr. Bansal told him he could work on a farm, which he refused to do, or he could work at a bottle depot, which he did until he was detained by CBSA for working illegally. Mr. Basyal was not cross-examined on working at the Kitimat store.

[185] I conclude that Mr. Bansal confused Mr. Khadka, who did work at the Kitimat store and about whom Mr. Bansal also gave evidence that he complained that Kitimat was too cold, with Mr. Basyal.

[186] I do not accept any of Mr. Bansal's evidence about Mr. Basyal because he was remembering the wrong person. I also conclude that the fact that he could not remember Mr. Basyal yet on some issues was prepared to testify as though he did, for example taking him to get a SIN number, a SIM card and MSP benefits, calls into question the reliability and veracity of his evidence generally.

[187] Mr. Bansal's evidence also suffered from him wanting to testify to a narrative that does not address the common issues in this case. That narrative included a history about Kentucky Fried Chicken declaring bankruptcy in 2012, and franchises or dealer run restaurants arising out of that bankruptcy. From what I gather from Mr. Bansal's evidence, the Government of Canada created what he regarded as an exception for employers where franchises or dealerships were in flux. However, what Mr. Bansal was trying to impart and whether it was first-hand evidence or opinion evidence was far from clear. The point of his evidence seemed to be that Overseas tried to use the KFC precedent to keep workers in the country and keep them employed. It is not clear whether that was for any subclass members. It was not helpful evidence. It was argumentative in tone and, to the extent the content could be understood, in content.

[188] Finally, Mr. Bansal was caught in an outright lie. In the answer to several questions, he stated that one person, whom he later identified as Mr. Khadka, did not communicate with Overseas for nine months after accepting his visa and then showed up in Canada without notice to Overseas that he was coming. Mr. Bansal was shown an email that Ms. Hirak sent to Mr. Higuchi, copying Mr. Bansal, advising of a number of workers and their expected arrival dates including flight numbers, among them Mr. Khadka. That email was sent 12 days before Mr. Khadka arrived and so Overseas obviously had at least that much notice. On cross-examination, Mr. Bansal then changed his evidence to say that they did not know he was getting his ticket and only had two days notice despite that the emails clearly showed at least 12 days. Ridiculously, he then gave evidence to the effect that he did not know whether April 1, when Ms. Hirak sent her email, was before April 11, when he seemed to be saying he had notice that Mr. Khadka had a ticket to arrive in Canada

on April 13. Finally, Mr. Khadka's flight itinerary shows that the ticket was purchased in the name of Bishnu Khadka, but the email address under the heading "customer information" is Mr. Bansal's Overseas email address. When asked about this, Mr. Bansal testified that he could read the document. The many attempts by Mr. Bansal to disseminate on this topic undermines the veracity of his evidence generally.

[189] I do not accept the evidence of Mr. Bansal on contested matters unless it is corroborated. Where Mr. Bansal's evidence conflicted with that of one of the representative plaintiffs as to what happened in relation to the representative plaintiff, I prefer the evidence of the representative plaintiff.

Breach of Contract Alleged Against Mac's by the Subclass

Common Issue A1: What are the relevant terms (express, implied or otherwise) of the subclass members' employment contracts with the Mac's?

[190] This common issue was stated with reference to the following terms:

- a. wage rate;
- b. hours of work;
- c. length of the contract;
- d. recruitment fees; and
- e. payment of two-way air transportation.

[191] With regard to a., b., and c., the representative plaintiffs and Mac's agree that the terms are set out in the subclass members' employment contracts. They agree those terms should be determined on an individual basis for each subclass member pursuant to ss. 27 and 28 of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50.

[192] With regard to d., the representative plaintiffs submit that the Court should find that there is insufficient evidence to determine the issue.

[193] There is some probative evidence on the issue, including the employment contracts for the representative plaintiffs. The evidence is that the subclass member contracts were standard form contracts and but for some blanks being filled in that might vary from contract to contract, for example the rate of pay, the subclass members' employment contracts contained the same terms. There is no evidence that they contained a term regarding recruitment fees. There was no evidence or argument that such a term should be implied.

[194] Given it was stated as a common issue, the representative plaintiffs have the burden, and the evidence does not support a finding that the employment contracts had terms on recruitment fees, I conclude the employment contracts between Mac's and the subclass members did not contain terms regarding recruitment fees.

[195] With regard to e., the representative plaintiffs and Mac's previously resolved this issue through a consent order dated October 29, 2021.

Common Issue A2: Did Mac's breach any of the foregoing contractual terms? If so, how?

[196] Mac's concedes that it breached subclass members' employment contracts by not providing any employment or by providing employment different from what was stipulated in the employment contracts. The representative plaintiffs accept this to be an appropriate resolution of the common issue.

[197] Mac's and the representative plaintiffs agree that whether there was a breach of a given subclass member's employment contract in this manner is a matter for individual determination pursuant to ss. 27 and 28 of the *Class Proceedings Act*.

Common Issue A4: Did Mac's breach its duty to honestly perform the terms of the employment contract by misleading subclass members about the availability of employment?

[198] The representative plaintiffs assert that Mac's entered into the employment contracts knowing that it was really just a matter of chance of whether a job that satisfied the requirements of the TFWP in relation to the subclass member's LMO, and matched the job contracted for, was available when the subclass member

received a visa and could travel to Canada to work. The representative plaintiffs argue that the truth was that Mac's did not intend to employ the subclass members at the jobs described in the signed employment contracts. Rather, Mac's intended to set up a pool of foreign workers it had the option to employ in whatever positions were open at a given time. The representative plaintiffs argue that having made job offers accompanied by signed employment contracts, which the subclass members accepted, Mac's had a duty to advise subclass members that it was not going to provide the jobs as stated in the contracts.

[199] Mac's submits that the issue of whether subclass members came to Canada for jobs that were not provided to them due to Mac's breach of its duty of honesty in contractual performance must fail for three reasons.

[200] The first is that the issue cannot be decided commonly because the alleged factual allegations relating to the dishonesty are too varied for a common assessment of the alleged dishonesty. Mac's argues that misleading by omission must be assessed taking into account all of the communications between Mac's, Overseas and the subclass members.

[201] The second is a temporal argument. Mac's asserts that it had no duty of honesty to the subclass members because there were true condition precedents in the employment contracts that were outstanding and which suspended the obligation to perform the contract. Mac's argues that if it could not be called upon to perform, it could not owe a duty of honesty in contractual performance and nothing it did or did not do could be in breach of that duty. For the same reason, Mac's argues that the alleged dishonesty was not directly related to contract performance.

[202] Third, Mac's argues that the representative plaintiffs have not proven that Mac's acted with subjective dishonesty.

[203] Alternatively, Mac's argues that damages sought by the representative plaintiffs are tort reliance damages which are not compensable because breach of the duty of honesty in contractual performance only gives rise to expectation

damages. Mac's argues that it follows that, there is no point in addressing the claim for breach of the duty of honesty in contractual performance because expectation damages are the same damages as are compensable for breach of contract, which Mac's has conceded.

Legal Principles

[204] In *Bhasin v. Hrynew*, 2014 SCC 71 at paras. 47, 63–66, the Supreme Court of Canada recognized that contract law includes an organizing principle of good faith which manifests itself in specific doctrines, including the duty of cooperation between the parties to achieve the objects of the contract; the duty to exercise contractual discretion in good faith; the duty not to evade contractual obligations in bad faith; and the duty of honest performance.

[205] The content of the duty of honesty in contractual performance was addressed in *Bhasin* and then again in *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 at paras. 38 and 89–91. The duty prohibits lying or otherwise knowingly misleading a contracting partner about matters directly linked to the performance of the contract: *Bhasin* at para. 73, *Callow* at paras. 37, 77. In both cases, the Court acknowledged that parties to contracts do not have a positive duty of disclosure, do not have a fiduciary duty, nor are they required to subordinate their interests to those of the other party: *Bhasin* at para. 86. Active dishonesty is a breach: *Bhasin* at paras. 86–87; and *Callow* at paras. 5, 38.

[206] In *Callow* at para. 81 Justice Kasirer, for the majority, held that where “the failure to speak out amounts to active dishonesty in a manner directly related to the performance of the contract, a wrong has been committed”. Justice Kasirer, at paras. 89–91, also explained that in addition to outright lies, half-truths, omissions, actions, or inactions can be misleading. Correcting the misunderstanding created by a failure to speak out—or other breaches of the duty of honesty—is not subordinating one party's interests to the other, because it does not confer a benefit on the party who has been wronged: *Callow* at para. 81.

[207] An issue in this case is the temporal scope of the duty. The leading case on whether the duty of honesty in contractual performance extends to pre-contractual dishonesty, generally during contract negotiations, is *Ocean Pacific Hotels Ltd. v. Lee*, 2025 BCCA 57. Justice Butler for the Court concluded that "the duty of honest performance in contract does not extend to dishonesty that was intended to influence the other party to enter into the contract". Justice Butler did not rule out that pre-contractual dishonesty, other than during negotiations, could form the basis of a claim: *Ocean Pacific Hotels*, at para. 73.

[208] In *Basyal v. Mac's Convenience Stores Inc.*, 2021 BCSC 1002, an earlier decision on this case pertaining to the certification order, I determined that since the breach was alleged to have occurred in relation to conduct before and after contract formation, the temporal scope of the doctrine of the duty of honest performance was best left for trial (paras. 57–60).

The Alleged Dishonesty

[209] The representative plaintiffs must establish that Mac's conduct amounts to a lies, half-truths, omissions, actions or inactions that amount to active dishonesty.

[210] The evidence is not contradicted that Mac's job offers were sent to the subclass members by Overseas as part of a package including a positive LMO to which the subclass member had been named, a job offer on Mac's letterhead, and an employment contract executed by Mac's. The subclass members were instructed to accept the job offer by signing the employment contract and returning it to Overseas. By virtue of the class and subclass definitions, each subclass member signed those contracts.

[211] The representative plaintiffs submit, and I agree, that the essence of a contract of employment is that the employer provides a job and compensation for doing the job, and the employee provides the labour. By making the job offers accompanied by the signed employment contract and positive LMOs naming the employee, Mac's communicated to the subclass members that it would provide the job and compensation described.

[212] For varying reasons, Mac's knew that, except by happenstance, it would not or could not provide the job described in the employment contract to the subclass members, either at the time it made the offers and conveyed them to the subclass members with signed employment contracts, or after it sent the offers and signed employment contracts but before the subclass members travelled to Canada.

[213] In the case of named LMOs, that might be because the job was filled with someone else before the subclass member arrived or a corporate store became a dealer store, and Mac's no longer had the position. Mac's points out, and it is not controverted, that under the TFWP, Mac's was required to continue to attempt to fill the position locally even after obtaining a positive LMO for the position. It argues that it cannot be found to be liable for breach of its duty of honesty in contractual performance for doing something that it was required to do, *i.e.*, continue to strive to fill the positions with a Canadian worker or a worker who was a permanent resident.

[214] That argument does not address the dishonesty alleged. The reason that Mac's did not have the position available is not the alleged dishonest conduct. Failing to provide the job is not the alleged dishonest conduct. The dishonest conduct alleged is not telling the subclass members that Mac's was not going to provide the jobs contracted for on the terms contracted for because, for example, they might fill it with someone else or Mac's might not have the position to fill by the time the subclass member arrived.

[215] In the case of blanket LMOs based on hypothetical positions, again, Mac's offered jobs accompanied by signed employment contracts and positive LMOs naming the subclass members, describing jobs which were not jobs that Mac's was required to or seeking to fill and which were not actually vacant at the time the job offers was made.

[216] For example, Mr. Higuchi was asked about a blanket LMO for 40 cashier positions in Edmonton to which Mac's named 40 people to whom it offered jobs and sent signed employment contracts. Mr. Higuchi testified that Mac's was not seeking to fill 40 cashier positions in Edmonton and when asked to confirm that Mac's named

people to LMOs when Mac's did not have those jobs for them, he answered, "I guess so". So far as the subclass members are concerned, the problem was not that Mac's was utilizing the blanket LMO approach, it was that Mac's did not tell those 40 people that their LMO was for a hypothetical job that Mac's could not and would not provide to them, unless, coincidentally, Mac's had to fill that job when the subclass member arrived.

[217] Ironically, Mr. Higuchi identified this dishonest conduct himself but blamed Ms. Hirak for it when he stated to her in his April 2013 email that subclass members were travelling to Canada under "false pretenses". Mr. Higuchi's evidence about this exchange demonstrates that Mac's understood the importance of providing the job that the subclass member had been told was approved on the LMO and that Mac's had contracted to provide. Mr. Higuchi testified as follows at his examination for discovery:

Q. So you're saying there someone gets an LMO for a job, and then they expect they job that was on the LMO even if things change?

A. Right. So they're [Overseas] not communicating to the--our candidates that says, hey, look we may under--again, because we had control over the job offer that we may gave you that, but our situation keeps changing in Canada and that we may offer you that store supervisor / CSR position now, but by the time you go through the process, the job may not be there for a number of reasons. And that, again, as I explained yesterday, is the role of OSI to keep that candidate informed so the candidate can also make an informed decision that says, I don't want this. No, that's not why you guys originally talked about, sent me a job--the first job offer. But again, -- that was something that they said we could do, and that's what we continued to do so it allows us the flexibility to manage our situation here.

Q. You go on to say in his email:

"I can see their frustrations as well since they have up rooted themselves under false pretenses".

A. M'mm-hmm.

Q. Can you explain that.

A. I'm just saying to OSI, you didn't tell them that they were coming here as a CSR. You didn't do the--take the necessary steps, and one of them would have been to change that job offer of store supervisor to CSR. I don't see that happening. I don't see what happens, what transpires. It's only when they come here. But she had a responsibility--or OSI had a responsibility to communicate that and make that change so that when that person came

over, the job offer matched what we—they signed, and it matches their work permit.

[218] Mac's dishonesty is what Mr. Higuchi described to Ms. Hirak as the false pretences under which subclass members came to Canada and about which he expressed sympathy for them – the jobs did not match what they had contracted for, and they had not been told that would be the case.

[219] Mr. Higuchi's evidence at his examination for discovery was that Overseas was supposed to tell the subclass members not to do a single thing, including applying for a visa, "until it's confirmed that the job offer is valid". There is no evidence that Mac's ever told subclass members that they were offered, and accepted, unconfirmed or invalid jobs.

[220] At trial, in chief, Mr. Higuchi testified that Mac's understood that Mac's made valid job offers despite his examination for discovery evidence from which the only inference that could be drawn is that Mac's regarded the job offers to be for unconfirmed invalid jobs. This attempted repair of his discovery evidence that the job offers were not for valid jobs included his evidence that the offers were valid, but they would be rescinded if the position was not available.

[221] Both versions of Mr. Higuchi's evidence about the validity of the jobs contracted for demonstrate the difference between the jobs offered and set out in the employment contracts and the reality that Mac's would not or could not provide the job except by happenstance.

[222] That, again, is the essential dishonesty; that there was a difference, that the difference persisted, and Mac's never conveyed that difference to the subclass members even though it knew that the positive LMOs, job offers and signed employment contracts created false pretences.

[223] I conclude that Mac's created the false pretences and by creating them and failing to correct them, it engaged in at least an obfuscation of the truth if not an

outright lie. Either way, it meets the definition that Kasirer J. set in *Bhasin* for actionable dishonesty.

[224] Mac's argues that its failure to give the subclass members the correct information about whether the jobs contracted for would be provided by Mac's was not dishonest because it directed Overseas to do so by telling the subclass members not to do a single thing until a valid job was confirmed and to ensure that the subclass members knew that Mac's would rescind the "job offers" if a valid confirmed job did not become available. Mr. Higuchi also testified that Overseas did rescind job offers.

[225] I observe that Mac's has, throughout this litigation, taken the position that Overseas were not Mac's agents and was successful on that argument on the appeal of the summary trial.

[226] At para. 35 of the 2025 Court of Appeal Reasons, Justice Fenlon, for the majority, explained that a true principal and agent relationship requires that the agent have the ability to enter into contracts that bind the principal, citing *Fridman* 4th Ed. at p. 13. At paras. 47 and 57 of the 2025 Court of Appeal reasons, Fenlon J. concluded that Overseas was not authorized to bind Mac's to contracts with the class (which includes the subclass) expressly or apparently.

[227] Given the lack of authority to bind Mac's to a contract, it cannot be that Overseas had the authority to discharge Mac's duty of honesty in contractual performance. That would entail, at the very least, a form of agency by which Overseas was authorized to perform the contract on Mac's behalf. There is no evidence of that, and Mac's did not argue that Overseas was its agent for the purpose of performance or the duty of honesty in contractual performance.

[228] In any event, Overseas did not discharge Mac's duty of honesty or correct the false pretences Mac's conveyed in the employment contracts. There is no evidence that Overseas told any subclass member, before the subclass member travelled to Canada, that the job that the subclass member had contracted to do was not, or likely would not, be available. Mac's points to Mr. Khadka's evidence that he

understood that there might not be a job, but if that was the case, Overseas would find him another one. However, that was not the real or complete truth. The truth was that Mr. Khadka's employment contract was based on a false pretence because Mac's was not going to provide that job, or a similar job, to Mr. Khadka.

[229] I find that Mac's was dishonest with the subclass members by not telling them that it would not or could not provide the jobs contracted for except by happenstance.

Commonality

[230] The discussion as to whether this certified common issue can be decided commonly starts with the acknowledgement that it was stated as a common issue in the certification order. However, it is not controversial that certification of a common issue is not the last word on whether it can be decided commonly. The evidentiary test for certification requires the plaintiff to adduce some evidence in support of commonality but the certification judge is not to weigh competing evidence on commonality. At trial, the entire body of evidence and the process of weighing the evidence may result in the court may determining that some issues cannot be decided commonly despite being stated as a common issue in the certification order.

[231] Mac's argues that there are variations in the dishonesty alleged by the representative plaintiffs such that issue cannot be decided commonly. Some of the variations that Mac's points to include: allegations that Mac's was trying to hire dealers but could not use the TFWP to bring dealers into Canada and so hired subclass members as retail store supervisors or food service supervisors when they wanted to train them (without pay) as dealers; hiring subclass members for two-year positions in corporate stores that Mac's intended to revert to dealer stores in less than two years meaning those positions would not last the duration of the employment contracts; and putting hypothetical dealer store positions that were not vacant and/or not within the ability of Mac's to fill onto blanket LMOs.

[232] These variations are about the reasons for the dishonesty, not the dishonest conduct alleged. As stated above, the dishonesty arises from the fact that Mac's was

offering jobs and signing employment contracts and not communicating that Mac's, except by happenstance, would not or could not perform providing the contracted for positions on the contracted for terms when the subclass members came to Canada. Variations in the reasons for it do not disrupt the commonality of the conduct.

[233] Mac's also argues that the issue cannot be decided commonly because it is an act of misleading by omission which depends on a variety of oral representations and interactions.

[234] Other than the interviews and the conveyance of the job offers and employment contracts, for the most part, Mac's did not communicate with the subclass members before the subclass members arrived in Canada. There are a few exceptions, but they do not negatively impact commonality because there is no evidence that in any case, Mac's told the subclass members the truth: that it would not or could provide the job contracted for, except by happenstance.

[235] For example, Mr. Higuchi responded to an email from Mr. Cajés advising Mr. Cajés that he was not on Mr. Higuchi's list and to not travel until Mr. Higuchi sorted it out. When reading Mr. Higuchi's email to Mr. Cajés, not knowing the fundamental false pretence conveyed in the employment contract, it has the appearance of Mr. Higuchi raising a clerical issue that needed to be addressed. The bare reference to a list was not meaningful information because there is no evidence that Mr. Cajés knew what list or type of list Mr. Higuchi was talking about. Mr. Higuchi did not tell Mr. Cajés that despite their signed employment contract, Mac's would not or could not provide a job to Mr. Cajés. When Mr. Cajés asked for clarification from Overseas, none was forthcoming.

[236] The Cajés emails do not demonstrate varying communications between subclass members and Overseas or Mac's on whether Mac's discharged its duty of honesty by communicating with subclass members about whether the jobs they had agreed to would be provided. In fact, they show that when a subclass member gave Mac's and Overseas the opportunity to be honest about whether Mac's was going to perform the contract by providing a job, neither did so.

[237] There is a period of time after July 2014, when Mac's announced it had parted company with Overseas, and class members including subclass members contacted Mac's about their jobs. No breach of the duty of honesty in contractual performance is claimed in reference to class members (apart from subclass members) and so communications with them are not relevant. There is no evidence that Mac's told any class members that there were no jobs, and that any of those class members travelled to Canada in any event, thereby becoming subclass members to whom Mac's had communicated the truth before they travelled.

[238] In summary, the dishonesty does not involve any interactions or communications between Mac's and the subclass members other than the provision of the job offers and employment contracts and the lack of subsequent communication by Mac's that the jobs contracted for would not or could not be provided except through happenstance. There are no "variety of oral representations and interactions" that preclude a common issue consideration.

The Alleged Dishonesty is Pre-contractual and in the Context of a Conditional Contract that Mac's was Not Called Upon to Perform

[239] In *Bhasin*, the majority justified the then-novel imposition of the duty of honesty in performance as a manifestation of the broad duty of good faith because contracting parties must have appropriate regard to the legitimate interests of a contracting party.

[240] The subsequent jurisprudence has made it clear that dishonesty leading up to the formation of the contract, specifically, misrepresentations during contract negotiations, cannot be the source of dishonesty that directly relates to the performance of the contract: *Ocean Pacific Hotels* at para. 72. That conclusion accords with the pre-contractual absence of the underlying rationale for the duty, namely that contracting parties must have due regard to each other's legitimate contractual interests. During contract negotiations, there are no contracting partners nor legitimate contractual interests because there is no contract.

[241] In addition to the temporal element, the misleading conduct must be directly linked to performance: *Callow* at para. 49. The duty is that parties to a contract “must not lie or otherwise knowingly mislead each other about matters directly linked to the performance of the contract”.

[242] Negotiations are over and a contract has been made when there has been an offer and acceptance: *Nowak v. Biocomposites Inc.*, 2018 BCSC 785 at para. 28. The evidence is that Mac’s made job offers. The class as defined is persons who accepted those offers. The subclass is a subset of the class, and therefore also persons who accepted the offers. The dishonest conduct was not limited to the time at which the contract was entered into, it spanned the time from each subclass member entered into the employment contract to when that subclass member travelled to Canada to work at the job contracted for.

[243] Mac’s does not assert that the dishonesty occurred during negotiations, and it does not dispute that the employment contracts were made when the dishonesty by omission occurred. Mac’s argues that the contracts had true conditions precedent, and because it rescinded the contracts before those true conditions precedent were satisfied, it never had a duty to perform and so it never was subject to the duty of honesty in contractual performance and could not have engaged in dishonesty in contractual performance.

[244] With respect, the conduct cannot be “pre-contractual” if the contracts were made and the dishonest conduct occurred or continued after contract formation. Mac’s argument is really that the conduct was “pre-performance”, and specifically, prior to the duty to perform on either party because of the existence of the true conditions precedent.

[245] This argument raises sub-issues: whether the employment contracts contained true conditions precedent such that there was no duty to perform; and whether Mac’s rescinded the employment contracts prior to the true condition precedents being satisfied.

Whether the Employment Contracts Contained True Conditions Precedent

[246] Mac's argues that the employment contracts were not binding; rather they were subject to true conditions precedent: that the subclass members obtain a work permit and successfully enter Canada.

[247] This argument is based on para. 2 of the standard form contracts which reads:

Both parties agree that this contract is conditional upon THE EMPLOYEE obtaining a valid work permit pursuant to the Immigration Regulations, and his/her successful entry to Canada.

[Capitalization in the original.]

[248] Mac's characterizes these requirements as a true conditions precedent. A "true" condition precedent renders the agreement ineffective to bind the parties until the condition is fulfilled: *St. Alcuin College for the Liberal Arts Society v. Montaigne Group Ltd.*, 2025 BCCA 370 at para. 72, citing *Turney v. Zhilka*, [1959] S.C.R. 578 at 583–584; *Peier v. Cressey Whistler Townhomes Limited Partnership*, 2012 BCCA 28 at para. 19. True conditions precedent are uncertain future events entirely within the control of an independent third party, unlike contractual conditions which must be performed by a contracting party and do not affect the validity or binding quality of a contract but rather suspend the obligation to perform relating to that condition precedent: *Turney* at 583; *Peier* at para. 19, citing G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Carswell, 2006) at 430.

[249] Condition precedents may also be subjective, objective, or both. In *Peier*, Justice Lowry explained that a "subjective" condition precedent that depends entirely on the state of mind of a party means that the contract is still at the offer stage, whereas an "objective" condition precedent that depends on a clear and precise event occurring means the contract is binding but the performance obligations of the parties are suspended until the condition is fulfilled. There are also condition precedents that are both subjective and objective, for example a condition that a sale of property is "subject to planning department approval of the subdivision plan".

In such cases, a term is implied requiring the party responsible for obtaining the approval that they will take all reasonable steps to fulfill the condition: at para. 21.

[250] A clause with a condition that is sufficiently objective and precise, requires action by a party but also a decision by an independent third party, is an objective and subjective condition precedent creating a binding contract with performance obligations suspended: *Peier* at paras. 25. See also *Dynamic Transport v. O.K. Detailing Ltd.* 1978 CanLII 215 (SCC), [1978] 2 S.C.R. 1072 at 1082–83.

[251] I do not accept that the conditions in para. 2 of the employment contracts to be true condition precedents because they are not uncertain future events entirely within the control of an independent third party. They belong to the class of “subjective and objective” condition precedents discussed by Justice Lowry in *Peier*, because the fulfillment of these conditions depended on the actions of both the parties and third parties.

[252] The terms of the employment contract put the requirement on the employee to obtain the work permit. The evidence is that the subclass member would seek one on entry to Canada. The evidence is that on some occasions, CBSA would call Mac's to see if Mac's was expecting the employee. Mac's could say yes or no and if Mac's said no, the subclass member was not issued a work permit. Accordingly, both parties had the ability to affect the fulfillment of entry on a work permit as did an independent third party, CBSA.

[253] The terms of the employment contract included successful entry into Canada. The evidence is that the visa permitted the subclass member to enter Canada. The condition could not be fulfilled unless the subclass member applied for it and the Government of Canada issued it. This was not a matter entirely within the control of the Government of Canada.

[254] The conditions in these employment contracts have the same features as those held to be “subjective and objective” conditions precedent in *Peier*. They are

not “true” condition precedents that render the agreement ineffective to bind the parties, as Mac’s argues.

[255] Accordingly, there was a binding contract. Mac’s obligation to perform was suspended. The question becomes whether the duty of honesty in performance arises in such circumstances.

Whether There is a Duty of Honesty in Contractual Performance in a Binding Contract when Performance Obligations are Suspended

[256] I return to the rationale for the duty, to require contracting partners to give due consideration of the legitimate contractual interests of its contractual partners. The case law demonstrates the purpose has played a role in defining the scope. During contract negotiations, there is no contractual partner and no legitimate contractual interests to consider. The duty only applies to matters directly related to contractual performance because the purpose of the duty only relates to legitimate contractual interests of contracting partners.

[257] As between Mac’s and the subclass members, the duty arose because they had binding contracts and the animating reason for the duty was extant. The subclass members were applying for visas, quitting their jobs and travelling to Canada to take their jobs with Mac’s. Their legitimate contracting interests were engaged.

[258] Mac’s dishonesty was not due to the unfulfilled conditions. The dishonesty was directly related to the performance of the contract because Mac’s would not or could not, except through happenstance, perform the employment contracts by providing the jobs but did not convey that to the subclass members who were doing things that involved sacrifice of time, money and existing employment to take the jobs that Mac’s contracted to provide when they arrived in Canada.

Whether Mac's Rescinded the Employment Contracts Before the Conditions were Satisfied

[259] Mac's argues that because the contractual conditions were not fulfilled, it could and did, through Overseas, "rescind" the job offers. There are multiple problems with this argument.

[260] The first is that Overseas was not Mac's agent for the purpose of binding it to the employment contracts with the subclass members. Therefore, Mac's cannot rely on Overseas' actions to argue that Overseas could and did un-bind Mac's from those same employment contracts.

[261] The second is there is no evidence that Overseas did anything that could amount to rescinding the contracts even if it had the legal ability to do so. Nor is there evidence that Mac's asked Overseas to rescind the employment contracts. Mac's did not put to Mr. Bansal on cross-examination that Mac's asked or directed Overseas to rescind the employment contracts.

[262] The third is that rescission as a legal concept is not applicable to this situation. Rescission is not a freestanding right of a party to a contract at any time or under any circumstances. Rescission is a remedy for fundamental breach of contract such as fraud or essential error of a material kind that induced the party to enter the contract and which allows the rescinding party to behave as though the contract was never made: *Guarantee Co. of North America v. Gordon Capital Corp.*, 1999 CanLII 664 (SCC), [1999] 3 S.C.R. 423 at para. 39, citing Lord Atkinson in *Abram Steamship Co. v. Westville Shipping Co.*, [1923] A.C. 773 (H.L.) at 781.

[263] As explained by Justices Iacobucci and Bastarache in *Guarantee Co. of North America*, at para. 40, rescission is not the same thing as repudiation, where a party evinces an intention to not be bound by a contract and the non-repudiating party can accept the repudiation in which case the contract is terminated. If the non-repudiating party does not accept the repudiation, the contract continues to be binding.

[264] There is no evidence that the subclass members fundamentally breached their contracts entitling Mac's to rescind them or that Mac's stated or evinced an intention to rescind the contracts. One might say that Mac's failure to provide the contracted-for jobs evinced an intention to not be bound, putting it in the position of a repudiator of the contract, but that simply means that the subclass members had the ability to accept the repudiation or not.

[265] In summary, it was not open to Mac's to unilaterally rescind the employment contracts. It could not seek the remedy of rescission in the absence of a fundamental breach or a misrepresentation by a subclass member. Neither is alleged.

[266] Finally, there is nothing in *Turney* or *St. Alcuin* that gives a contracting party the right to prevent a contracting partner from fulfilling a condition, thereby permanently relieving itself of performance, by "rescinding" an accepted offer.

Subjective Dishonesty

[267] It is a requirement for the claim of breach of the duty of honesty in contractual performance that the defendant engage in conduct that had some level of intent, malice or blatant disregard for the plaintiffs: *Bank of Montreal v. Cheetham*, 2025 BCCA 374 at paras. 99–100, adopting *Fresco v. Canadian Imperial Bank of Commerce*, 2020 ONSC 75 at paras. 88–90, *aff'd*, 2022 ONCA 115.

[268] Mac's argues that at the highest, the representative plaintiffs have proved that Mac's did not exercise reasonable care, but they have not proven that Mac's knew or was reckless that its conduct created a false impression with the subclass members that it failed to take steps to correct.

[269] I have found that the dishonesty was in not advising the subclass members that Mac's would not or could not, except by happenstance, provide the jobs that it had contracted to provide. Clearly, the signed employment contracts created false pretences on that topic that persisted through the period when the subclass members took the steps to travel to Canada and arrived in Canada to work.

[270] Mac's voiced its knowledge that the subclass members were being misled when Mr. Higuchi castigated Ms. Hirak for the fact that subclass members were coming to Canada under false pretences. While that communication was made partway through the class period, the evidence is only consistent with Mac's having knowledge of the false pretences it created with each signed employment contract.

[271] In his false pretences email, Mr. Higuchi blamed Overseas for the manifestation of the problem, *i.e.*, subclass members showing up expecting to work at the jobs they had contracted for on the terms they had contracted for. Mr. Higuchi blamed Overseas for that problem because he expected Overseas to keep the subclass members from travelling to Canada. That is despite that the conditions of the employment contracts between Mac's and the subclass members required the subclass members to take steps to come to Canada and report for work.

[272] Leaving aside my conclusion that, at law, Overseas could not discharge Mac's duty of honesty, Mac's did not direct Overseas to tell the subclass members that Mac's would not or could not, except by happenstance, provide the jobs it had contracted to provide. Mac's directed Overseas to tell the subclass members to wait until a job was confirmed. Ms. Hirak confirmed, in an email to Mr. Higuchi dated January 15, 2024, that Overseas would tell the subclass members to await "notification from us with a start date prior to them giving their resignation to their current employer". This is far from a communication that corrects the dishonesty. By communicating that they should wait to be told a start date, Overseas seemed to confirm that the jobs contracted for would be provided. At best, Mac's directed Overseas to further obfuscate the truth by communicating that it was a timing issue. That is further evidence that Mac's was being intentionally dishonest and knew it was being dishonest.

[273] I find that Mac's intention in using the TFWP was to, as the representative plaintiffs allege, create a pool of foreign workers whom it could call on to come to Canada and fill positions as they became available.

[274] I concluded that Mac's dishonesty was intentional.

Whether a Finding on the Breach of the Duty of Honesty in Contractual Performance is Superfluous

[275] Mac's argues that because it has conceded that it breached the contracts by not providing jobs contracted for in the employment contracts, and because the breach of the duty of honesty in contractual performance is also a breach of contract, there is no utility to deciding both types of breaches.

[276] I start with the proposition that the fact that success on more than one theory may result in the same compensatory route does not mean that both theories ought not be ruled upon when they are tried. It is open to a court to cease its analysis when an issue or a theory had become redundant or moot. But just because the representative plaintiffs have established breach of contract by Mac's failing to provide the jobs contracted for, it does not mean that a ruling on an alternate theory of breach of the duty of honesty in contractual performance should not be given. Both were stated as common issues. They were not stated in the alternative.

[277] Mac's also argues that breach of contract damages are generally expectation damages, not reliance damages. It submits that the representative plaintiffs are attempting to claim reliance damages for the breach of the duty of honesty in contractual performance by claiming the wages they would have earned had they not left their jobs to come to work for Mac's.

[278] There is an established and growing body of law of the damages for breach of contractual good faith requirements, including the duty of honesty in contractual performance. In *Callow* at paras. 107–108, the Court observed that while the ordinary measures of damages for breach of contract is expectation damages, expectation and reliance damages will often give the same result even though they are conceptually different. Expectation damages put the party in the position had the contract been performed, or in the case of the breach of a duty of honest performance, had the duty been fulfilled, whereas reliance damages put the party in the position had they not entered the contract at all.

[279] In *Callow*, the minority concurring judges held that they would have awarded the same damages but would have used reliance damages to do so. The minority reasoned that the animating reasons for reliance damages are better aligned to breaches of the duty of honesty in contractual performance than damages limited to what arose from failing to perform the contract. The minority pointed out that expectation damages were developed because reliance damages will often not fully compensate a party for a breach or might incentivize a breach where the cost of performance is greater than the reliance measure of damages: at paras. 141–142.

[280] The growing body of jurisprudence also includes *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, in which the Court split 4:3 on whether reliance damages should be permitted for breach of the duty of good faith in contractual discretion.

[281] The jurisprudence is not categorical on excluding reliance damages for breach of contract including where the breach is a breach of the duty of honesty in contractual performance. While generally the damages are to be expectation damages, the caselaw also demonstrates that the application of expectation damages in breach of the duty of honesty in contractual performance cases is more nuanced than strictly looking at what flows from failing to perform the contract, as occurs in typical breach of contract damages assessments.

[282] For example, in *Bhasin*, the Court held that had the contractual duty been honestly performed, the plaintiff would have known that his contractual relationship with the defendant was in serious jeopardy and would have taken steps to protect his business rather than see it expropriated by the defendant. The plaintiff was compensated for this aspect of his loss. The concurring minority in *Callow*, at para. 145, described the *Bhasin* damages assessment as “directed solely towards making good the detriment that flowed from Bhasin’s reliance on a dishonest misrepresentation”.

[283] In *Callow*, the majority applied *Bhasin* and upheld the trial judge’s award of damages which incorporated a loss of opportunity analysis into expectation

damages where the defendant breached the duty of honesty by knowingly misleading the plaintiff about its exercise of a termination clause in an agreement. The misleading conduct caused the plaintiff to fail to realize that it needed to protect its interests. Expectation damages included the plaintiff's losses from not bidding on other contracts during the period it was misled by its contracting partner.

[284] *Callow* and *Bhasin* also demonstrate that loss of opportunity can be incorporated into expectation damages, even though the lost opportunity is not part of the contract that was not performed or performed dishonestly, so long as the opportunity is one that would have been available had the contract been performed honestly. See also: Brandon Kain, *Good Faith in Canadian Contract Law* (Toronto: LexisNexis Canada Inc., 2024) at § 8.02[2][a].

[285] These applications of expectation damages flow from the rationale for the overarching duty of good faith: to require contracting parties to take into account the legitimate contractual interests of their contract partners. This explains why expectation damages might look like reliance damages in cases where one of the manifestations of the breach of good faith gives rise to damages.

[286] I do not accede to the argument that the representative plaintiffs are limited in their options for damages such that there is no compensatory damages rationale for making a finding of dishonesty in contractual performance.

[287] In addition, the representative plaintiffs seek punitive damages. In *Whiten v. Pilot Insurance Company*, 2002 SCC 18, [2002] 1 S.C.R. 595 at para. 78, applying *Vorvis v. Insurance Corporation of British Columbia*, 1989 CanLII 93 (SCC), [1989] 1 S.C.R. 1085 at 1105–1106, the Court explained that where the defendant has been found liable for breach of contract, entitlement to punitive damages is rare because the conduct of the defendant must also be an independent actionable wrong in order for punishment to be justified at law. In *Vorvis*, the breach of contract was termination of an employment contract, which is not wrong in law so long as it is compensated with notice period damages.

[288] In *Whiten*, decided long before Bhasin, the Court described the contractual duty of good faith as an independent actionable wrong, notwithstanding that it is not a tort, and which can ground an assessment of punitive damages so long as the conduct passes the threshold of characterization as egregious, oppressive, malicious, etc.: *Whiten* at para. 79.

[289] Accordingly, in this case, breach of the duty of honesty in contractual performance, one of the manifestations of the overarching duty of good faith in contracts, is relevant to whether punitive damages should be considered.

[290] I conclude that in addition to being relevant to compensatory damages, this breach is relevant to punitive damages.

Conclusion on the Breach of the Duty of Honesty in Contractual Performance

[291] Mac's breached its duty of honesty in contractual performance by not telling the subclass members that it would not or could not, except by happenstance, provide the jobs contracted for in the signed employment contracts.

Common Issue A5: Are subclass members able to recover damages in excess of the minimum notice period in the employment contracts?

[292] The employment contracts require Mac's to give one week's written notice if it terminates after three consecutive months of service however, Mac's has conceded that the class members are able to recover damages in excess of the notice period in the employment contracts because the notice period is inconsistent with the applicable employment standards legislation.

[293] It is not in dispute that the notice period must be considered alongside the determination of common issue A3, which is that the subclass members have a duty to mitigate: 2025 Court of Appeal Reasons, para. 79; and the determination of common issue A6, which is that Mac's is entitled to take into account any earnings during the two-year terms of the employment contracts: Summary Trial Reasons, at para. 225.

[294] Accordingly, the answer to this common issue question is yes, the subclass members are entitled to recover damages in excess of the minimum notice period in the employment contract, subject to the duty to mitigate and subject to Mac's entitlement to take into account any earnings during the two-year terms of the employment contracts.

[295] The representative plaintiffs make an additional submission that the notice period should extend to the earlier of the time at which a subclass member found new work or to the end of the 24-month period contracted for. I will address this argument under the remedy of common issues below.

Common Issue B1: The Nature of the Fees Class Members Paid to Overseas and Trident

[296] The representative plaintiffs argue that they paid Overseas fees to procure jobs in Canada. The job was central to the contract; it was what they wanted and what they were paying for. They assert they did not need or receive any substantive or significant assistance with the immigration aspects of coming to Canada. They point to the facts that Mac's was paying Overseas to handle the TFWP application process, the key to which was the LMO, and that Mac's also paid Overseas to settle workers in Canada on arrival.

[297] Overseas' position is that Mac's paid it to recruit workers, and Overseas charged the class members for immigration services and settlement.

Legal Principles

[298] The employment standards legislation of British Columbia, Northwest Territories, Saskatchewan, Manitoba, and Alberta prohibit charging workers fees for jobs or for information about jobs. However, it is permitted to charge fees for immigration services to persons looking to come to Canada to work: *Gorenshtein v. British Columbia (Employment Standards Tribunal)*, 2016 BCCA 457 at paras. 1–2.

[299] In *Prince George Nannies and Caregivers Ltd. v. British Columbia (Employment Standards Tribunal)*, 2010 BCSC 883, Justice Sewell heard a judicial

review of a decision of an Employment Standards Tribunal and reconsideration of that decision. Prince George Nannies and Caregivers provided services to persons who wanted to come to Canada to work as live-in caregivers. Prince George Nannies and Caregivers had a contract in which a bundle of services were provided for payments of installments totalling \$4,000, including advertising and settlement services but not including finding employment. The Employment Standards Tribunal held that the bundled service and fee were a guise for a fee for a job. The reconsideration panel upheld the tribunal decision. Justice Sewell upheld both.

[300] From Sewell J.'s decision and the tribunal and reconsideration decisions that he upheld, the following emerges:

- a) A contract describing fees for services other than prohibited fees for jobs is not determinative.
- b) A marker that a fee described to be for services is actually a fee for a job is when the user must take the whole bundle of services pay the fee the bundled fee, regardless of which services the user requires and would pick if given the opportunity. Evidence showing that the user of the services did not request any or all of the services in the bundle, but the services to acquire a job cannot be accessed without paying for the bundle of services, supports the conclusion that the fee is a fee for a job.

Discussion

[301] For any class member to obtain a job in Canada through the TFWP, there were both job recruitment and immigration aspects to the process.

[302] The evidence does not support the thesis that there is a neat dichotomy through which Mac's paid for recruitment and class members paid for immigration and settlement services as argued by Overseas.

[303] The services that Overseas provided to Mac's had worker recruitment aspects such as reviewing C.V.s, screening candidates, organizing job fairs for

interviews, preparing employment contracts, etc., and TFWP immigration aspects such as advertising as a precursor to LMO applications, LMO applications and settlement services.

[304] The representative plaintiffs testified that they went to the event hosted by Overseas at the Flora Creek Hotel in Dubai because they had heard that Overseas could get them better jobs in Canada than they had in Dubai. Their evidence that this was their motivation for attending the Overseas events is supported by the advertising that Overseas did in Dubai by way of the flyers entitled “Work Permit Seminars & Interviews” which Mr. Basyal and Mr. Khadka testified about.

[305] The Overseas flyer had two bullet point lists. The left-hand list had a header that read, “For 2013 we are recruiting the following occupations” and listed a number of job types including food counter attendants, restaurant managers, and retail store operators. The right-hand list read, “We Offer Complete Relocation Services” and listed a number of things including guaranteed job allocation, 10 days free accommodation, medical registrations, bank account and mobile phone set up, which Mr. Bansal described as settlement services.

[306] Overseas relies on the retainer agreements it says it had with each class member. The evidence is that the retainer agreements were between Mr. Bansal, in his capacity as an RCIC, and some but not all class members. Neither the representative plaintiffs nor Overseas made a submission about what significance to put on the fact that the retainer agreements were with Mr. Bansal and not Overseas. I will not spend time on that issue since the law is that the retainer agreements are not determinative.

[307] Nevertheless, the retainer agreements provide some evidence of the nature of the deal. Those contracts provided that Mr. Bansal would inform the client of which documents were required for a work permit application, assist the client with preparation of the application to the appropriate Canadian embassy; provide ongoing consultation throughout the work permit application, and if the client was provided a work visa for Canada, Mr. Bansal would provide the client with support in

making travel arrangements for Canada and assist with temporary accommodation and resettlement assistance.

[308] As in *Prince George Nannies and Caregivers*, the agreements with Mr. Bansal describe a bundle of services. Mr. Bansal testified that “it was a complete package when we are talking about an application from Dubai”, from which I understood him to say that they charged the full fee to class members, regardless of whether they had a retainer agreement, and regardless of what services the class member requested.

[309] The evidence is that at least some of the class members, including the representative plaintiffs, did not need or request assistance with the visa application. The evidence is that each class member had to pay the same fee, regardless of which services they required from Overseas.

[310] The evidence shows that the services actually provided to the class members was the introduction to Mac's as a prospective employer, the visa application checklist, and accommodation to the subclass members in some but not all cases.

[311] In the flyer advertisements, the emphasis was on jobs – the types of jobs that Overseas was recruiting for, that there would be interviews, and that job allocation was guaranteed. The class members went to the events for jobs and were willing to pay for jobs.

[312] Despite that the Overseas flyer described job placement as guaranteed, Mr. Bansal disagreed that Overseas guaranteed jobs, reasoning or arguing that because the employer chose the candidates, Overseas could not guarantee jobs. He agreed that he refunded the first part of the fee (described in the retainer agreements as a deposit), if Overseas did not find a job for the worker. Mr. Bansal testified about a class member who came to Canada to work for Mac's, was not employed by Mac's but found work elsewhere, so Mr. Bansal did not refund him. Mr. Bansal testified about a class member who came to Canada for a job but was not provided the job and left Canada. Mr. Bansal refunded the full fee. The refunds

were clearly connected to the job, not the immigration status. This is evidence that Overseas and the class members were on the same page – they were paying Overseas to find jobs and Overseas refunded the fee if they did not find jobs for the class members.

[313] Mr. Bansal testified that the lump sum fee of \$7,000 to \$8,000 was based on an application taking about 25–30 hours at \$250 per hour. His evidence was not specific about what “application” took 25 hours and what that entailed. Since Mac’s was paying Overseas for recruiting candidates including pre-screening them, arranging for interviews, making the LMO application, putting together the offers of employment and employment contracts, providing them to Mac’s for signing, and conveying them to the candidates, those matters are not in the 25 hours unless Overseas were charging the class members and Mac’s for the same work.

[314] With regard to the visa or work permits, there is no evidence that the representative plaintiffs or any class member sought to retain Overseas to provide assistance with obtaining a visa or work permit. Overseas did not permit any class member to opt out of paying for assistance with obtaining a visa or work permit. None of the representative plaintiffs received assistance from Overseas with their visa applications other than the checklist. Their evidence was not challenged on this point. Ms. Tesorero complied with Overseas’ direction that she provide the completed application to Overseas for review before submitting it. However, she did not hear anything from Overseas, so she submitted it without input from Overseas.

[315] Mr. Bansal testified that they provided the checklist to the class members, but they also sat down with each class member to work on it, including medical clearance, criminal clearance and financial clearance. He did not specify any class member who Overseas had such a sit-down meeting with. There is no evidence of in-person meetings or any meetings between any class member and anyone at Overseas during the visa application process. If Mr. Bansal meant that Overseas guided each class member through the visa process, I do not accept his evidence.

[316] The evidence does not support that Mac's spent 25–30 hours on any class member's visa application.

[317] With regard to settlement services, Mac's paid Overseas to provide settlement services to persons brought over for Mac's under the TFWP. Mr. Bansal also testified that the retainer agreements provided for settlement services to be provided as part of that retainer.

[318] I conclude that Overseas contracted to provide settlement services with both Mac's and with the class members with whom it had written agreements. The evidence of the settlement services that Overseas actually provided to some subclass members was a place to stay in an overcrowded apartment or hotel room.

[319] While all of the representative plaintiffs testified about needing those services, all of them described receiving inadequate temporary housing, and none of them described assistance with cell phones, SINs, or medical coverage.

[320] The evidence demonstrates that, with the exception of the job interviews, Overseas did its best to ensure that the class members only communicated with Overseas and not with Mac's about the jobs. Overseas transmitted the job offers and the employment contracts and communicated with the class members after contract formation. Overseas did not provide Mac's with the list of persons and their contact information with whom employment contracts were made. I find Overseas wanted to ensure that Mac's and the class members could not deal directly with each other and undermine Overseas' role and ability to collect the fees from the class members.

Conclusion on Common Issue B1

[321] I conclude that, notwithstanding the wording of the retainer agreements with some class members, and notwithstanding that the jobs that the class members contracted for had immigration aspects and requirements, the fees that they paid to Overseas were for jobs and were prohibited by employment standards legislation.

[322] The evidence demonstrates that in some cases, Overseas directed the class members to pay the fees to Trident and the class members did so. In such cases, the fees paid to Trident were fees for jobs and were prohibited by employment standards legislation.

Unjust Enrichment Alleged Against Overseas and Trident

[323] An action in unjust enrichment restores money or property to a plaintiff who can establish: (1) the defendant was enriched; (2) the plaintiff suffered a corresponding detriment; and (3) the absence of a juristic reason for the enrichment: *Kerr v. Baranow*, 2011 SCC 10 at para. 32.

Common Issue C1: Was there any juristic reason for Overseas and Trident to charge the recruitment fees?

[324] Overseas' did not make any submissions specific to juristic reason except that the fees were lawful fees for immigration and settlement services. Having found that the fees were for jobs and unlawful, I conclude there is no juristic reason for them. That finding applies to the fees paid to Overseas and to Trident.

Common Issue C2: Were Overseas and/or Trident unjustly enriched by having the class members pay the recruitment fees?

[325] Having collected unlawful fees, Overseas and Trident were unjustly enriched by the fees, and the class members suffered a corresponding deprivation.

Breach of Fiduciary Duty Alleged Against Overseas and Trident

[326] In a fiduciary relationship, the fiduciary has a duty to act with undivided loyalty to the beneficiary by placing the beneficiary's interest above their own and forsaking all other interests in favour of the beneficiary: *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at paras. 43–44; and *Roussy v. Savage*, 2019 BCSC 1669.

[327] The constituent elements of breach of fiduciary duty are:

- a) the defendant was in a fiduciary relationship with the plaintiff;

- b) the defendant acted in a manner inconsistent with that fiduciary relationship which could include breach of the duty of loyalty, acting in the face of a conflict, preferring a personal interest, taking a profit, acting dishonestly; and
- c) loss or damage, which could be remedied by a monetary remedy or a proprietary remedy such as a constructive trust.

Common Issue D1: Did Overseas and Trident have a fiduciary duty to the class members as Regulated Canadian Immigration Consultants?

[328] Certain types of relationships, referred to as *per se* fiduciary relationships, give rise to fiduciary duties as a matter of course. These include a trustee-beneficiary or a solicitor-client relationship.

[329] Where the relationship does not fall into an established category of fiduciaries, an assessment of whether to impose a fiduciary duty is necessary. Where imposed, this is referred to as an *ad hoc* fiduciary relationship.

[330] In *Elder Advocates* at para. 36, the Supreme Court of Canada described the following elements relevant to the assessment:

- a) an express or implied undertaking by the asserted fiduciary to act in accordance with a duty of loyalty in the best interests of the beneficiary;
- b) a defined person or class of persons who are vulnerable in the sense of the fiduciary having a discretionary power over them; and
- c) the alleged fiduciary's power may affect the legal or substantial practical interests of the beneficiary.

See also: *Galambos v. Perez*, 2009 SCC 48 at para. 75; *Zhong Tie Enterprise Inc. v. Topcorp Development Inc.*, 2024 BCSC 224 at paras. 208–215, citing *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, 1994 CanLII 70; *Klein v. Sun*, 2018 BCSC 245 at para. 196.

[331] Overseas did not make any submissions on whether it, or the RCICs it employed, owed a fiduciary duty to the class members. Overseas argued that Overseas' RCICs followed all regulations that they were required to follow. Since Trident did not attend the trial, it led no evidence on this point and made no submissions.

[332] I will address the relevant factors based on the evidence and the submissions of the representative plaintiff.

Undertaking

[333] The evidence is that during the time at which Overseas was recruiting class members to work for Mac's and collecting fees for jobs from the class members, Mr. Bansal of Overseas, Ms. Hirak of Overseas and Ms. Bala of Trident were RCICs.

[334] Class members sought out Overseas to assist them with getting jobs in Canada under the TFWP. The representative plaintiffs testified that they paid the initial fees without any receipt because they understood that it was necessary to start the process. During his evidence, Mr. Bansal referred to persons who meet the definition of class members as "clients". The agreed statement of facts includes that Trident and Overseas had an arrangement that Trident would assist Overseas with its work. On the facts, I find that in some cases Overseas directed class members to pay fees to Trident. I conclude that Trident was also acting for class members to assist them with getting jobs in Canada under the TFWP.

[335] The governance structure and code of professional conduct pertaining to RCICs changed in June 2011. Prior to that time, RCICs were regulated by a body known as the Canadian Society of Immigration Consultants (CSIC). There was a 120-day transition period to the new regulator, the College of Immigration and Citizenship Consultants (CICC). During his evidence, Mr. Bansal seemed to be saying that as a result, he was not subject to the CICC Code of Professional Ethics when he was recruiting class members to work at Mac's. His evidence made no sense and I reject it.

[336] The June 2011 Code of Professional Ethics applicable to RCICs was updated in June 2012 but not in ways that are material to the ethical obligations pertinent to this case. Both versions set requirements pertaining to RCICs' conduct in relation to their clients including competency, conflict avoidance, honesty, candour, avoidance of misleading conduct, honour, integrity, good faith, timeliness, responsiveness to communications and confidentiality.

[337] I conclude that the nature of the relationship between the class members and the employees of Overseas and Trident was that of RCICs and client, such that there is an express (by virtue of the code of conduct) and implied undertaking of loyalty and to act in the best interests of the client solely.

Vulnerability

[338] Vulnerability on the part of the person asserting that they were owed a fiduciary duty is not required. A party to whom a fiduciary duty is owed can be sophisticated, educated and financially secure. Many lawyers' clients are not vulnerable in the colloquial sense, but nonetheless their lawyers owe them a fiduciary duty. What is required is vulnerability due to the fiduciary having discretionary power or a knowledge imbalance in the context of the relationship.

[339] The evidence of the representative plaintiffs and the context of the class members demonstrates that they were working low-paying jobs, and they were willing to move to work other low-paying jobs because those jobs were better than the ones they had. Overseas and Trident had the power to affect whether they would get Canadian jobs.

[340] As Mr. Khadka testified, he gave Overseas the first portion of the payment without receiving a receipt because it was necessary to start the process and he had to trust Mr. Mann to pursue his dream of coming to Canada where he believed there were better opportunities for him to support his family.

[341] The evidence demonstrates that the TFWP was a complex program and employers, like Mac's, used companies like Overseas to recruit employees through

the TFWP. Overseas controlled the interactions between the employers and the candidates through the recruitment process. The class members could not get access to employers like Mac's unless they went through Overseas.

[342] The evidence also demonstrates that Overseas obtained LMOs for Mac's and matched workers to the LMOs. It was critical to the worker that the LMO matched the work permit and matched where the person went to work. If those did not line up, the foreign worker could end up detained, as Mr. Basyal was. The RCICs were the ones who had the expertise in those matters which were critical to whether a class member could legally work in Canada.

[343] I conclude that Overseas had a power and knowledge imbalance over the class members that supports the finding of a fiduciary relationship.

Conclusion on Whether a Fiduciary Duty was Owed

[344] I conclude that Overseas and Trident, through the RCICs they employed, owed fiduciary duties to the class members.

Common Issue D2: Did Overseas and Trident breach this fiduciary duty?

[345] Overseas argued that it did not breach any fiduciary duty owed because its RCICs followed all regulations that they were required to follow. Since Trident did not attend the trial, it led no evidence on this point and made no submissions.

[346] Overseas and Trident charged and collected unlawful fees for jobs from class members. By unlawfully collecting fees for jobs, Overseas and Trident preferred their interests to those of the class members and thereby breached the fiduciary duties they owed to class members.

[347] In addition, Overseas was aware of and participated in the dishonesty communications made through the job offers and signed employment contracts and participated in the continuing dishonesty by not telling the class members that Mac's would not or could not, except by happenstance, provide the jobs that the class members were paying Overseas for.

[348] Notwithstanding Overseas' arguments that it complied with all regulations, Mr. Bansal agreed that the Code of Ethics of his RCIC professional governing body required him to be honest and candid with the class members. He agreed that if a foreign worker client had a contract for a job that did not exist, he had an obligation to be honest about that. Neither he nor anyone else at Overseas or Trident corrected the misrepresentation that had been made to the class members about whether the jobs contracted for would be provided.

[349] The factual findings I made pertaining to Mac's failure in the duty of honesty in contractual performance in relation to the subclass members applies to Overseas and Trident's fiduciary duty to all class members.

Remedy

Common Issue E1: If the answer to any of the common issues is yes, what remedies are class members entitled to?

Common Issues A1, A2 and A5

[350] The representative plaintiffs and Mac's both submit that the assessment of remedies for breach of contract and breach of the duty of honesty in contractual performance are individual issues.

[351] However, the representative plaintiffs argue that some components of the remedies for breach of contract and breach of the duty of honesty in contractual performance can be answered in common.

[352] The first component is the starting point for the notice period. The representative plaintiffs argue that they are entitled to damages based on a notice period of the time remaining in the 24-month employment contracts for the breach of not providing the employment on the terms contracted for.

[353] The representative plaintiffs rely on case law establishing that where there is a fixed-term contract, the notice period for damages for wrongful dismissal is the balance of the term of the contract, subject to the duty to mitigate: Geoffrey England, *Individual Employment Law* (Toronto: Irwin Law, 2008) at 286, citing *Vandette v.*

Vancouver Port Corp. (1987), 21 B.C.L.R. (2d) 209 (S.C.). See also: *Jacks v. Victoria Amateur Swimming Club*, 2005 BCSC 778 at para. 19; and *Roome v. Kaiser*, 2024 BCSC 940 at para. 80.

[354] In the Summary Trial Reasons, I held that the contracts did not contain a provision for liquidated damages that ousted the duty to mitigate. While I was overturned on my holding that the contracts contained an implied term ousting mitigation (2025 Court of Appeal Reasons at para. 80) the Court of Appeal did not question the finding that there was no liquidated damages clause. In such circumstances, the damages are for a notice period from the date of dismissal to the termination of the contract, subject to the duty to mitigate and to actual mitigation.

[355] Mac's argues that the factors to establish the notice period for breach of an employment contract set out in *Bardal v. Globe & Mail Ltd.*, 1960 CanLII 294, 24 D.L.R. (2d) 140, (ON HCJ) require individual assessment. The factors include age, pay, responsibility and availability of alternative employment for each subclass member. The representative plaintiffs argue that while they are useful considerations, their assessment will not result in meaningful differences because the key factors for all subclass members are the same: low-paying jobs at Mac's and the inability to work elsewhere without undertaking the time-consuming process of a new LMO and a new work permit.

[356] It is difficult to understand why the representative plaintiffs referred to the *Bardal* factors as useful considerations when they take the position that the notice period is the remaining term of the contract.

[357] At any rate, I agree with the representative plaintiffs that the law provides that the notice period in a fixed-term contract is the remaining term of the contract, subject to the duty to mitigate and to actual mitigation.

[358] That does not mean, however, that the length of notice, subject to the duty to mitigate and actual mitigation, can be determined commonly. The breach alleged is failing to provide any employment at all or providing employment other than on the

agreed-upon terms or for less than the agreed-upon duration of the contract. For those subclass members who were not employed at all, the starting point would be 24 months, but for those who were employed for some period of time at the agreed-upon terms, the notice period will be less than 24 months.

[359] I am of the view that the notice period, before accounting for the duty to mitigate or actual mitigation, cannot be decided commonly.

[360] The second component of breach of contract damages that the representative plaintiffs submit can be determined commonly is that for breach of the duty of honesty in contractual performance, the subclass members may elect notice period damages based on the monies they could have earned had they stayed in Dubai. While I do not preclude the subclass members from making that argument for the reasons I have given above, whether a subclass member elects and prove damages in this manner is an individual issue.

[361] In summary, the remedies for breach of contract and breach of the duty of honesty in contractual performance are to be determined after individual assessments of the subclass members' claims for damages.

Common Issue C2–Unjust Enrichment

[362] The representative plaintiffs submit that the remedy for unjust enrichment is the restitution of the fees paid by the class members to Overseas and Trident.

[363] As discussed by the Supreme Court in *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 23, restitution is a remedy for unjust enrichment, distinct from disgorgement, in that restitution requires correspondence between the wrongful gain and the plaintiff's deprivation, whereas disgorgement is assessed relative to the defendant's wrongful gain alone.

[364] In this case, there is evidence of correspondence between the wrongful gain and the class members' deprivation because the fees paid by the class members were wrongfully charged and collected by Overseas and Trident. Accordingly,

restitution is an appropriate remedy for the unjust enrichment. However, for the reasons below, I am of the view that restitution damages require individual assessment.

Common Issue D1–Breach of Fiduciary Duty

[365] The representative plaintiffs assert that Overseas' and Trident's breach of fiduciary duty entitles them to restitution of the fees paid by the class members to Overseas and Trident. Restitution is also a remedy for breach of fiduciary duty: See Peter Birks, *An Introduction to the Law of Restitution*, rev. ed. (Oxford: Clarendon Press, 1989); Peter D. Maddaugh and John D. McCamus, *The Law of Restitution*, looseleaf ed. (Aurora: Canada Law Book, 2004). For the reasons given above, I conclude that restitution of the wrongful fees paid is the appropriate remedy for breach of fiduciary duty.

[366] The representative plaintiffs argue that the breach of fiduciary duty also gives rise to aggravated and punitive damages.

[367] For the reason given below, I conclude that entitlement to aggravated damages must be addressed as an individual issue.

[368] For the reasons given below, I conclude that while the conduct of Overseas gives rise to punitive damages, the quantum cannot be determined until compensatory and restitutionary damages have been assessed.

Common Issue E2: If the answer to any of the common issues is yes, are the defendants liable on a class-wide basis?

[369] Subject to the issues that require individual determination, Mac's is liable to the subclass for damages for breach of contract and breach of the duty of honesty in contractual performance on a subclass-wide basis.

[370] Subject to the issues that require individual determination, Overseas and Trident are liable to the class for damages for unjust enrichment and breach of fiduciary duty on a class-wide basis.

[371] There is no liability by any defendant for aggravated damages on a subclass-wide or class-wide basis because entitlement to aggravated damages is an individual issue.

[372] With regard to punitive damages, I have determined that the conduct of Mac's with regard to the subclass and the conduct of Overseas with regard to the class meet the threshold for punitive damages and warrant assessment of a quantum of punitive damages. Mac's and Overseas' respective liability for punitive damages will be determined on a subclass-wide and class-wide bases.

Common Issue E3: What is the appropriate method of procedure for distributing the damages award to the class?

[373] Common issue E3 was stated in the reasons in the first certification decision, the reasons for which are indexed and published at 2017 BCSC 1649, by the first judge who heard certification. Those reasons do not provide a detailed discussion as to what is encompassed by it. That issue has not been addressed in any of the subsequent decisions by the Court of Appeal or by this Court.

[374] At this trial, none of the parties made submissions as to exactly what is encompassed by this common issue.

[375] For breach of contract and breach of the duty of honesty in contractual performance, the representative plaintiffs' position is that the damages should be assessed in accordance with ss. 27 and 28 of the *Class Proceedings Act*. That position precludes application of the aggregate damages provisions found in ss. 29 and 30 of the *Class Proceedings Act*. In addition, the representative plaintiffs submit that the class members will seek to make elections with regard to the method of calculating their damages. I am of the view that an individual issues resolution procedure must be employed but I do not agree that specifying that procedure is encompassed by common issue E3.

[376] In any event, the proposal by the representative plaintiffs is not a complete individual claims process and I decline to make an order specifying only part of the process.

[377] With regard to unjust enrichment and breach of fiduciary duty, the representative plaintiffs assert that the average of the fees charged, which they assert were \$7,000 to \$8,000, should be multiplied by the number of class members, which they say is 877, to produce an aggregate damage sum of \$6,577,500 plus pre-and-post-judgment interest. The representative plaintiffs make reference to s. 29 of the *Class Proceedings Act* but do not make specific submissions as to the application of that provision to this claim.

[378] Section 29(1)(b) permits a court to make an aggregate monetary award where no questions of fact or law remains to be established to determine the defendant's monetary liability. I am of the view that the s. 29(1)(b) requirement is not met for this approach to restitutionary damages at this time for the following reasons.

[379] The list of class members which the representative plaintiffs use to assert their number of 877 is a list prepared by Mac's listing "potential" class members, a list prepared by Overseas containing "potential" class members and lists obtained from Service Canada pertaining to persons named to LMOs. The representative plaintiffs argue that the lists are actual class members, and that Mac's and Overseas cannot qualify the lists as "potential" class members because the lists were produced in response to a court order to provide a list of class members.

[380] The evidence is that Mac's prepared its list from its payroll records of temporary foreign workers employed by Mac's. However, that evidence came from Mr. Hartl, who did not prepare the list, and so his evidence is hearsay. His evidence cannot be correct since persons who had employment contracts, but were never actually employed, are on the list. The evidence of Mr. Higuchi is that he did not track with whom he signed employment contracts and that Mac's payroll only became involved when a person was in Canada and going to work in Mac's store. In order to produce the list including persons who never worked in a Mac's store, the

inference is inescapable that Mac's created the list from some other data, either from Overseas or Service Canada or from information Mac's collected that neither Mr. Higuchi nor Mr. Hartl referred to when they testified.

[381] Mr. Bansal did not give evidence about the list that Overseas produce and Overseas did not make any submissions as to how they created their list.

[382] The representative plaintiffs acknowledge that the court should not find that "each of the persons on the list is definitively a class member", but rather that the magnitude of the class is in the range of 880 people for the purpose of considering punitive damages. I observe punitive damages considerations involve different applications of class size numbers than are involved in calculating aggregate damages. For aggregate damages, the representative plaintiffs seek to have the Court use 877 as one of the two numbers multiplied to arrive at restitutionary aggregate damages.

[383] It may be that the aggregate damages provisions of the *Class Proceedings Act* allow for an approach of the type proposed by the representative plaintiffs, subject to each class member ultimately proving class membership. In that case, submissions on whether and how the evidence about class size meets the criteria for use under s. 29 of the *Class Proceedings Act* would be required. However, I did not receive argument on the appropriateness of the approach or the appropriateness of the evidence for such an approach.

[384] In addition, more evidence would be required about the other half of the equation, that is the dollar figure of fees paid. The evidence is not complete on whether all class members paid fees totalling \$7,000 to \$8,000. The evidence is that Overseas charged and Overseas and/or Trident collected the fees in two portions; \$1500 to \$2000 in the first portion to start the process; and \$5,500 to \$6,000 after an employment contract was signed and a visa was obtained. I find that every class member paid at least the first portion. The evidence is that Overseas required the second portion to be paid after the class member received a visa and before they travelled to Canada. The class definition and the evidence allow for the possibility

that a class member may have paid the first portion but not the second portion, because, for example, the person did not receive a visa.

[385] I conclude that the quantum of fees paid by class members must be determined pursuant to ss. 27 and 28 of the *Class Proceedings Act*.

[386] I conclude that it is premature to determine the appropriate method for distributing damages for breach of contract, breach of the duty of honesty in contractual performance to the subclass and for unjust enrichment and breach of fiduciary duty to the class.

Common Issue E4: Is the class entitled to an award of aggravated or punitive damages based on the defendants' conduct, and, if so, in what amount?

Aggravated Damages

[387] The common issue pertaining to aggravated damages was stated in the first certification decision as part of the list of common issues proposed by the plaintiff but without any specific discussion about commonality.

[388] This common issue was not addressed by the Court of Appeal in either of its decisions on the appeal of the certification order. The parties did not make submissions about it at the hearing before me to settle the certification order subsequent to the decisions by the Court of Appeal.

[389] Mac's argues that aggravated damages cannot be determined as a common issue because aggravated damages compensate psychological or mental distress and are therefore inherently unsuitable to being assessed on a class-wide basis: *Syngenta AG v. Van Wijngaarden*, 2025 BCCA 334 at para. 153, adopting the reasoning in *Gomel v. Live Nation Entertainment, Inc.*, 2021 BCSC 699. In *Escobar v. Ocean Pacific Ltd.*, 2021 BCSC 2414, I held that damages for mental distress could not be stated as a common issue because the different situations of the class member *vis-à-vis* their employment and employer would cause them to have

different reactions to the alleged breach of contract and breach of the duty of honesty in contractual performance.

[390] As I have already related above, statement of an issue as a common issue in a certification order does not preclude revisiting whether the issue can be decided commonly.

[391] The inherent unsuitability of aggravated damages as a common issue has not been overcome by the evidence at trial. Although the evidence of the representative plaintiffs demonstrated that each of them suffered mental anguish due to Mac's conduct, their experiences were different from one another.

[392] It is also clear that the mental anguish experienced by the representative plaintiffs was in part because they wanted better paying jobs in Canada so they could support their families in the countries from which they originally came. When Mac's did not provide the jobs contracted for, and they had left other jobs in the UAE for the jobs with Mac's, their mental anguish included that they could not support their families. There is no evidence that every subclass member was supporting a family.

[393] After Ms. Tesorero left the temporary accommodation provided by Overseas, she continued to have housing, first from a person she described as a good Samaritan, and then by friends. While I do not discount the distress and vulnerability she felt at being housed by a good Samaritan, her experience was different from that of Mr. Basyal and Mr. Khadka, both of whom lived in homeless shelters for a period of time. The class members did not experience homelessness by virtue of coming to Canada.

[394] I conclude that the evidence does not support the determination of aggravated damages as a common issue for either the subclass or the class.

Punitive Damages

[395] Punitive damages are exceptional remedies, awarded to denounce the conduct of a defendant that is characterized as “malicious, oppressive and high-handed misconduct”: *Whiten*, at para. 36, quoting from *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, 1995 CanLII 59 at para. 196. The assessment of the conduct as exceptional and meeting those descriptors is key; there are no types of cases or causes of action that do justify or do not justify punitive damages and no particular factors that must exist or cannot exist to find the threshold has been surpassed: *Whiten* at para. 67.

[396] The claims made out against Mac's are breach of contract and breach of the duty of honesty in contractual performance. *Whiten* was a breach of contract case in which the majority held that punitive damages could be grounded due to the breach of the duty of good faith in the contractual dealings between the plaintiffs and the defendant. In this case, the breach of the duty of honesty in contractual performance permits consideration of punitive damages in relation to Mac's conduct.

[397] The claims made out against Overseas include breach of fiduciary duty. It is not in dispute that breach of fiduciary duty can ground a claim for punitive damages without an independent actionable wrong.

[398] I turn to consider whether the conduct of Mac's in relation to the subclass, and Overseas, in relation to the class, warrant punitive damages.

[399] Overseas and Mac's worked together to implement the scheme of Mac's offering and contracting to provide jobs to class members where those jobs either did not exist at the time they were offered or would only exist by happenstance at the time the employee was ready to go to work.

[400] Mr. Higuchi testified that he interviewed all the class members except for three he cannot account for. Although he denied perceiving that the class members were vulnerable, he knew that they were ready to move from one country to another to take low-paying jobs that Mac's was unable to fill in Canada. Mr. Higuchi testified

that he agreed with the sentiment expressed in an email from a market manager, set out below, that Mac's valued TFWP employees because of their work ethic and drive to work. The class members signed on to the employment contracts with Mac's for better low paying jobs and to come to Canada where they had a better opportunity to build a life and/or support their families.

[401] These financially vulnerable circumstances, work ethic and drive to work provided fertile ground for Mac's and Overseas to implement the scheme. I find they took advantage of it. Mac's had a pool of potential employees it could call upon; it only had to pay Overseas the recruitment fees when the person came to work, and it only had to pay those employees to whom Mac's provided work.

[402] Mac's acknowledges that it made mistakes including being ignorant of how the TFWP worked, but it submits that it was not malicious and did not intend to cause harm to the subclass members. I find Mac's callously disregarded the harm it was causing for the subclass members but was not ignorant of it.

[403] The scheme was too obviously abusive to dismiss as simply careless. Again, the focus is not on whether Mac's and Overseas were correctly using the TFWP. The focus is whether their use of the TFWP, whether permissible or not so far as Canada was concerned, exploited the subclass members by causing them to believe they had jobs that Mac's would not or could not provide except by happenstance.

[404] Mac's knew, as Mr. Higuchi's email to Ms. Hirak demonstrated, that the employment contracts created "false pretences". Mac's and Overseas knew that subclass members were quitting their jobs and showing up with no jobs. Mac's tried to shelter itself from responsibility through Overseas instead of discharging its own responsibility to be honest with its contractual partners about whether there would be work for them. Its failure to discharge its own responsibility towards its vulnerable and work-ethic driven contractual partners, instead relying on Overseas to do so, is part of its egregious conduct.

[405] Mac's continuing disavowal of its responsibilities exacerbated its callous conduct because Mac's knew that Overseas was not preventing the subclass

members from travelling to Canada for jobs that did not exist despite Mr. Higuchi telling Overseas not to permit the subclass members to travel until Mac's confirmed jobs. Subclass members travelled to Canada in the belief that a dream was coming true when what they were in store for, as was described by the representative plaintiffs, unbelievable and bewildering nightmares.

[406] I do not accept that Mac's did not know that the subclass members who travelled to Canada when no jobs were waiting for them would be in peril both personally and with the Canadian authorities. The only way to avoid understanding that would be to disregard the consequences of not providing jobs to people who had travelled from afar for low-paying jobs described in employment contracts and could only legally work for Mac's. It should not have been unexpected that the subclass members became reliant on the generosity of others for subsistence and housing, or became unhoused, or were arrested if they resorted to working unlawfully.

[407] Common sense and consciousness were not the only means of insight that Mac's had that might have pricked its corporate conscience. A Mac's market manager, dealing with what he considered to be Overseas' lapses for which Mac's was responsible, emailed Mr. Higuchi as follows in October 2012, near the beginning of this problem:

What should I tell these people now that there is 16 days to go? That the application that was submitted 4 months ago, was never done. You know one of them was Anna's sister right? And somehow they are all connected. Do you want to break all current foreign worker's trust like this? And start losing out on that side of our staffing?

These people are here to work, we benefit as they never call in sick, never late and all they want to do is work. They only have us, no family, no one to lookout but us. And if we as a company betray 1, we betray them all. Plus playing with their lives unnecessarily like this. Imagine if that was you...with mom/dad/children/etc back home waiting for your support.

[408] Eventually, subclass members emailed Mr. Higuchi with their dire situations in Canada and so he came to know about that directly from them. In his responses, he implied they were to blame because they took too long to come to Canada and

came to Canada without confirming the jobs, despite that the employment contracts that Mr. Higuchi signed for Mac's confirmed their jobs. The chain of emails between Ms. Tesorero and Mr. Higuchi set out above is one example. The emails demonstrate distressing callousness by Mac's towards the subclass members.

[409] Even after Mac's officially discontinued working with Overseas and using the TFWP in late June early July 2014, Mr. Higuchi continued to use Overseas to help Mac's fill positions. This evidence demonstrates how determined Mac's was to solve its worker shortage positions despite all Mac's had come to learn about Overseas' inappropriate conduct, the jeopardy that conduct caused to Mac's and, for the purposes of this assessment, the harm it caused to subclass members.

[410] I conclude that Mac's conduct in relation to the subclass warrants punitive damages.

[411] So far as Overseas was concerned, the scheme that Overseas and Mac's implement was that Mac's offered jobs that would not likely be open when the employee arrived. When the obvious consequences of the scheme played out, Overseas exacerbated the issue when it suggested that Mac's should use blanket LMOs. Now Mac's was not just offering jobs that would likely not be open when the employees would arrive – it was offering jobs that were never open in the first place. Mr. Bansal acknowledged that his responsibility as an RCIC required him to tell the class members that they were contracting for jobs that did not exist. His failure to do so shows malicious disregard for the class members, disregard animated by Overseas' self-interest in collecting the fee.

[412] In addition, Overseas was charging class members for jobs, something Overseas was not permitted to do at any price point. The quantum of the fees charged in relation to the financial circumstances of the class members – people who were prepared to move across the world for low-paying jobs – exacerbates the wrong that Overseas perpetrated in a way that is fairly described as egregious.

[413] The evidence demonstrates that class members were communicating with Overseas but often those communications went unanswered. Overseas also blamed the subclass members or gave them options that put them in even more perilous situations, such as Mr. Basyal being sent to work at the bottle depot where he was not paid and where he was arrested by CBSA for not having a work permit to do the work he was doing. This conduct was callous and malicious.

[414] Overseas' settlement services were to include temporary accommodation. I do not believe Mr. Bansal's evidence that all subclass members were housed in accommodation where they had their own beds. On the evidence, the temporary accommodation provided was atrocious and diminished the human integrity of the subclass members.

[415] I conclude that Overseas' conduct in relation to the class members including the subclass members warrants punitive damages.

[416] There is no specific evidence pertaining to Trident except that it received unlawful fees from class members. I consider that evidence alone to be an insufficient basis on which to assess whether punitive damages are warranted and I conclude that the claim against Trident for punitive damages fails.

[417] The second part of this common issue, the quantum of punitive damages, cannot be assessed until after the compensatory and restitutionary damages, matters of individual assessment, have been addressed: *Rorison v. Insurance Corporation of British Columbia*, 2023 BCCA 474 at para. 63. This is because the objectives of punitive damages are punishment, behaviour modification through financial deterrence and denunciation: *Whiten* at para. 68. The total damages awarded against a defendant must be taken into account when determining the quantum of an award that will further one or more of the objectives of the law: *Whiten* at para. 71–72, 74.

[418] In class actions, the result is that punitive damages common issues are often bifurcated with the first stage of the common restricted to determining whether a

defendant's conduct warrants punitive damages but deferring the quantum assessment until the compensatory damages have been determined: *Chalmers v. AMO Canada Company*, 2010 BCCA 560 at paras. 31, 35.

[419] The representative plaintiffs acknowledge that the Court cannot assess or award punitive damages at this stage. However, they submit that the Court can and should order the total compensatory and punitive damages as that will allow the parties to address individual claims without a need to return to the Court. The representative plaintiffs seek that the Court order that the total damages Mac's is required to pay to the subclass is \$15 million, and that Overseas and Trident are each required to pay to the class \$15 million.

[420] The representative plaintiffs assert that for the subclass, the compensatory damages may total in excess of \$10 million, which would result in punitive damages being \$5 million. The representative plaintiffs assert that for the class, the punitive damages will be approximately \$4 million, on the basis that the restitution of the overcharged fees totals

[421] The compensatory damages estimations are not even estimations; they are almost pure speculation. For the restitution of the fees, as set out above, some class members may have only paid the first portion of the fee, and the amount of restitution claimed could be overstated.

[422] No authority has been provided for this approach. I do not rule it out, because it is not necessarily out of alignment with the concept that the total damages must compensate and punish while not over-compensating or over-punishing. However, in this case, the speculative nature of the submissions on the totals is such that I am satisfied that I should not follow this approach in these circumstances and so it is not necessary for me to determine whether the law allows for this approach.

E5: If the answer to E4. is yes, what is the appropriate method or procedure for distributing any aggravated or punitive damages to the class?

[423] For aggravated damages, this issue must be revisited after the entitlement and, if applicable, quantum of aggravated damages has been determined.

[424] For punitive damages, this common issue must be revisited after the compensatory and restitutionary damages have been assessed as individual issues and the quantum of punitive damages has been determined.

Disposition

[425] The common issues are resolved as follows.

Common Issue A1

[426] The wage rate, hours of work and length of the contract are set out in the subclass members' employment contracts. They shall be determined on an individual basis.

[427] The employment contracts between Mac's and the subclass contained no terms regarding recruitment fees.

[428] The issues pertaining to payment of two-way transportation have been resolved through the consent order dated October 29, 2021.

Common Issue A2

[429] Mac's breached subclass members' employment contracts by not providing any employment or by providing employment different from what was stipulated in the employment contracts. Whether there was a breach of a given subclass member's employment contract is a matter for individual determination.

Common Issue A4

[430] Mac's breached its duty of honesty in contractual performance by not telling the subclass members that it would not or could not, except by happenstance, provide the jobs contracted for in the signed employment contracts.

Common Issue A5

[431] Subclass members are entitled to recover damages in excess of the minimum notice period in the employment contracts, subject to the duty to mitigate and subject to Mac's entitlement to take into account any earnings during the two-year terms of the employment contracts.

Common Issue B1

[432] The fees paid by the class members to Overseas and/or Trident Immigration were fees for jobs and prohibited by employment standards legislation.

Common Issue C1

[433] There was no juristic reason for the fees charged to the class members and paid to Overseas and Trident for employment.

Common Issue D2

[434] Overseas breached its fiduciary duties to the class members by collecting unlawful fees and by not telling them that Mac's was not committing to providing the jobs agreed to in the employment contracts.

[435] Trident breached its fiduciary duty to the class members by collecting unlawful fees from them.

Common Issue C2

[436] Overseas and Trident were unjustly enriched by the fees paid by the class members to them and the class members suffered a corresponding deprivation.

Common Issue D1

[437] Yes, Overseas and Trident Immigration had a fiduciary duty to the Class members' as Regulated Canadian Immigration Consultants

Common Issue E1

[438] The subclass members' remedies for breach of contract and breach of the duty of honesty in contractual performance are to be determined pursuant to individual assessments of the subclass members' claims for damages.

[439] The class members remedy for Overseas and Trident's breach of fiduciary duty and unjust enrichment is restitutionary damages to be determined pursuant to individual assessments of the subclass members claims for damages.

Common Issue E2

[440] Subject to the issues that require individual determination, Mac's is liable to the subclass for damages for breach of contract and breach of the duty of honesty in contractual performance on a subclass-wide basis.

[441] Subject to the issues that require individual determination, Overseas and Trident are liable to the class for damages for unjust enrichment and breach of fiduciary duty on a class-wide basis.

[442] There is no liability by any defendant for aggravated damages on a subclass-wide or class-wide basis because entitlement to aggravated damages is an individual issue.

[443] The conduct of Mac's with regard to the subclass and the conduct of Overseas with regard to the class warrants punitive damages and warrants assessment of a quantum of punitive damages. Liability for punitive damages will be determined on a subclass-wide and class-wide basis.

Common Issue E3

[444] Damages payable by Mac's to the subclass members for breach of contract and breach of the duty of honesty in contractual performance must be assessed individually at a process to be determined pursuant to ss. 27 and 28 of the *Class Proceedings Act*.

[445] Restitutionary damages for fees paid by class members to Overseas and/or Trident must be assessed individually at a process to be determined pursuant to ss. 27 and 28 of the *Class Proceedings Act*.

[446] It is premature to determine the appropriate method for distributing damages for breach of contract, breach of the duty of honesty in contractual performance to the subclass and for unjust enrichment and breach of fiduciary duty to the class.

Common Issue E4

[447] Entitlement to aggravated damages, and if entitlement is established, quantum, must be assessed individually at a process to be determined pursuant to ss. 27 and 28 of the *Class Proceedings Act*.

[448] Mac's conduct in relation to the sub-class warrants punitive damages. Overseas' conduct in relation to the class warrants punitive damages. The claim against Trident for punitive damages is dismissed.

[449] The quantum of punitive damages payable by Mac's and Overseas must be assessed after compensatory and restitutionary damages have been assessed.

Common Issue E5

[450] No appropriate method can be determined at this time to distribute aggravated damages; this issue must be revisited after the entitlement and, if applicable, quantum of aggravated damages have been determined.

[451] The appropriate method to distribute punitive damages must be revisited after the compensatory damages and restitutionary damages have been assessed as individual issues and the quantum of punitive damages has been determined.

"Matthews J."