IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Basyal v. Mac's Convenience Stores Inc.,* 2024 BCSC 2007

Date: 20241101
Docket: S1510284
Registry: Vancouver

Between:

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

Plaintiffs

And

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

Before: The Honourable Justice Matthews

Reasons for Judgment on Summary Trial Applications

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Place and Dates of Hearing:	Vancouver, B.C. May 14-16, 2024
Place and Date of Judgment:	Vancouver, B.C. November 1, 2024

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Overview

[1] This class action is about persons who were recruited overseas under the Canadian Temporary Foreign Workers program to work for the defendant Mac's Convenience Stores Inc. by the defendants Overseas Immigration Services Inc., Overseas Career and Consulting Services Ltd., (together, "Overseas") and/or Trident Immigration Services ("Trident"). The representative plaintiffs allege that Overseas charged the class members fees, that are prohibited by statute, for jobs. In addition, there is a subclass of persons who entered into contracts for employment with Mac's but arrived in Canada to find there were no jobs available for them.

[2] The representative plaintiffs seek summary trial determination of whether Mac's is vicariously liable for the breach of fiduciary duty it alleges that Overseas committed in charging prohibited fees to the class members.

[3] Mac's seeks summary trial determination of whether the subclass members had a duty to mitigate by seeking alternate employment when the jobs they contracted to do did not materialize, and whether, regardless of a duty, any earnings during the notice period should be taken into account when determining damages.

Suitability for Summary Trial

[4] *Supreme Court Civil Rules*, R. 9-7(15)(a) states that a matter will not be suitable for summary trial if the court is unable to find the facts necessary to decide the issues of fact or law, or if it would be unjust to decide the issues summarily. Even if the parties agree that the matter is suitable for summary trial, the court must make a threshold determination: *Main Acquisitions Consultants Inc. v. Yuen*, 2022 BCCA 249 at para. 89 and *Newhouse v. Garland*, 2022 BCCA 276 at paras. 83–88.

[5] The factors set out in R. 9-7(15)(a) (i) and (ii), whether the necessary facts can be found and whether it would be unjust to decide the issues raised, are separate but related questions: *Liu v. Luo*, 2018 BCSC 1237 at para. 29. In some circumstances it may be unjust to decide a case summarily even if, on the whole of the evidence, it is possible to find the necessary facts: *Placer Development Limited*

v. Skyline Explorations Ltd. (1985), 67 B.C.L.R. 366 at 385–386, 1985 CanLII 147 (C.A.); *Creyke v. Creyke*, 2016 BCCA 499 at para. 45.

[6] With regard to whether the necessary facts can be found, where the evidence conflicts on some points, if other admissible evidence makes it possible to find the necessary facts to determine the issues, the court may proceed to by summary trial: *Cory v. Cory*, 2016 BCCA 409 at para. 10, citing *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 at 219, 36 C.P.C. (2d) 199 at 216, 1989 CanLII 229 (C.A.).

[7] A party who seeks determination by summary trial must put its case forward on the basis that it will be determined summarily, including the risk that the claim may be summarily determined against it, and a party who is responding to the summary trial application must take every reasonable step to respond to it: *Gichuru v. Pallai*, 2013 BCCA 60 at para. 32.

[8] Accordingly, there is a difference between circumstances where the court cannot find the facts and a case where there are gaps in the evidence because a party who bears the onus has not put forward evidence to discharge that party's burden of proof. So long as the parties have had the opportunity to develop the evidence, the court may determine the matter taking into account whether a party who has an onus on an issue has discharged it: *Spring Hill Farms Limited Partnership v. Nose*, 2014 BCCA 66 at para. 20; *Gichuru* at para. 32; and *Brown v. Douglas*, 2011 BCCA 521 at paras. 29–30.

[9] Each of the representative plaintiffs and a class member and subclass member, Arthur Cajes, filed affidavits. In those affidavits, they gave evidence about interactions with the defendants, including with Mr. Higuchi of Mac's and Mr. Bansal and Ms. Hirak of Overseas, and other persons with Overseas and Trident.
Mr. Higuchi and Mr. Bansal swore affidavits. Their evidence does not contradict the affidavits sworn by the representative plaintiffs or Mr. Cajes directly, with three exceptions.

[10] The first is that some of the representative plaintiffs deposed to discussions with Overseas employees about the Overseas' fees in a manner that is consistent with the fees being charged for the jobs. Overseas denies that it charged fees for the jobs or said anything to class members that could be interpreted in the manner the class members have deposed to. That conflict does not need to be resolved on these proposed summary trials.

[11] Second, some of the representative plaintiffs deposed that they had interviews with Mac's representatives, including Mr. Higuchi. Mr. Higuchi deposed that Mac's has no records of interviews with Mr. Cajes, Mr. Khadka or Ms. Tesorero. The evidence that Mac's does not have records of interviewing persons who were subsequently offered jobs by Mac's is relevant to the allegations of the existence and/or extent of an agency relationship between Mac's and Overseas, but the question of whether a given class member was interviewed by a representative of Mac's does not need to be resolved to resolve these summary trials.

[12] Third, Overseas' deponent, Mr. Bansal, has deposed about efforts it made to assist subclass members who did not receive work in the jobs they contracted for. That evidence is not directly in conflict, but goes against the theme of evidence from the subclass members which, generally speaking, paints a picture of abandonment by Mac's and Overseas. On this summary trial, there is a question of whether the subclass members had a duty to mitigate. This conflicting evidence will become relevant if the duty is found to exist, but it is not relevant to whether a duty did exist.

[13] In addition, while the parties disagree about the inferences that should be drawn and the legal consequences that arise from certain evidence, on the issues for this summary trial, they do not disagree about what the evidence is or that the documents are what they purport to be on the issues to be addressed on these summary trial applications.

[14] The representative plaintiffs and Mac's each assert that the other has not led evidence that is important in order for their respective positions to be successful. They agree that the matters are still suitable for summary trial determination and if

the Court does not find the facts to support one party's desired outcome, that party will bear the consequences of not having put its best foot forward.

[15] Neither Mac's, the representative plaintiffs nor Overseas asserted that these evidentiary conflicts prevent the court from finding the facts it needs to find. I am satisfied that despite some disputes on the evidence including disputes about what inferences to draw or legal conclusions should be reached, I can find the necessary facts to decide these matters summarily.

[16] As summarized in *Gichuru* at paras. 30–31, citing *Inspiration Management*, whether it would be unjust to proceed summarily depends on the following factors:

a) the amount involved;

b) the complexity of the matter;

c) its urgency;

d) any prejudice likely to arise by reason of delay;

e) the cost of taking the case forward to a conventional trial in relation to the amount involved;

f) the course of the proceedings;

g) the cost of the litigation and the time of the summary trial;

h) whether credibility is a critical factor in the determination of the dispute;

i) whether the summary trial may create an unnecessary complexity in the resolution of the dispute;

j) whether the application would result in litigating in slices; and

k) any other matters which may be relevant in the particular case.

[17] In this case, the focus of the arguments I support of summary trial relate to points i) and j).

[18] The issues on these summary trials are not factually complicated, but they are disputed. The issue of whether an alleged principal, who is not alleged to owe a fiduciary duty to the plaintiffs, can be held vicariously liable for the breach of fiduciary duty of its agent, is hotly disputed. It is an intensely legal issue. Resolving it is important to the resolution of the issue of Mac's vicarious liability.

[19] I have been told that resolution of the duty to mitigate and deduction of any wages earned during the notice period are essential to out of court resolution of the case, and so the resolution of the mitigation issue will facilitate settlement. I have also been told that resolution of the vicarious liability issue will be helpful, if not essential, to settlement discussions.

[20] The common issues sought to be tried summarily are related to other common issues. For example, the common issue pertaining to vicarious liability is only engaged if the answer to other common issues—whether Overseas had a fiduciary duty and whether Overseas breached it—are yes. The mitigation common issue only applies if Mac's failure to provide jobs to the subclass is found to be a breach of contract.

[21] This interrelation of the issues gives rise to the concern about litigating in slices, and so mandates against suitability for summary trial determination. In addition, these issues may be moot if other issues are not decided in favour of the representative plaintiff, accordingly these summary trials may not be an efficient use of court resources. However, no party has suggested that trying these issues summarily, while the related issues are outstanding, will introduce complexity or result in potentially conflicting findings of fact. The parties are much more familiar with the factual matrix as a whole, including what evidence will be led on other issues, than the Court is at this stage. I infer that because all of the parties agree that these matters are appropriate for summary trial determination, they will not be leading evidence at the trial of the other common issues that is embarrassing given the findings of fact the court must make on this summary trial.

[22] Considering all of these issues, I conclude that it is appropriate to determine these matters by summary trial.

Representative Plaintiffs' Application for Summary Trial on Vicarious Liability

[23] The common issue to be summarily tried is:

> D3: If the answer to D2 [Did Overseas and Trident Immigration breach this fiduciary duty?] is yes, was Overseas acting as agent of Mac's when it breached its fiduciary duty and, if so, is Mac's liable for the actions of its agent?

[24] It is not disputed that Overseas and Mac's entered into an arrangement, not reduced to writing, by which Overseas would introduce Mac's to prospective foreign workers. If Mac's desired to hire any of them, Overseas would obtain the labour market opinion necessary to obtain permission to hire workers under Canada's Temporary Foreign Worker Program ("TFWP"), and submit them with the aim of obtaining a positive labour market opinion that would permit that foreign worker to come to Canada to do specific work for Mac's.

[25] It is also not disputed that Overseas charged fees to the foreign workers. The nature of the fees and what the fees were for is in issue and those issues are not to be decided on this summary trial. I will describe the fees as "Overseas' fees". On the evidence on this application, Overseas' fees were around $8,000, broken into two instalments: around $2,000 before introduction to Mac's; and around $6,000 after Mac's made a job offer that the employee accepted. The class members did not all pay the same amount of Overseas fees but they all paid some amount.

[26] The plaintiffs submit that Overseas and Trident collected the Overseas' fees in breach of its fiduciary duty to the class members. The representative plaintiffs do not allege that Mac's was in fiduciary relationship to the plaintiffs. The representative plaintiffs allege that Mac's was the principal of Overseas, and is vicariously liable for the actions of its agent.

[27] Mac's submits that Mac's, as an alleged principal who is not also alleged to owe a fiduciary duty to the plaintiffs, cannot be held vicariously liable for the breach

of fiduciary duty of its agent. Mac's asserts that only a principal who is also a fiduciary can be held liable for the breach of fiduciary duty of its agent.

[28] If Mac's can be held vicariously liable for Overseas' breach of fiduciary duty, the next question is whether Mac's was Overseas' principal, under an agency relationship of actual or apparent authority. If that question is answered yes, the question is whether that relationship is such that the Court would hold Mac's vicariously liable if Overseas is found to have breached its fiduciary duty to the class members.

Legal Principles

Breach of Fiduciary Duty

[29] A fiduciary duty arises where one party relies on the guidance or advice of another in the circumstances where the party giving the guidance or advice knows the other party is relying on that guidance or advice, and will obtain some benefit or has some interest in the receiver of the guidance or advice following it. Vulnerability in the party relying on the guidance or advice is indicative of a fiduciary relationship, but it is not a necessary feature. It is necessary that there be a relationship of trust and confidence that gives rise to a duty of loyalty by the fiduciary to the other party. The question is whether a party to a transaction reasonably expected that the fiduciary would act in that party's best interests in the circumstances. See: *Galambos v. Perez*, 2009 SCC 48 at para. 75; *Can. Aero v. O'Malley*, [1974] S.C.R. 592 at 606, 1973 CanLII 23; *Klein v. Sun*, 2018 BCSC 245 at para. 196, citing *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, 1994 CanLII 70; and *Zhong Tie Enterprise Inc. v. Topcorp Development Inc.*, 2024 BCSC 224 at paras. 208–215.

Vicarious Liability

[30] Vicarious liability is a doctrine of law by which one person is held responsible for the misconduct of another because of their relationship: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59 at para. 2. Vicarious liability is imposed on the theory that a person may properly be held responsible where the risks inherent in their enterprise materialize and cause harm, so long as the imposition of

vicarious liability is both fair and useful: *K.L.B. v. British Columbia*, 2003 SCC 51 at para. 18.

[31] The relationships which may give rise to vicarious liability include the employer and employee relationship, the principal and agent relationship, the employer and independent contractor relationship (in certain circumstances), and relationships on which a statute imposes vicarious liability. The categories of relationships in law that attract vicarious liability are neither exhaustively defined nor closed: *Sagaz Industries* at para. 25.

[32] The policy considerations at the heart of the vicarious liability doctrine are fair compensation, deterrence and loss internalization: *Austeville Properties Ltd. v. Josan*, 2019 BCCA 416 at para. 51, citing *Sagaz Industries* at paras. 25–29; *Bazley v. Curry*, [1999] 2 S.C.R. 534 at para. 29, 1999 CanLII 692; and *Keddie v. Canada Life Assurance Co.*, 1999 BCCA 541 at paras. 20–24.

[33] In *Bazley* at para. 41, the Supreme Court of Canada summarized the guiding principles for determining the applicability of vicarious liability where party sought to be held vicariously liable is the employer of the wrongdoer. The touchpoints of the analysis are whether the wrongful act was sufficiently related to conduct authorized by the employer, such that the wrong occurred in a situation where the employer created or materially enhanced the risk that the wrong could be done, even if that wrong was unrelated to the employer's desires. The sufficiency of the connection between the creation or enhancement of the risk and the wrong is important, because it is not appropriate to impose liability where the wrong is unrelated to the risks that exist by virtue of the employer/employee relationship.

[34] In *Bazley* at para. 41, the Court listed relevant factors to determine the sufficiency of the connection for intentional torts as including:

a) the opportunity that the enterprise afforded the employee to abuse his or her power;

b) the extent to which the wrongful act may have furthered the employer's aims (and hence be more likely to have been committed by the employee);

c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the employer's enterprise;

d) the extent of power conferred on the employee in relation to the victim;

e) the vulnerability of potential victims to wrongful exercise of the employee's power.

[35] In *K.L.B.* the Supreme Court of Canada considered whether the provincial government should be held vicariously liable for harm done to children while in foster placements. Chief Justice McLachlin, for the majority, referred to *Bazley* and at para. 19, summarized the framework for imposing vicarious liability as involving two issues:

a) whether the relationship between the tortfeasor and the person against whom liability is sought is sufficiently close as to make a claim for vicarious liability appropriate;

b) whether the tort is sufficiently connected to the tortfeasor's assigned tasks that the tort can be regarded as a materialization of the risks created by the enterprise.

[36] Chief Justice McLachlin also observed that these factors are related, because a tort will only be sufficiently connected to an enterprise to constitute a materialization of the risks introduced by it if the tortfeasor is sufficiently closely related to the employer.

[37] A principal may be vicariously liable for wrongful acts committed by an agent if the agent was acting within the scope of his or her actual or apparent authority: *Thiessen v. Mutual Life Assurance Co. of Canada*, 2002 BCCA 501 at para. 31; and *Austeville Properties* at para. 54. Apparent authority can arise when the principal

permits the agent to act in the conduct of the principal's business in a manner that represents to the outside world that the agent has such authority, or where the principal has placed the agent in a position which would be generally regarded as carrying authority to enter into transactions of the kind in question: *Thiessen* at paras. 30–32. If such apparent authority (or actual authority) is made out, and the policy objectives of vicarious liability are met, then vicarious liability will be imposed on the principal: *Thiessen* at paras. 35–36. If a principal does not say or do anything to suggest that the wrongdoer is their agent, vicarious liability will not be justified: *Keddie* at paras. 45–46.

Can A Principal Who is not a Fiduciary be Held Vicarious Liability For its Agent's Breach of Fiduciary Duty

[38] Michael Ng, *Fiduciary Duties: Obligations of Loyalty and Faithfulness* (Toronto, Canada: Thomson Reuters, 2022) (loose-leaf updated 2024, release 9) at §7.6 describes the debate raised in this case as a contest between the historical approach and a current open question. The historical approach is that "[e]quity never recognized that a fiduciary could be held vicariously liable in equity for the acts of a delegate" because in equity, liability was always for personal fault. Mr. Ng describes the current open question as arising because of the "modern fusion of law and equity".

[39] Mac's relies on *Nova Scotia (Attorney General) v. Carvery,* 2016 NSCA 21 at paras. 67–97, for the proposition that vicarious liability is a tort-based doctrine and does not apply to equitable doctrines such as fiduciary duties. Mac's argues that *Carvery* is in accord with caselaw from the Supreme Court of Canada on vicarious liability which addresses it through principles of tort, often specifically using the word "tort" or "tortfeasor": see e.g., *K.L.B.* at para. 19; and *Bazley* at para. 11.

[40] The representative plaintiffs rely on statements from the Supreme Court of Canada that is appropriate for equity and common law to mingle together to a certain extent, and that courts should strive to treat similar wrongs similarly, regardless of the particular cause or causes of action that may have been pleaded.

[41] There are no cases from the Supreme Court of Canada holding that vicarious liability can attach to non-tortious misconduct, other than statutorily mandated vicarious liability. However there are no cases from that Court ruling out vicarious liability for causes of action other than tort, and there are British Columbia cases wherein vicarious liability has been imposed on an employer (or principal) for the equitable breach of fiduciary duty by their employee (or agent).

Supreme Court of Canada Jurisprudence

[42] The representative plaintiffs point to *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534*,* 1991 CanLII 52., in which Justice La Forest, for the majority, refers to the mingling of common law and equity in the course of an appeal about whether the trial judge erred by holding a defendant liable for breach of fiduciary duty but awarding damages measured by the damages that would be payable under the tort of deceit where the claim in deceit had failed.

[43] At 587–588, La Forest J. explained that equitable concepts exist apart from common law rules, but the equitable principles emerging from the recognition of fiduciary relationships and common law causes of action have overlapped considerably, such that “[w]hether the courts refine the equitable tools such as the remedy of compensation, or follow the common law on its own terms, seems not particularly important where the same policy objective is sought.” This point relates to the minority’s view, authored by Justice McLachlin, that common law damages are reserved for common law causes of action and equitable wrongs must be remedied through equitable remedies.

[44] Justice La Forest acknowledged there are detractors to the merging and mingling doctrines approach, but he observed that it had not caused confusion and its flexibility had made possible a just and reasonable result in many cases (at 587).

[45] Mac’s submits that *Canson* was only about remedy, and if this approach is extended to liability through the imposition of the common law doctrine of vicarious liability on the equitable doctrine of breach of fiduciary duty, the concerns expressed

by the minority of the important distinctions between law and equity will be forever blurred.

[46] Consistent with the decision of the majority in *Canson,* the majority in *Hodgkinson* referred to the fusion of law and equity and stated that courts should strive to treat similar wrongs similarly, regardless of the particular cause or causes of action that may have been pleaded (at 444).

[47] In *Strother v. 3464920 Canada Inc.*, 2007 SCC 24, the underlying wrong was the breach of fiduciary duty. The party found to be vicariously liable had no direct liability for breach of fiduciary duty but was subject to statutory vicarious liability based on the *Partnership Act*, R.S.B.C. 1996, c. 348: *Strother* at para. 99. The Court employed common law principles of vicarious liability to interpret the phrase “in the ordinary course of business” within the *Partnership Act*: *Strother* at paras. 104–106.

[48] Although *Strother* does not assist with the precise question of whether vicarious liability can be applied in a case where the underlying wrong is breach of fiduciary duty because in that case the vicarious liability was grounded in statute, *Strother* does provide support for the proposition that there is nothing about the principles that underscore vicarious liability that make it inappropriate to apply where the underlying wrong is breach of fiduciary duty.

[49] Mac’s relies on *E.D.G. v. Hammer*, 2003 SCC 52, in which a night janitor at a public school sexually assaulted a student. The student argued that the school board was both directly liable for breach of fiduciary duty and vicariously liable for the janitor’s breach of fiduciary duty. Her argument that the school was vicariously liable for the janitor’s conduct failed because, although the janitor was employed by the school board and his duties provided him with the opportunity to commit the wrongful acts, he had no direct duties involving students. The “creation of opportunity without job-created power over the victim or other link between the employment and the tort will seldom constitute the ‘strong connection’ required to attract vicarious liability”: *E.D.G.* at para. 10, quoting *Jacobi v. Griffiths*, [1999] 2 S.C.R. 570, 1999 CanLII 693 at para. 45. The Court also held that personal fault is required for direct liability for

breach of fiduciary duty (see para. 25) and that distinguished it from statutory non-delegable duties and claims based on vicarious liability.

[50] Mac's relies on this case for the proposition that that breach of fiduciary duty requires personal fault and so doctrinally cannot give rise to vicarious liability if the principal of the fiduciary is not also a fiduciary. However, the vicarious liability claim did not fail due to lack of personal fault; rather direct liability for breach of fiduciary duty failed due to lack of personal fault. The vicarious liability claimed failed because of the failure to prove the strong connection between the School Board's creation of the opportunity and the wrong.

British Columbia Jurisprudence

[51] In several cases, judges of this Court have held investment brokerages and real estate brokerages vicariously liability for the agent's breach of fiduciary duty to a client. See: *Cuttell v. Bentz* (1986), 70 B.C.L.R. 85 at paras. 25 and 39, 1986 CanLII 882; *Osborne v. Harper*, 2005 BCSC 1202 at para. 233; *Westrheim v. Gao*, 2007 BCSC 274 at para. 88; *Wu v. Ma*, 2022 BCSC 1737 at para. 249. None of these cases contains an analysis of the issue of whether a principal can be vicariously liable for the breach of fiduciary duty of its agent.

[52] In *C.A. v. Critchley* (1998), 60 B.C.L.R. (3d) 92, 1998 CanLII 9129 (C.A.), the Court of Appeal for British Columbia analyzed the duties owed by the Crown to the children who were in care and who had been abused by the defendant Mr. Critchley. Chief Justice McEachern held that the Crown owed a direct duty to the children, but it did not breach the duty. Chief Justice McEachern also upheld the trial judge's finding that the Crown was vicariously liable for Mr. Critchley's unlawful misconduct which included negligence and breach of fiduciary duty. After discussing the principles of vicarious liability, at para. 119 McEachern C.J.B.C. concluded that the trial judge did not err in imposing vicarious liability "for the wrongs" of Mr. Critchley, without differentiating between the tortious and breach of fiduciary duty elements of the unlawful misconduct. However, at para. 138 of the decision, McEachern C.J.B.C. disposed of the appeal based on vicarious liability for the "torts" of Mr. Critchley. The

disposition of the case therefore did not specifically address vicarious liability for breach of fiduciary duty despite that the issue was extant in the case.

[53] In *Genesis Fertility Centre Inc. v. Yuzpe*, 2017 BCSC 167; appeal allowed on another issue: 2017 BCSC 1037, Master Muir cited *Critchley* for the proposition that an employer can be vicariously liable for its employee's breach of fiduciary duty.

[54] Finally, and notably, the Court of Appeal, in its second set of reasons pertaining to certification in this case (***Basyal v. Mac's Convenience Stores Inc.***, 2019 BCCA 276 at para. 17), addressed the issue of whether the representative plaintiffs' pleadings disclosed a cause of action for the vicarious liability on the part of Mac's in the event the representative plaintiffs proved that Overseas beached its fiduciary duty to the representative plaintiffs. Justice Newbury, for the Court, observed that the pleading of agency with Mac's as principal and Overseas as agent was sufficient to plead an agency, but that did not change the status that Mac's was not a fiduciary. Justice Newbury also stated that the agency might make Mac's "responsible as principal for damages for the breaches of fiduciary duty by its agent(s) vis à vis the plaintiffs".

[55] The Court of Appeal's analysis was whether the pleadings were sound as a matter of law. Mac's position on this summary trial that vicarious liability for breach of fiduciary duty is not available at law cannot be squared with the Court of Appeal's second certification decision.

Carvery

[56] Mr. Carvery brought a claim about sexual abuse he alleged was perpetrated against him by a probation officer employed with Nova Scotia's Department of Community Services. The questions on appeal were whether he could sue Nova Scotia directly for breach of fiduciary duty, and whether he could hold Nova Scotia vicariously liable for the breach of fiduciary duty of the probation officer.

[57] At paras. 79 and 80, the Nova Scotia Court of Appeal held that Nova Scotia could not be held vicariously liable for the probation officers' breach of fiduciary duty,

stressing the different paths that equity and tort take to liability. The Nova Scotia Court of Appeal explained that equity, and in particular fiduciary duty, is based on a personal relationship and so a relationship between the party wronged and the party to be held responsible for the wrong is necessary for breach of fiduciary duty. The Court of Appeal explained that by contrast, common law liability starts with the wrong which it seeks to remedy; if the wrongdoer is the employee of a party who can provide a remedy, it will trace it back to that party.

[58] The Nova Scotia Court of Appeal also traversed jurisprudence on breach of fiduciary duty, and emphasized the distinctions between that equitable cause of action and the common law causes of action of tort and contract as described by Justice McLachlin in *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at 272, 274 and 290–291, 1992 CanLII 65. However, the Nova Scotia Court of Appeal did not address *Canson*, in which, as discussed above, the majority did not consider the distinction between common law causes of action and the equitable breach of fiduciary duty cause of action to forbid equity borrowing from the common law.

Analysis

[59] Application of *stare decisis* and the previously decided decisions do not provide a clear answer. While the British Columbia cases are authorities for what they decided in the factual matrix of the case (*Tom v. Tang,* 2023 BCCA 221 at para. 30); it is also permissible to depart from the ratio of horizontal authority if the reasoning is not applicable to the instant case: *R. v. Sullivan*, 2022 SCC 19 at paras. 64, 73 and 75.

[60] As discussed above, in the second certification appeal reasons on this case, the Court of Appeal made a statement that supports the representative plaintiffs' position. However, like the cases from British Columbia trial judges holding employers and principals vicariously liable for their employees/agents breach of fiduciary duty, the Court of Appeal did not undertake an analysis which assists in answering this question definitively. I also consider it to be non-binding *obiter dicta*

as described in *Neale Engineering Ltd. v. Ross Land Mushroom Farm Ltd.*, 2023 BCCA 429 at paras. 39, 41.

[61] Nonetheless, I do not consider it appropriate to ignore the body of British Columbia caselaw accepting that breach of fiduciary duty can ground vicarious liability since consistency in outcome is an important feature of the rule of law and the administration of justice. Artificial distinctions within the law should be avoided, and courts should strive to treat similar wrongs similarly: *Hodgkinson* at 444. Although not binding, the statement of the Court of Appeal in this case is compelling because it is appellate authority made in the context of a second hearing on an appeal in which the legal issues in the notice of civil claim were vociferously challenged and finely parsed.

[62] In *Critchley*, the outcome expressed in the disposition section was vicarious liability for negligence. However, the case was about vicarious liability for both breach of fiduciary duty and negligence. Chief Justice McEachern for the majority expressed that breach of fiduciary duty ought to be reserved for cases where the fiduciary "personally takes advantage of a relationship of trust or confidence for his or her direct or indirect personal advantage" (at para. 85). This limiting feature was expressly rejected by the majority in *Canson.*

[63] *Carvery* is directly applicable, but the Court of Appeal of Nova Scotia is not a court of coordinate jurisdiction and so the decision is not binding. Its reasoning is clear and tracks very closely to the reasoning of the minority in *Canson* by stressing the importance of the distinctions between equity and the common law. The reasoning in *Carvery* is inconsistent with the majority reasoning in *Canson* which concludes that hard distinctions do not exist, a hallmark of equity is flexibility, and cites many examples of equity borrowing from common law and some where the common law has borrowed from equity.

[64] None of the Supreme Court of Canada cases, *Canson*, *Strother*, *K.L.B. or E.D.G.* are directly on point. Nevertheless, the principles that fall out of them, as *obiter dicta* or otherwise, are highly persuasive. I consider it appropriate to decide

this issue consistent with those principles. The outcome must be determined by reference to the policy objectives of equitable doctrines generally and breach of fiduciary duty, specifically, as well as the policy objectives of vicarious liability.

[65] In *Canson* at 571, La Forest J., for the majority, explained that the equitable cause of action of breach of fiduciary duty is flexible, and is informed by the equitable court's jurisdiction "as a court of conscience" to prevent persons from acting against the dictates of conscience and to remedy breaches by putting the person harmed in as good a position as he would have been before the breach. The maxims of equity "are not rules that must be rigorously applied but malleable principles intended to serve the ends of fairness and justice": *Canson* at 586.

[66] The policy objectives of vicarious liability are fair compensation, deterrence and loss internalization: *K.L.B.* at para. 18 and *Austeville Properties* at para. 51. In *Critchley* at para. 118, McEachern C.J.B.C. described the principal reason for imposing vicarious liability on an "innocent" principal for "intentional crimes" as being based on "deep pockets", while acknowledging that those described by Justice Donald in his concurring reasons, at para. 158, also exist, including the ability of the principal to redistribute the loss by insurance, by increasing prices or by raising taxes. Another policy reason is to ensure that principals engage in more careful recruitment and supervision of their agents who are placed in the position that they could cause harm to others.

[67] Mac's argues that imposition of vicarious liability for breach of fiduciary duty where the principal does not have a co-existent fiduciary obligation will destroy the goal of holding fiduciaries accountable for the breach of the obligation of trust or confidence to which the relationship with the person harmed has given rise. Mac's argues that because joint and several liability will allow the plaintiffs to claim all of the compensation from Mac's, Overseas, who will be the only fiduciary with personal fault, will not be called upon to account for its breach of fiduciary duty.

[68] This argument assumes that the representative plaintiffs chose to claim recovery only from Mac's. There is no basis for me to assume that will be the case. The deep pockets, or ability to pay concepts described in *Critchley*, are based on the

assumption that some wrongdoers do not have the ability to pay, in which case the fiduciary is not called upon to redress the wrong and the harmed person is not compensated. The concept of vicarious liability acts to promote the goal of compensation. Its existence to promote that goal is practically necessary where the wrongdoer's ability to pay is such that the goal of requiring the personal wrongdoer to make good is unattainable in any event, but the goal of compensation can still be fulfilled.

[69] In *Carvery*, the Nova Scotia Court of Appeal emphasized that breach of fiduciary duty requires personal fault, and therefore vicarious liability for breach of fiduciary duty is incompatible with the breach of fiduciary duty. In my view, that rationale does not assist with determining whether there is a principled reason to permit or not permit vicarious liability for breach of fiduciary duty. Vicarious liability for negligence, for example, applies to hold a principal liable where the principal has not breached a duty of care, but its agent has. A duty of care in negligence only exists where the harm could cause harm to the person or the person's property, or where there is a relationship with certain characteristics. That holding is not incompatible with breach of fiduciary duty forming the basis for vicarious liability just as it does for torts where the tortfeasor's fault is personal but the principal who is vicariously liable has no personal fault.

[70] In *Canson*, the minority did not describe the difference between personal fault on the wrongdoer as the significant difference between breach of fiduciary duty and tort, but rather that equity focuses on enforcing the trust at the heart of the fiduciary relationship, whereas common law doctrines of tort and breach of contract accept that the actors to the relationship will act on their own self-interest (at 543). Justice McLachlin reasoned that difference meant that the remedies for breaches should remain categorical (at 544–547).

[71] Justice La Forest, for the majority in *Canson*, did not gainsay that breach of fiduciary duty requires personal fault, but he did point out that breach of fiduciary duty does not always require the fiduciary to have put its personal interest ahead of the other party's interest, rather it simply required the fiduciary to not take sufficient

steps to protect the fiduciary's interests (at 573). At 573–574, La Forest J. expressed the view that a non-existent orderliness underlay the minority's view about the differences between equity and common law, especially when it came to describing the role of equity, and to engaging in reasoning that did not embrace the elasticity or flexibility of equity.

[72] On the topic of remedy, the central issue in *Canson*, La Forest J. described that while in some cases it is easy to see the difference between common law damages and restitution, where the compensation was not for restoration of property, the difference between restitutionary compensation and damages was not easy to discern (at 577, 585).

[73] There is nothing in the judgment of La Forest J. that detracts from the principle that breach of fiduciary duty and tort have different foci. Nevertheless, he held that the remedies did not have to be categorical; he was of the view that one could borrow from the other.

[74] The policy goals of breach of fiduciary duty and vicarious liability overlap on the issue of providing redress where harm has been done. In addition, regardless of whether it is described as "deep pockets" or financial capacity to bear the loss, vicarious liability is concerned with the practicalities of loss re-dress as well as providing incentives for principals to carefully engage and supervise agents where the agents are in a position to cause harm. Those goals are similar to the *raison d'être* of equity, which steps in where the common law does not provide an answer. These complementary and overlapping principles have the prospect of working together harmoniously.

[75] The several decisions of the British Columbia Supreme Court allowing for a such a result without analysis, and the reasons of McEachern C.J.B.C. in *Critchley* which did not distinguish between vicarious liability for tort and vicarious liability for breach of fiduciary duty, may be reflections of a natural acceptance that vicarious liability can attach to breach of fiduciary duty. That certainly seems to be the case

with the Court of Appeal's statement in the second certification appeal reasons in this case.

[76] In cases of vicarious liability for negligence or an intentional tort, the agent actor has personal fault, but the principal does not and the principled basis for the imposition of liability is the connectedness between the principal's enterprise, the risk for wrongdoing, and the actions of the wrongdoer as described in *Bazley* at para. 41.

[77] With respect to the contrary view of the Nova Scotia Court of Appeal in *Carvery*, in my view utilizing the requirements for vicarious liability to guard against inappropriate imposition of vicarious liability is more doctrinally sound than precluding vicarious liability because of the lack of personal fault on the part of the principal. I conclude that law allows for equity to borrow from the common law to provide fair and reasonable redress and therefore vicarious liability should be able to attach to breach of fiduciary duty so long as the necessary connections required for vicarious liability exist.

[78] In *Bazley*, the Court stipulated that the extent to which the agent's wrongful conduct be in furtherance of the principal's enterprise or the principal's benefit be considered. In my view, in cases of vicarious liability for breach of fiduciary duty, that consideration is of utmost importance so that vicarious liability will not be imposed for an agent's unlawful acts from which the principal received no benefit: *Austeville Properties* at para. 61.

[79] In addition, the law currently provides that a principal's vicarious liability for an agent's wrongdoing is available only where the principal acted in a manner that conferred actual or apparent authority on the agent to enter into that fiduciary relationship: *Thiessen* and *Keddie. Thiessen* also provides that the actions which constitute the breach of the fiduciary duty must be within the actual or apparent authority of the agent.

[80] I would modify the *Bazley* considerations as follows when vicarious liability is being considered for breach of fiduciary duty in a principal/agent context:

a) the opportunity that the principal's enterprise afforded the wrongdoer to abuse his or her power;

b) the extent to which the creation of the fiduciary duty by the agent and the breach of fiduciary duty by the agent may have furthered the principal's aims;

c) the extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the principal's enterprise;

d) the extent of the actual or apparent authority and the resulting power conferred on the agent by the principal;

e) the vulnerability of potential victims to wrongful exercise of the agent's power.

[81] I conclude that vicarious liability for breach of fiduciary duty of an agent undertaking the enterprise of the principle under actual or apparent authority is available subject to the modified *Bazley* factors I have set out.

Whether Mac's was Overseas' Principal In Recruiting Class Members

Legal Principles

[82] In *0848052 B.C. Ltd. v. 0782484 B.C. Ltd.,* 2023 BCCA 95 at para. 42, the Court of Appeal adopted the description of agency set out in G.H.L. Fridman, *Canadian Agency Law*, 3rd ed. (Toronto, Ontario: LexisNexis Canada Inc., 2017) at 5 which provides that agency exists when the law considers that agent represents the principal in "such a way as to be able to affect the principal's legal position by the making of contracts or the disposition of property".

[83] At para. 43 of *0848052 B.C. Ltd.,* the Court of Appeal described the essential elements of agency as consent of the agent and principal; the grant of authority given to the agent by the principal; and the principal's control of the agent's actions, citing Halsbury's Laws of Canada, *Commercial Law I (Agency)*, at HAY-2 "Essential Elements of Agency".

[84] As the Court of Appeal explained at para. 65 of its first set of reasons on the certification appeal in this case (***Basyal v. Mac's Convenience Stores Inc.***, 2018 BCCA 235), citing F.M.B. Reynolds*, Bowstead and Reynolds on Agency* (17th ed., 2001), there are two ways in which an agent's authority may arise. Actual agency arises from express or implied authority granted by the principal to the agent. Apparent agency arises where the principal communicates the authority for the agent to bind the principal to a third party. Agency can arise by agreement, implication, subsequent ratification, estoppel or operation of law: F.M.B. Reynolds, *Bowstead and Reynolds on Agency*, 22nd ed. (London: Thompson Reuters, 2021) at 45; Halsbury's Laws of Canada, *Commercial Law I (Agency)* at HAY–11 "Creation of Agency" (2024 Reissue).

[85] The term agency and the manifestation of authority, actual or apparent, are referred to interchangeably in the jurisprudence.

Evidence

[86] The context in which this issue arises is Mac's retainer of Overseas to recruit temporary foreign workers pursuant to the TFWP to work in Mac's convenience stores and Subway food outlets. Under the TFWP, Mac's could obtain permission to hire workers from abroad if they had a labour market opinion that satisfied Service Canada that they had been unable to recruit workers locally.

[87] Mr. Higuchi deposed that it was necessary for Mac's to apply for a labour market opinion for a specific worker, or for an unnamed worker to which a specific worker's name would later be attached. He deposed that in order to obtain a positive labour market opinion for lower skilled occupations, the employer had to have a written contract with the employee; had to agree to cover recruitment and return airfare costs; had to assist with finding suitable accommodation, provide medical coverage until the employee was covered under a provincial / territorial plan, and had to enrol the employee in workers compensation insurance.

[88] Mr. Higuchi deposed that if a positive labour market opinion was obtained, then the temporary foreign worker would complete and submit a work permit

application to Citizen and Immigration Canada, which had to include a copy of the positive labour market opinion and the employment contract signed by the employer.

[89] A recruited temporary foreign worker's work permit was necessary for the worker to enter the country under the TFWP.

[90] Mr. Higuchi deposed that in 2012. Mac's engaged Overseas to "assist Mac's in filling labour needs with foreign workers in Corporate Stores and Corporate Food Service Operations in the Western Region". He deposed that Overseas offered to provide services including the following:

a) pre-screening candidates as per Mac's specified requirements;

b) recruitment of qualified candidates;

c) video-conferencing for personal interviews;

d) settling selected candidates;

e) completion of all documents for business and immigration documents required federally and provincially.

[91] Mr. Higuchi deposed that Mac's and Overseas did not sign a written contract.

[92] Mr. Higuchi deposed that Mac's agreed to pay a success fee for every temporary foreign worker that was hired in the amount of $500 for a cashier or food counter attendant and $1500 for a supervisor. For those fees, Overseas undertook the labour market opinion process and worker recruitment.

[93] Overseas' deponent, Mr. Bansal, deposed that in order to recruit workers, Overseas held recruitment fairs in Dubai. It charged workers a fee of $2,000 to attend the recruitment fair, or to begin the recruitment process. It charged a further $5,500 to $6,000 when the foreign worker obtained a visa to come to Canada under the TFWP. Mr. Bansal described Overseas' fees as fees for immigration and settlement services, and not for recruitment or job placement.

[94] The evidence of Mr. Bansal, which is not contested, is that Overseas organized a number of job fairs in Dubai for Mac's starting in November 2012 and running into 2013. Mr. Bansal deposed that Overseas held job fairs for other employers prior to November 2012. Mac's points to evidence of job fair flyers circulated by Overseas in November 2012 that list jobs, such as truck drivers, carpenters, brick layers and mechanics, as well as jobs consistent with the Mac's positions such as food counter attendants. Mac's asserts this is evidence that Mac's did not solely create the opportunity for Overseas to interact with the class members because Overseas was holding job fairs for other employers.

[95] Mr. Bansal deposed that if Overseas had contact with prospective temporary foreign workers prior to a job fair, it would ask them to send their CVs and an initial deposit of $2,000 for Overseas' immigration and settlement services. Mr. Bansal deposed that the initial fee was for Overseas to review the person's suitability for the jobs that employers were offering and to test the foreign worker's commitment to immigrating to Canada to take a job under the TFWP because the employers invested considerable time and money into travelling to the job fairs, and so should not have to waste their time on "tire kicking" job seekers.

[96] Mr. Bansal deposed that when foreign workers arrive at the job fair without having prior contact with Overseas, an Overseas representative usually met with them to vet their CVs and ensure they had the basic requirements the employer was seeking and would require the initial payment as a retainer for the immigration and settlement services that would ensue if the worker got a job offer. In some cases, the discussion about the retainer for immigration and settlement services occurred after the foreign worker had met with a representative of the employer.

[97] Mac's deponent deposed that it understood that Overseas did not charge for securing employment, but did charge candidates fees to assist them with processing immigration documents and navigating the immigration process unless the candidate was from a visa exempt country. Mr. Higuchi deposed that Mac's did not authorize Overseas to charge or collect payments from temporary foreign workers.

[98] Mr. Higuchi deposed that Mac's retained Overseas to assist with recruiting temporary foreign workers and Mac's appointed Overseas as its representative for the purpose of submitting labour market opinion applications including higher level skill positions and lower level skill positions. Mr. Higuchi deposed that Overseas introduced prospective temporary foreign worker candidates to Mac's and set up interviews by phone or in person. Some interviews were in Canada and some were in Dubai at job fairs organized by Overseas. Mr. Higuchi deposed that he communicated with Overseas, not the temporary foreign worker candidates, about the jobs that were available.

[99] Mr. Higuchi deposed that if he thought the candidate was suitable after the interview, Overseas communicated the job offer to the candidate through a contract that Mr. Higuchi signed on behalf of Mac's. Overseas provided the contracts to him to sign and he returned those signed contacts to Overseas. Mr. Higuchi deposed that Overseas did not always advise him whether a specific candidate had accepted the employment contract. Mr. Higuchi deposed that Overseas did not sign any employment contracts with class members on behalf of Mac's.

[100] The representative plaintiffs, Prakash Basyal, Bishnu Khadka and Edlyn Tesorero, rely on their certification affidavits. They also rely on the affidavit of Arthur Cajes, who was a proposed representative plaintiff at the time he made his affidavit but is no longer a representative plaintiff.

[101] Mr. Cajes testified that he is Filipino, and was living in the United Arab Emirates when he heard about Overseas through a friend who had obtained a job in Canada. Mr. Cajes deposed that he wanted to come to Canada with his wife and two children to obtain permanent residency and citizenship, something that was not possible in the United Arab Emirates. His children were living in the Philippines while he and his wife were in the United Arab Emirates. He deposed to meeting someone he believed was an employee of Overseas (which Overseas disputes, but it is not relevant to this summary trial). He deposed to paying fees to Overseas, the details of which are not relevant to this summary trial. He deposed that he sent his resume to

Overseas and attended a job fair that Overseas held in November 2012. He deposed that at that job fair, he was interviewed by two representatives of Subway and/or Mac's. He deposed that in April 2013, Overseas sent him a job offer signed by Mr. Higuchi of Mac's, an employment contract signed by Mr. Higuchi for work of 37.5 hours per week at $13 per hour, and a labour market opinion allowing Mac's to hire food service supervisors to work in Calgary, Alberta, the position stated in the employment contract. The labour market opinion identified Overseas as a third party.

[102] Mr. Cajes deposed he signed the employment contract, and used it and the labour market opinion to apply for a visa to travel to Canada, which he received in October 2013. He deposed he emailed Mr. Higuchi to tell him that he would be travelling to Canada for his work, and Mr. Higuchi replied that Mr. Cajes was "not on his list". Mr. Cajes deposed that he then contacted Overseas, who told him to make his second Overseas' fee payment, which he did. He deposed that his wife took out an interest bearing loan so he could make the second payment. After he made the payment, he communicated regularly with Overseas for about three months before he was told that Overseas had arranged for his travel to Canada.

[103] Mr. Basyal deposed that he is from Nepal. He came into contact with Overseas when the was living and working in Dubai, United Arab Emirates, and remitting money home to his family in Nepal. He deposed that he attended a job fair that Overseas held in Dubai where he met Mr. Bansal. He deposed about discussing jobs in Canada and the Overseas' fee with Mr. Bansal. Mr. Basyal deposed that he attended another Overseas' job fair at which he had an interview with Mr. Higuchi of Mac's. He deposed that the interview was arranged and scheduled by Overseas. He deposed that in February 2013, Overseas sent him a job offer signed by Mr. Higuchi of Mac's, an employment contract signed by Mr. Higuchi for work of 37.5 hours per week at $11.40 per hour, and a labour market opinion allowing Mac's to hire cashiers to work in Edmonton, Alberta, the position stated in the employment contract. The labour market opinion identified Overseas as a third party.

[104] Mr. Basyal deposed that he signed the employment contract with Mac's and applied for a visa with the employment contract and the labour market opinion, which he received in December 2013. He deposed that he met with Mr. Bansal at another job fair and Mr. Bansal told him to pay the next installment of the Overseas' fee and Overseas would arrange for his travel to Canada. He deposed that he paid the fee and then quit his job in Dubai. He deposed that he communicated regularly over the next few months with Overseas and in March 2014, an Overseas representative told him to book his travel to Vancouver, British Columbia, which he did.

[105] Mr. Khadka deposed that he is Nepalese. He deposed that in 2012, he was living and working in Dubai and financially supporting his wife and parents who lived in Nepal. He deposed that he learned about job opportunities in Canada through a friend, and met with a representative of Overseas (a person that Overseas disputes was its representative). That person described the Overseas' fee to him and gave him a flyer advertising the services offered by Overseas. Mr. Khadka paid the first installment of the Overseas' fee and then did not hear anything from Overseas. He went to an Overseas job fair where he met Mr. Bansal. He deposed that Mr. Bansal told him that Mr. Bansal would find him a job or refund him the fee he had paid. Mr. Bansal denied that he linked the fees to a promise of a job, but does not deny that Mr. Khadka paid the fee that Mr. Khadka asserted he paid.

[106] Mr. Khadka deposed that in December 2012, he received a job offer signed by Mr. Higuchi of Mac's, an employment contract signed by Mr. Higuchi for work of 37.5 hours per week at $11.40 per hour, and a labour market opinion allowing Mac's to hire cashiers to work in Calgary, Alberta, the position stated in the employment contract. The labour market opinion identified Overseas as a third party.

[107] Mr. Khadka deposed that he signed the employment contract with Mac's and applied for a visa with the employment contract and the labour market opinion, which he received in July 2013. He deposed that when he received the visa, he contacted Overseas and was told to pay the next installment of the Overseas' fee to Trident, which he did. He deposed that he quit his job in the United Arab Emirates and

returned to Nepal in anticipation of travelling to Canada for work. He deposed that he repeatedly communicated with Overseas about this but did not hear anything until Overseas arranged a ticket for him to travel to Vancouver in April 2014.

[108] Ms. Tesorero deposed that she is a citizen of the Philippines. She deposed that in June 2012, she was living and working in Dubai. She deposed that she had spoken with a representative of Overseas previously, and in 2012 contacted that person about obtaining a job in Canada. She deposed about making arrangements to pay the first installment of the Overseas' fee. She deposed that Overseas communicated with her about an interview with Mac's which she deposed she attended with Mr. Higuchi on November 20, 2012. She deposed that she asked Mr. Higuchi if she got the job and he told her that he would let her know through Overseas.

[109] Ms. Tesorero deposed that in April 2013, she received a job offer signed by Mr. Higuchi of Mac's, an employment contract signed by Mr. Higuchi for work of 37.5 hours per week at $13 per hour, and a labour market opinion allowing Mac's to bring food services supervisors to work in Calgary, Alberta, the position stated in the employment contract. The labour market opinion identified Overseas as a third party.

[110] Ms. Tesorero deposed that she signed the employment contract with Mac's and applied for a visa with the employment contract and the labour market opinion, which she received in September 2013. She deposed that an Overseas representative told her to pay the second Overseas' fee installment to Trident, which she did. She bought a plane ticket to Vancouver, and travelled to Vancouver on December 1, 2013.

[111] In order that Overseas could submit labour market opinion applications, Mac's executed multiple Human Resources and Skills Development Canada/ Service Canada forms entitled "Appointment of a Third Party Representative". These forms are referred to as Service Canada forms.

[112] Each Service Canada form included a statement that Mr. Higuchi, of Mac's, was appointing Mr. Bansal, of Overseas, as:

> … my representative to act on my behalf in order to obtain from HRSDC/Service Canada a labour market opinion relating to [name of individual to whom employment has been offered]. I, hereby, agree to ratify and confirm all that my representative shall do or cause to be done by virtue of this appointment.

[113] The attestations made by Mac's in relation to each labour market opinion included the following:

> I declare that all recruitment done or that will be done on my behalf by a third party was or will be done in compliance with federal/provincial/territorial laws governing recruitment. I am aware that I will be held responsible for the actions of any person recruiting temporary foreign workers on my behalf.

[114] Mr. Higuchi deposed that the employment contracts signed by Mac's with class members were based on a template prescribed by Service Canada.

[115] Each of the representative plaintiffs, Prakash Basyal, Bishnu Khadka and Edlyn Tesorero, and a class member, Arthur Cajes, deposed that when they were sent the job offers to work for Mac's and contracts with Mac's, they were sent them by Overseas. They each deposed that at the same time they received the job offers and employment contracts signed by Mac's, they received a copy of a positive labour market opinion which identified Overseas as the "third party".

[116] The employment contracts between these class members and Mac's have mostly identical wording. The exceptions are spaces for the name of the employee, job description, rate of pay, etc., to be filled in. I readily conclude they were standard form contracts, and given no evidence to the contrary from Mac's, that they were the same for all of the class members.

[117] Mr. Higuchi deposed that the process and time of matching a temporary foreign worker with a labour market opinion often was such that the Mac's job that underlay the labour market opinion was filled by the time the temporary foreign worker arrived in Canada. Mac's deponent deposed that Mac's told Overseas to tell the temporary foreign worker to not travel to Canada unless a job was confirmed.

[118] Mr. Higuchi did not dispute that he signed the employment contracts appended to the affidavits of Mr. Cajes, Mr. Basyal, Mr. Khadka and Ms. Tesorero. He deposed that at some point he told Overseas that Mac's did not have jobs for Ms. Tesorero and Mr. Khadka. He deposed that he asked that their names be removed from the labour market opinions. His evidence is only consistent with this being communicated to Overseas and not to the employees with whom he had signed contracts. I note that when Ms. Tesorero contacted Mr. Higuchi directly, after travelling to Canada for her job, he told her that Mac's did not have a job for her. Mr. Higuchi also deposed that Mr. Basyal's name was added to a labour market opinion on January 23, 2013 but Mac's did not receive any further communication from him. This evidence ignores that on January 28, 2013, Mr. Higuchi signed an employment contract for employment between Mac's and Mr. Basyal, and on February 5, 2013, Mr. Higuchi signed an offer of employment for Mr. Basyal, both of which were sent to Mr. Basyal by Overseas as was the practice described by Mr. Higuchi. Mr. Basyal signed the employment contract and communicated with Overseas that he obtained his visa.

[119] Mr. Cajes deposed that he arranged for travel shortly after receiving a visa and communicated that to Mr. Higuchi, who told him that he was not "on his list" and he should not travel. Mr. Cajes communicated with Overseas, who told him to pay the next installment, $6,000 of Overseas' fee. Mr. Higuchi deposed that in March 2014, he was told by Overseas that Mr. Cajes had found other employment and that his name would be removed from the specific labour market opinion.

[120] However, Mr. Cajes deposed that in February 2014, Overseas told Mr. Cajes that it had purchased a plane ticket for him to travel to Canada. He did so, and on arrival in Canada, obtained a work permit with Mac's as his employer working at the occupation and in the place listed on the labour market opinion.

[121] The contracts provided that Mac's was to ensure that reasonable and proper accommodation was provided to the employee.

[122] When Mr. Cajes arrived in Vancouver on February 16, 2014, an Overseas employee took him to accommodation in Surrey where he lived with several other workers in housing that he deposed was overcrowded.

[123] Mr. Basyal deposed that he booked and paid for his own transportation from Nepal to Vancouver. He deposed he was reimbursed for about half of that by Overseas. He deposed that he arrived in Vancouver on April 18, 2014. He deposed that Mr. Bansal told him to live in a basement apartment with six to eight other workers in Surrey, British Columbia.

[124] Mr. Khadka deposed that on arrival in Vancouver, he was told where to live by Mr. Bansal of Overseas. He was then sent to Kitimat, where he lived in an unfurnished apartment with another worker. He deposed they shared one blanket.

[125] Ms. Tesorero deposed that she purchased her plane ticket from Dubai to Canada. She deposed that on arrival in Vancouver on December 1, 2013, Mr. Bansal told her to stay at the best Western Hotel in Surrey. She deposed that Overseas bought her a bus ticket to Calgary, and she travelled by bus to Calgary, where she was supposed to work but she was not provided with employment or accommodation.

[126] Mr. Higuchi deposed that on December 19, 2013, he told Overseas that Mac's had no available position for the labour market opinion to which Ms. Tesorero was named and asked that her name be removed from the labour market opinion.

Analysis - Actual Authority

[127] In *Keddie* at para. 23, the Court of Appeal adopted a definition of actual authority from *Bowstead and Reynolds on Agency*: a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including implications from the express words used, the usages of the trade, or the course of business between the parties.

[128] Mac's argues that the representative plaintiffs have not proved that there was an agreement between Mac's and Overseas that Overseas would collect recruitment fees from the class members on behalf of Mac's, and so there is no actual agency.

[129] This submission is misplaced. The question of existence of actual agency authority does not depend on an agreement that the agent would do the very thing that is the subject matter of the litigation. The question is whether there was an agreement between the parties to the alleged agency for one to act on the other's behalf for a purpose, in this case to recruit workers under the TFWP. Whether the specific act, in this case, the charging of allegedly unlawful fees, was done as part of the authority of that agency, must be answered in relation to determine if vicarious liability will attach: *Keddie* at para. 21, citing G.H.L. Fridman, *The Law of Agency,* 7th ed. (London: Butterworths, 1996), at p. 315.

[130] In most cases where principals are vicariously liable for the actions of their agents, there is no suggestion or assertion that the specific unlawful act was specifically authorized. For example, in *Keddie*, an insurance broker misappropriated funds while selling Canada Life insurance products. The broker was not employed by Canada Life. The agency question was whether the broker was Canada Life's agent for the purpose of selling life insurance, not whether the broker was Canada Life's agent for the purpose of misappropriating funds. If the agency was proved, the vicarious liability question would be whether the agent's misconduct occurred while acting within the scope of authority: *Keddie* at para. 21.

[131] In this case, the question on existence of actual agency is whether Mac's and Overseas agreed that Overseas would act as Mac's agent to recruit temporary foreign workers for Mac's.

[132] Mr. Higuchi deposed that Mac's retained Overseas to assist Mac's in filling labour needs with foreign workers. It is clear that by foreign workers, Mr. Higuchi means temporary foreign workers under the TFWP. From this, I readily infer that there was an agreement between Mac's and Overseas on this topic. Mr. Higuchi deposed that there was no agreement in writing. Neither he nor Mr. Bansal on behalf

of Overseas has deposed to the terms of the agreement, but there is other evidence that assists with that.

[133] The evidence includes that the services Overseas offered to provide included pre-screening candidates; recruitment of qualified candidates; video-conferencing for personal interviews; settling selected candidates; and completion of all documents for business and immigration documents required federally and provincially. Mr. Higuchi did not depose that some of these services were not part of the agreement. He did depose that in exchange for success fees for every temporary foreign worker that was hired, Overseas undertook the labour market opinion process and worker recruitment. Mr. Bansal deposed that the oral agreement between Mac's and Overseas, which he referred to as the "recruitment contract", was for Overseas to assist Mac's with obtaining labour market opinions and labour market impact assessments which would authorize Mac's to fill vacancies with workers under the TFWP; organize 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 facilitate communications between Mac's and foreign workers that Mac's decided to hire under the TFWP.

[134] I find that the agreement between Mac's and Overseas included that Overseas would provide the services it offered to provide, including those listed above.

[135] With regard to the labour market opinion process, Mac's appointed Overseas as its representative to submit labour market opinion applications by completing the Service Canada forms entitled "Appointment of a Third Party Representative" and stating that Mr. Higuchi of Mac's, was appointing Mr. Bansal of Overseas to obtain labour market opinions on behalf of Mac's. In addition, in the forms Mac's attests that recruitment done on its behalf by a third party will be done in compliance with federal/provincial/territorial laws governing recruitment and that Mac's will be responsible for the actions of any person recruiting temporary foreign workers on its behalf.

[136] Mac's argues that even if these forms show a representation made to Human Resources and Skills Development Canada, it is not evidence that Mac's and Overseas had a consensual agreement on this topic. Overseas does not disavow that it knew about the attestation in the forms, but Mac's argues that the representative plaintiffs have not proved that Overseas knew that Mac's appointed it as representative and so the form cannot be evidence of actual agency.

[137] I do not accept this argument. Mr. Bansal is a regulated immigration consultant. Overseas agreed with Mac's that it would recruit foreign workers in accordance with the TFWP and as part of that, complete the labour market opinion process for Mac's. The inference that Mr. Bansal and Overseas understood what that entailed is obvious and it is equally obvious that by submitting the forms, Mr. Bansal, and through him Overseas, understood that Mac's appointed it as its agent for recruitment and agreed to be responsible for Overseas' compliance, or lack thereof, with provincial and federal laws pertaining to recruitment. Based on Mr. Higuchi's evidence that in exchange for success fees, Overseas agreed to undertake the labour market opinion process and worker recruitment, combined with the forms appointing Mr. Bansal as Mac's representative, I am of the view that the forms are evidence of some of the terms of the agreement between Mac's and Overseas about what Overseas would do and how it would do it, namely with Mac's authority to act as its representative as described in the form.

[138] The representative plaintiffs argue that I can find that Overseas was aware of attestations in the Service Canada forms signed by Mac's through the documents in possession doctrine. That doctrine provides that documents in possession of a party who has acted on them are admissible for the truth of their contents. While I do not need to rely on this doctrine to make the finding that Overseas was aware that Mac's appointed it to act as its representative for labour market opinions, and in doing so made the attestations, it is available as an additional route to the same conclusion. I consider these forms admissible for the truth that Overseas was aware that Mac's had appointed Overseas and agreed that it would be held responsible for the actions of any person recruiting foreign workers on its behalf.

[139] Mac's also takes the position that the attestations in the Service Canada forms expressly limits the scope of the agency to the temporary foreign worker application. It is not clear what Mac's means by this. The evidence demonstrates that bringing a worker to Canada under the TFWP does not involve a single application, rather it involves many steps.

[140] Mr. Higuchi deposed that, among other things, in order to obtain a labour market opinion and bring a worker to Canada under the TFWP, Mac's had to have a written contract with the employee and had to cover recruitment and return airfare costs; assist with finding suitable accommodation; provide medical coverage until the employee is covered under a provincial / territorial plan; and enrol the employee in workers compensation insurance. One of the services that Overseas offered to Mac's and which I have found was part of their agreement, was "settlement services". I conclude that Mac's obligation to assist temporary foreign workers to find suitable accommodation was a part of settlement services that Mac's and Overseas had an agreement on.

[141] Mr. Higuchi deposed that he interviewed candidates that Overseas identified and if he thought the candidate was suitable, he conveyed that to Mac's who conveyed the offer of employment to the candidate. Mac's signed employment contracts sent to it by Overseas and returned them to Overseas.

[142] Mr. Higuchi also deposed that Mac's has no records of interviews with some of the representative plaintiffs, for example Mr. Khadka and Ms. Tesorero. Mr. Khadka did not depose that he was interviewed by anyone from Mac's but he appends to his affidavit a contract that purportedly is signed by Mr. Higuchi and Mr. Higuchi did not deny that he signed that contract. Accordingly, the evidence makes it clear that while Mac's interviewed some candidates, it did not interview all to whom jobs were offered and with whom contracts of employment were signed.

[143] In cases where Mac's conducted interviews, the evidence demonstrates that all of the communications leading up to the employment contract, but for the interview, were between Overseas and the prospective employees. Mr. Higuchi

deposed that he told Overseas to ensure that the temporary foreign workers did not make flight arrangements to come to Canada until Mac's told Overseas they could. Based on this evidence, I find that the communications with class members about their Mac's employment took place through Overseas even after the contracts were signed. Once in Canada, the workers received instructions on where to stay, and where to go through Overseas. The communications about lack of work that led to this lawsuit came from Overseas. There is evidence that some class members attempted to, and in some cases did, contact Mr. Higuchi when the jobs they had contracted for did not materialize. Up to that time, however, all communications except the job interview took place through Overseas. In the case of those class members who did not have job interviews conducted by Mr. Higuchi or another person employed by Mac's, all of the communications prior to arrival in Canada took place through Overseas.

[144] Mac's "enterprise" was to hire temporary foreign workers. Several of the steps involved in that enterprise were necessary steps; someone had to do them and Mac's retained Overseas. The work Overseas was retained to do included identifying candidates, reviewing their qualifications, interviewing them, offering jobs to those who Mac's identified, having a labour market opinion prepared with regard to the position that was to be offered, arranging for travel for the temporary foreign worker, and assisting with finding accommodation. For most of these steps, with the exception of the interviews in some cases, the identification of those to be offered jobs, and signing the contracts, Mac's delegated completely to Overseas. On the evidence as a whole, the signing of the contracts was a mere formality. If Overseas did not undertake the vast majority of the steps to recruit the class members and put them in a position to arrive in Canada as approved temporary foreign workers, Mac's would not be able to meet its employment needs with the class members.

[145] I reject Mac's argument that its attestations on the Service Canada forms was only for the purpose of "a TFW application", both because the evidence does not disclose a process known as a TFW application, and because the application for a labour market opinion is not separable from the myriad of obligations on an

employer undertaking to recruit workers under the TFWP, which Mac's retained Overseas to do on its behalf consistent with what it told Service Canada.

[146] I conclude, on the basis of this ample evidence, that Mac's and Overseas had an agreement that Overseas would undertake recruitment of class members as temporary foreign workers for Mac's and on behalf of Mac's and as Mac's agent and Mac's turned its mind to accepting responsible for Overseas' compliance with provincial and federal laws pertaining to recruitment.

Analysis - Apparent Authority

[147] Apparent authority exists where there has been a representation through words or conduct on the part of the principal that leads a third party to believe that the agent has the authority in question: *Keddie* at paras. 28–29. Apparent authority requires evidence that the principal knew of the facts said to ground the apparent authority: *Keddie* at para. 36.

[148] For example, in *Schwartz v. Maritime Life Assurance Co.,* 149 Nfld. & P.E.I.R. 234, 1997 CanLII 14706 (C.A.), the principal life insurance company provided stationary to an independent broker who used it to sell life insurance. The principal did not make an express statement that the broker was authorized to act on its behalf. The principal was held to have communicated apparent authority to the plaintiff whom the broker defrauded while selling the principal's life insurance.

[149] For the same reasons I gave pertaining to actual authority, the authority in question is not whether Mac's gave Overseas the authority to charge the Overseas' fees, the question is whether there was an agreement between Mac's and Overseas that Overseas would act on behalf of Mac's to recruit workers under the TFWP.

[150] The representative plaintiffs argue that Mac's communicated apparent authority of Overseas to the class members by allowing Overseas to control all aspects of the hiring process so far as the class members could see including screening their CVs, determining who received an interview, communicating the offers, conveying the employment contracts, arranging for travel, telling the class

members when to travel and how to travel, and arranging for accommodation. Several of these matters, including the payment for travel and accommodation in Canada on arrival are matters that the TFWP program required Mac's to be responsible for and are addressed in the employment contract between Mac's and the subclass members. I agree that because the subclass members experience was that Overseas was undertaking matters that Mac's had contracted with the subclass members to undertake and which were directly related to the subclass members recruitment and prospective work for Mac's through the TFWP, Mac's communicated to the class members that Overseas had the authority to recruit the class members through the TFWP process on behalf of Mac's.

[151] I conclude that the representative plaintiffs have proved apparent authority.

Whether the Principal/Agent Relationship Gives Rise to Vicarious Liability for Overseas' Breach of Fiduciary Duty

[152] The issue of whether Overseas charged fees for jobs, which is prohibited by law, or charged fees for immigration and settlement services as it asserts, has not been decided. I will address whether the principal/agent relationship between Mac's and Overseas gives rise to vicarious liability for Overseas' breach of fiduciary duty, on the basis that the representative plaintiffs will establish that the Overseas' fees were charged for jobs, as that is the only circumstance in which Mac's potential vicarious liability as principal is engaged.

[153] I return to the modified *Bazley* factors.

The opportunity that the principal's enterprise afforded the wrongdoer to abuse his or her power.

[154] The evidence is that Overseas was recruiting for other employers also. Accordingly, I find that Mac's enterprise to hire foreign workers did not solely create the opportunity for Overseas to be in a position to charge fees for jobs. However, had Overseas not been recruiting for Mac's it would not have had the opportunity to charge fees to the class members, who took jobs with Mac's.

[155] This factor weighs somewhat in favour of holding Mac's liable for Overseas' conduct in charging the Overseas' fees.

The extent to which the creation of the fiduciary duty by the agent and the breach of fiduciary duty by the agent may have furthered the principal's aims.

[156] The next factor is the extent to which the creation of the fiduciary duty and the breach of the fiduciary duty furthered Mac's aims. The existence of the fiduciary arrangement came about as a result of Mac's hiring Overseas to recruit temporary foreign workers, appointing Overseas' to undertake some of the steps necessary to have them approved under the TFWP, and making it nearly the sole communicator with the job seekers. The job seekers could not have an interview with Mac's until they paid the first instalment of the fee. Overseas deposed that the Overseas' fees were levied before or at the job fairs to test the seriousness of the job seekers – to not waste time with "tire kickers". According to this evidence of Overseas, the Overseas' fees were charged as part of what it was retained to do for Mac's and for a reason intended to benefit Mac's. Overseas acted as gatekeeper for Mac's.

[157] The job seekers had to promise to pay the second installment once they secured a visa, and in order to secure a visa they had to have a job. According to Overseas, the fees were for settlement services, which is something that Mac's was required to undertake under the TFWP and which Overseas agreed with Mac's to provide. According to the representative plaintiffs, the fees were for jobs. Regardless of whether Overseas' characterization of the fees is correct, or the representative plaintiff's characterization of the fees is correct, the fees were in furtherance of Mac's goal of filling job positions with temporary foreign workers under the TFWP.

[158] This factor weighs heavily in favour of holding Mac's liable for Overseas' conduct in charging the Overseas' fees.

The extent to which the wrongful act was related to friction, confrontation or intimacy inherent in the principal's enterprise.

[159] The representative plaintiffs' evidence, and that of Mr. Cajes demonstrates that they were persons who were prepared to leave wherever they were and come to Canada to work at low paying jobs with Mac's. They went to Overseas' to help them achieve that goal. Mac's put Overseas in the position of recruiting the class members as temporary foreign workers, by definition, people who were willing to travel from abroad to work in Canada at low paying jobs.

[160] This factor weighs somewhat in favour of holding Mac's liable for Overseas conduct in charging the Overseas' fees.

The extent of the actual or apparent authority and the resulting power conferred on the agent by the principal.

[161] The evidence overall demonstrates that Mac's appointed Overseas as its agent for all aspects of recruitment and compliance with TFWP, with the exception of selecting those to be hired and signing the employment contracts. However, even these steps that Mac's undertook itself were communicated to the class members through Overseas.

[162] Two aspects of the evidence are particularly persuasive to bring the charging of Overseas' fees under the agency Mac's granted to Overseas. The first is Mr. Bansal's evidence that Overseas' charged the initial fee so that Mac's would not have to contend with "tire kicker" candidates. By this evidence, Overseas draws the pure recruitment and Mac's interests in the recruitment, into the charging of the fees. Second, the attestation in the Service Canada form in which Mac's acknowledged that it was responsible for Overseas' compliance with federal and provincial recruitment laws.

[163] This factor weighs heavily in favour of holding Mac's liable for Overseas conduct in charging the Overseas' fees.

The vulnerability of potential victims to wrongful exercise of the agent's power.

[164] The class members were vulnerable. They were persons who were living outside their home countries, working to support family members elsewhere. They sought out jobs in Canada, where they had little or no support or contacts except for Overseas and their new employer, Mac's. They were doing so with no financial fallback except these jobs. They left jobs to take these jobs. The affidavits of the representative plaintiffs' reasons for doing so demonstrate various kinds situations that led them to take this chance in which they were in a very vulnerable position.

[165] This factor weighs heavily in favour of holding Mac's liable for Overseas conduct in charging the Overseas' fees.

Conclusion on the Modified Bazley Factors

[166] Considering these factors, I conclude that Mac's ought to be held vicariously liable for Overseas' breach of fiduciary duty in charging the Overseas' fees, if that breach is established when that common issue is tried.

Conclusion on Common Issue D3 - Vicarious Liability

[167] The answer to question D3 is yes.

Mac's Application for Summary Trial on Mitigation

[168] Mac's application for summary trial determination applies to the subclass of persons who had binding contracts with Mac's, obtained work permits and visas, and travelled to Canada to take the jobs contracted for, but on arrival in Canada were not employed in the jobs contracted for or on the terms contracted for.

[169] The common issues to be tried are:

> A3 Where Subclass members' employment was terminated prior to the completion of the 24-month fixed term set out in the contract, were they required to mitigate their losses?
>
> A6 Is Mac's entitled to set off salary earned by the Subclass members during the notice period or otherwise, even if the Subclass members had no duty to mitigate?

[170] Mac’s argues that the subclass members had a duty to mitigate their damages. Mac’s argues that the clear law in British Columbia is that because the subclass members’ contracts did not contain a provision fixing damages for wrongful dismissal, earnings during the notice period are deductible regardless of whether the subclass members had a duty to mitigate.

[171] The representative plaintiffs submit that the British Columbia law is unsettled on whether there is a duty to mitigate losses in a fixed term contract but, the law of other Canadian jurisdictions is that there is no duty to mitigate. They argue that given that in this case the subclass members were only permitted by the terms of their work permits to work in Canada at the jobs specified on their work permits, and the contract is one of adhesion, no duty to mitigate ought to be imposed.

[172] With regard to whether notice period earnings should be deducted even if there is not duty to mitigate, the representative plaintiffs agree that the British Columbia jurisprudence provides that notice period earnings are deductible where the contract did not provide for a fixed amount of damages on wrongful termination. However, the representative plaintiffs argue that such a term can and should be implied in this case, especially because the representative plaintiffs had no bargaining power.

Evidence

[173] Mr. Cajes, Mr. Khadka, Mr. Basyal and Ms. Tesorero all purportedly meet the definition of the subclass. They each deposed that Overseas sent them offers of employment signed by Mac’s and an employment contract signed by Mac’s. The employment contracts were for two year periods.

[174] The employment contracts stated that:

> 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.

[175] The employment contracts also stated that:

> Temporary foreign workers who change jobs must ensure that their work permits are modified accordingly and EMPLOYERS who hire temporary

> foreign workers already in Canada must apply to HRSDC/Service Canada for a Labour Market Opinion (LMO) and obtain a neutral or positive LMO.

[176] There are terms requiring Mac's to give one week written notice if it terminates after three consecutive months of service and requiring the employee to give one week written notice of resignation. There are no other provisions providing for early termination, specifically no liquidated damages term and no term expressly addressing duty to mitigate.

[177] Mr. Cajes deposed that when he arrived in Vancouver on February 16, 2014, he applied for and received a work permit which stated his employer as Mac's Convenience Store Inc. dba Subway, that his occupation was food service supervisor, and his location was in Calgary. His work permit stated that he was not permitted to work at an occupation other than stated on the permit, for any employer other than as stated on the permit, or at any location other than stated on the permit.

[178] Mr. Cajes deposed that the day after he arrived in Vancouver he went to Overseas' office where he was told by Ms. Hirak, an employee of Overseas, that there was no work for him at Mac's. He deposed that he could not work other than at the place on his work permit, and he had to find a new employer who would be willing to apply for a new labour market opinion and hire him.

[179] Mr. Basyal's work permit has the same conditions regarding his permitted employment which was as a cashier at Mac's Convenience Stores Inc. dba Subway in Edmonton. Mr. Basyal deposed that in May 2014 (a few weeks after he arrived in Vancouver), Mr. Bansal told him there was no work for him. He deposed that Mr. Bansal told him he would send him to work on a farm, and he refused. He deposed he was not legally permitted to work anywhere than as specified on his work permit. He deposed that a few days later, Mr. Bansal told him that he had work for him at a bottle depot in Calgary and he would obtain a new work permit when he arrived in Calgary. Mr. Basyal deposed that he agreed based on his understanding that this work was legal.

[180] Mr. Basyal deposed that he worked 40 hours a week at the bottle depot until June 2014, but he never received the work permit. He deposed that despite having been told he would earn $11 per hour, he was not paid. He received room and board at the home of the father of the owner of the bottle depot. He deposed that in June 2014, the Canadian Border Services Agency ("CBSA") detained him for working illegally. He deposed he was placed in handcuffs and eventually taken to a homeless shelter in Calgary and then Vancouver.

[181] Ms. Tesorero's work permit has the same conditions regarding her permitted employment which was as a food service supervisor at Mac's Convenience Stores Inc. dba Subway in Calgary. Ms. Tesorero deposed that when she arrived in Calgary, she had no where to live and was not provided with accommodation. She deposed she stayed for six months following up on the job she was supposed to be working at, without success. She deposed that during this time she was homeless and stayed at the homes of Filipino community members and friends.

[182] Ms. Tesorero deposed that she tried to call Mr. Higuchi, Ms. Hirak (an employee of Overseas) and/or Mr. Bansal most days. Ms. Tesorero deposed that she was not able to work legally for any employer other than as indicated on her work permit. She deposed that in June 2014, she was contacted by CBSA and advised that it was investigating her situation. Ms. Tesorero deposed that at the end of June 2014, she decided to return to Dubai and told CBSA that.

[183] Mr. Khadka's work permit has the same conditions regarding his permitted employment which was as a cashier at Mac's Convenience Stores Inc. dba Subway. The location of his permitted employment is partially obscured in the attachment to his affidavit. According to the affidavits of Mr. Khadka and Mr. Bansal, the labour market opinion to which he was attached stipulated a job in Calgary, however according to Mr. Higuchi, Mr. Khadka's work permit authorized him to work anywhere in British Columbia.

[184] Mr. Khadka deposed that he was not sent to Calgary to work as he expected. He deposed that Overseas arranged for him to fly to Kitimat, where he worked at a

Mac’s store. He deposed that he thought this was legal replacement work but later learned it was not. He never received the amount of work provided for in his contract. He deposed that he returned to Vancouver and was told by Mr. Bansal that his options were to work on a farm in Canada or to return to Nepal.

[185] Mr. Higuchi deposed that Mr. Khadka was entitled to work for Mac’s anywhere in British Columbia, and that is why he was sent to Kitimat. Mr. Higuchi deposed that four days after Mr. Khadka started working there, the store at which he was working changed hands from Mac’s to a Mac’s dealership. Mr. Higuchi deposed that Mr. Khadka’s employment with Mac’s was terminated and he was hired by the new owner.

[186] Even if Mr. Higuchi was correct that Mr. Khadka’s work permit allowed for work in British Columbia, it only permitted work for Mac’s Convenience Stores Inc. dba Subway. Mr. Higuchi has deposed that after four days, Mr. Khadka was no longer working for Mac’s but for Makhija Enterprises Ltd., an entity not specified on Mr. Khadka’s work permit. Accordingly, it appears that Mr. Khadka’s evidence that the work in Kitimat was not authorized by his work permit was correct so far as it pertains to the work after the first four days.

[187] Mr. Bansal deposed that temporary foreign workers for whom jobs were not available were “technically legally permitted to remain in Canada, but could not work other than as was indicated on their work permits”. Mr. Bansal deposed that Overseas offered to get them included on a new labour market opinion (later called a labour market impact assessment) with a different employer but the process could take three or four months to get the labour market impact assessment and a further three to four months to get a new work permit. He deposed that the time for this process would be cut in half for farm jobs. He deposed that if a worker was “unwilling to wait” for a new labour market impact assessment or a work permit, Overseas would offer them an airplane ticket to the place from which they came to Canada.

Duty to Mitigate

Legal Principles

[188] In *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, 1999 CanLII 657 at paras. 30 and 34, Justice Major for the Court held that employment contracts are contracts that are subject to the ordinary rules of contractual interpretation.

[189] The goal of contractual interpretation is to ascertain the objective intent of the parties at the time the contract was entered into: *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53 at para. 49; and *Chudy v. Merchant Law Group*, 2008 BCCA 484 at para. 207. In undertaking this exercise, a decision-maker must read the contract as a whole, giving the words their ordinary and grammatical meaning consistent with the circumstances known to the parties at the time the contract was made. The circumstances at the time the contract is entered into are relevant because the meaning of words can vary depending on the context in which they are used and so it is not necessary to find ambiguity in order for evidence of the surrounding circumstances to be admissible: *Sattva Capital* at paras. 47, 50; and *British Columbia* (*Minister of Technology Innovation and Citizens' Services) v. Columbus Real Estate Inc.,* 2016 BCCA 283 at paras. 41–44.

[190] There is more limited ability to use extrinsic evidence of post contract conduct: *Water Street Pictures Ltd. v. Forefront Releasing Inc.*, 2006 BCCA 459 at paras. 26–27, citing *Re Canadian National Railways and Canadian Pacific Ltd.* (1978), 95 D.L.R. (3d) 242 at 262, 1978 CanLII 1975 (B.C.C.A.), aff'd [1979] 2 S.C.R. 668, 1979 CanLII 229.

[191] Where the contract was executed in a regulatory or legislative environment, it is appropriate to use the regulations or legislation to interpret the contract, including implying or inferring mandatory statutory provisions into a contract and interpreting the contract consistent with the regulatory or legislative environment: *Wells* at paras. 33, 34.

[192] It is not disputed that a plaintiff has a duty to mitigate wrongful dismissal from a non-fixed term contract. However, the law is not clear that a plaintiff who has a fixed term contract has a duty to mitigate in the absence of a provision addressing early termination that calls for payment of the balance of the term on termination.

[193] In *Payne v. The Kimberley Academy Ltd.,* 2020 BCSC 506 at para. 36, Justice Forth addressed the cases of *Quach v. Mitrux Services Ltd.,* 2020 BCCA 25 at para. 36 and *Neilson v. Vancouver Hockey Club Ltd.* (1988), 51 D.L.R. (4th) 40, 1988 CanLII 3051 (B.C.C.A.) at paras. 14–16 and observed that they address the deductibility of actual mitigation, and do not decide whether a fixed term contract gives rise to a duty to mitigate. She held that in the event there is a duty, the obligation to prove that an employee failed to mitigate is on the defendant and is a heavy onus: at para. 40 citing *Steinebach v. Clean Energy Compression Corp.,* 2016 BCCA 112 at para. 24 and *Petersen v. Labatt Breweries of British Columbia*, [1996] B.C.J. No. 2470, 1996 CanLII 1059 (S.C.). I agree with these observations.

[194] Justice Forth did not resolve the question of whether there was a duty to mitigate in *Payne* because the defendant did not attend the trial and lead evidence of failure to mitigate or earnings during the fixed term of the contract after termination.

[195] In *Wells* at para. 63, the contract was held to be neither a contract with no term nor a fixed term contract; rather it was a situation of statutory tenure based on the employee engaging in good behaviour until his age 70. At para. 65, Major J., citing *Neilson*, held that the usual rules of mitigation apply. By that reference to *Neilson*, Major J. was referring to the usual rules of deductibility of actual mitigation, and not to a duty to mitigate, because as discussed, *Neilson* did not decide whether there was a duty to mitigate.

[196] Mac’s relies on *Maxwell v. British Columbia,* 2014 BCCA 339, in which the Court of Appeal explained that it is well settled that where the contract provides for termination, that governs, and if the termination clause does not require mitigation, there is no duty to mitigate (at para. 27). That does not assist, because this contract

does not have a provision for termination, and because *Maxwell* did not involve a fixed term contract.

[197] Mac's cites several cases in which there were fix term contracts without early termination provisions and which imposed a duty to mitigate: *Carr v. Fama Holdings Ltd.* (1989), 63 D.L.R. (4th) 25, 1989 CanLII 240 (B.C.C.A.); *Jung* v. *Lheidli T'enneh Indian Band,* 2000 BCSC 578; *Whitecross v. Heiltsuk Nation,* 2001 BCSC 1506; *Rogers v. Tourism British Columbia,* 2010 BCSC 1562 at para. 23; *Gill v. Navigate Capital Corp.,* 2013 BCSC 1479 at para. 71, aff'd 2014 BCCA 462; *James v. The Hollypark Organization Inc.,* 2016 BCSC 495 at paras. 55–57, aff'd 2018 BCCA 217.

[198] The representative plaintiffs distinguish these cases for various reasons, including that not all of the cases clearly involved fixed terms contracts, and in some of the cases the duty to mitigate is referred to in *obiter*.

[199] However, in *Carr* at 43, the Court of Appeal clearly stated that dismissing an employee who has a fixed term employee does not require the employer to pay the employee for loss that could be avoided. The Court of Appeal held that the usual rules of duty to mitigate apply.

[200] In *Howard v. Benson Group Inc.,* 2016 ONCA 256 at para. 44, the Court of Appeal for Ontario held that where there is a fixed term contract with no provision for notice period in the event of early termination, a liquidated damages clause is implied and there is no duty to mitigate. In *Quach* at para. 36, the Court of Appeal rejected that reasoning from *Howard*. However, because there was an early termination clause in the fixed term contract in *Quach*, the rejection of the *Howard* reasoning appears to be limited to the point that, regardless of the duty to mitigate, actual mitigation will be deducted if there is no early termination clause. Because there was an early termination clause in *Quach,* the result of the case was that there was no duty to mitigate and no requirement for deduction.

[201] I conclude that the weight of the British Columbia law is that if a fixed term contract does not provide for early termination through a liquidated damages clause

or otherwise, then there is a duty to mitigate. However, a term addressing whether there is a duty to mitigate can be inferred or implied based on the circumstances including the regulatory and statutory context which the case was made.

Analysis

[202] Based on the law, and on the agreement that the contracts in issue are fixed term contracts, the questions in relation to the duty to mitigate are:

a) Do the terms of the contract oust the duty to mitigate by a provision for liquidated damages or with language that expressly ousts it?

b) If there is no provision for liquidated damages or language that ousts the duty to mitigate, is that the end of the inquiry or can ouster of the duty to mitigate be inferred given the regulatory and legislative framework in which the contract was made?

[203] The contracts do not contain terms expressly ousting the duty to mitigate.

[204] However, that is not the end of the inquiry. This case has similarities to *Wells* in that the contracts were made in a statutory and highly regulated context, and must be interpreted taking that context into account.

[205] In *Wells,* Major J. interpreted an employment contract using, in part, the legislative scheme in which it was made, which provided for the employee to hold office during good behaviour until age 70. While the contract was not a fixed term employment, Major J. held that the legislative provisions entitled the employee to damages up to his age 70 on termination. The representative plaintiffs rely on this case for the proposition that the legislative and regulatory scheme, in this case the TFWP, should be used to interpret the contracts in ways that are analogous to inferring or implying terms of no duty to mitigate.

[206] I agree that the *Wells'* analysis is applicable to this case. Specifically, these contracts must be interpreted taking into account that the worker could only work as specified on the work permit. While in some cases the geographical limitations were

province wide, in all cases the employer was Mac's. If Mac's did not have employment for the subclass member, then the subclass member could not work in accordance with the work permit. Accordingly, the contract must be interpreted that there was no duty to mitigate to look for or take work that was not in compliance with the work permit.

[207] The evidence of Mr. Bansal is that going through the process of obtaining a new work permit had to be preceded by obtaining a new labour market opinion or a labour market impact assessment. This would take six to eight months for work other than farm jobs or where an employer had an unnamed labour market opinion.

[208] Mac's relies on Mr. Bansal's evidence that the time to obtain a new labour market opinion or labour market assessment could be reduced if the subclass member agreed to work as a farm labourer, or took advantage of unnamed labour market opinions that other employers had. However, there is no evidence that Mac's or the subclass members knew that at the time these contracts were entered into. The subclass members were not hired to be farm labourers. The affidavit of Mr. Higuchi that Mac's told Overseas that it did not want the subclass members travelling to Canada unless Mac's had confirmed the availability of a job for the subclass member immediately before the travel is evidence that Mac's understood the complexity and time consuming nature of the TFWP process that would have to be repeated for that person if they came to Canada and the contracted for job was not available.

[209] Given the vulnerability of the subclass members at the time they entered into the contracts and the evidence of their reasons for being willing to travel to Canada to take relatively low paying jobs, it is not reasonable to conclude that there was an agreement that they would mitigate by taking work as farm labourers if the agreed to jobs did not materialize. Nor is it reasonable to conclude that they agreed to mitigate by taking advantage of unnamed labour market opinions that other employers had. There is simply no evidence that either Mac's or the subclass members had any information about that when they entered into the contracts. Finally, it is not

reasonable to conclude that Mac’s and the subclass members agreed that if the jobs contracted for were not available, the subclass members would mitigate by remaining in Canada, unemployed and unhoused, undertaking a 6-8 month process to be in a position to legally work.

[210] While Mr. Bansal deposed of various efforts that he made to assist the subclass members, Mr. Bansal and Overseas were not parties to the contract and this evidence is of post-breach conduct. Mac’s has not submitted that it is necessary to resort to extrinsic evidence of post contract conduct to interpret this contract.

[211] I have concluded that Mac’s and the subclass members did not make an express agreement to require mitigation. However, the actual issue is whether they agreed to oust the duty to mitigate, because generally speaking it is imposed unless ousted by the agreement. In this unusual case, I am of the view that the context requires these contracts to be interpreted to oust the duty to mitigate. The duty would require the subclass members to behave unlawfully and at risk of investigation and detention by CBSA. While there is evidence that suggests that Mr. Cajes may have managed to obtain some work at some time, that is post contract evidence that does not assist with understanding what the parties agreed to at the time of making contract.

[212] I conclude that in order to avoid interpreting the contracts to impose a duty to act in an unlawful manner and in order to avoid interpreting the contracts to require the duty to mitigate to the point of practical absurdity, the contracts must be interpreted to oust the duty to mitigate.

[213] I conclude that given the context in which the contract was made, that the subclass members were travelling to Canada for jobs with Mac’s arranged through the TFWP and were legally restricted to working for Mac’s, the employment contracts must be interpreted as not imposing a duty to mitigate if Mac’s did not provide employment that was in accordance with the work permits.

Conclusion on Common Issue A3

[214] The answer to common issue A3 is no.

Deductibility

Legal Principles

[215] In *Quach*, the Court of Appeal addressed whether a duty to mitigate arose in a fixed term contract. The fixed term contract at issue had a clause that required the employer, in the event of termination prior to the end of the contract`s fixed term, to pay all compensation due to the employee to the date of termination as well as all compensation due to the employee to the expiration of the term of the contract.

[216] As discussed above, Justice Saunders, for the Court, reviewed Ontario cases including *Howard* which provided that where there is a fixed term contract with no provision for notice period in the event of early termination, then the employee is entitled to the wages that would have been earned if the contract had not been breached by early termination and is therefore not required to account for any actual mitigation. In an earlier case, *Bowes v. Goss Power Products Ltd.,* 2012 ONCA 425, the Court of Appeal for Ontario came to the same result but the contract in issue had a notice period provision equal to the term of the contract.

[217] In *Quach* at para. 39, Saunders J. held that in British Columbia, the answer to the same question depends on whether the contract has a termination clause that provides for an amount to be paid on termination. Absent such a clause, the employee's claim is for damages, not remuneration, and regardless of the duty to mitigate, an employee must account for actual mitigation, citing *Neilson*.

[218] A liquidated damages clause is a type of clause that can result in no deductibility for actual mitigation because it amounts to an agreement on the damages that will be payable in the event of a breach. A review of the jurisprudence establishes that such a clause can be implied or inferred into a contract based on the agreement and the surrounding circumstances: *Ellis v. Whitepass Transportation Ltd.* (1983), 42 B.C.L.R. 361, 1983 CanLII 288 (C.A.) at para. 11; *Super Save*

Disposal Inc. v. Blazin Auto Ltd., 2011 BCSC 1784 at paras. 28–30; and *Crook v. Duxbury*, 2020 SKCA 43 at para. 46.

[219] While construing a contract by implication or where inference is permissible, the question of a liquidated damages contract requires that the evidence support that the parties agreed that an amount to be genuine pre-estimate of damages and that the amount owing can be determined by simple arithmetic: *Habitat for Humanity Canada v. Hearts and Hands for Homes Society*, 2015 BCSC 1182 at para. 132; and *A.M.T. Finance Inc. v. Gonabady*, 2010 BCSC 278 at para. 81. Liquidated damages clauses that are not a genuine pre-estimate of damages are penalty clauses and unenforceable; in such circumstances the plaintiff must prove damages in the usual way and the damages are subject to mitigation: *Super Save* at paras. 26 and 34.

Analysis

[220] This question turns on whether the contract should be interpreted to be that the parties agreed that there would be no deduction through a provision that provided for that or through a liquidated damages clause which would have the same effect: *Quach* at paras. 39, 41.

[221] Having interpreted the contract to oust the duty to mitigate, it is not compelling to interpret it to have an implied term about deductibility of actual mitigation, either for or against. In addition, there is nothing in the contract or in the surrounding circumstances that supports such an interpretation.

[222] There is nothing in the contract, the evidence of the representative plaintiffs, or the surrounding circumstances that compel or support that there was an implied liquidated damages clause let alone one that, using simple arithmetic, produces the amount to be paid. There is no evidence that supports that the parties turned their minds to liquidated damages, and certainly no evidence would allow the court to infer or imply such a clause as a genuine pre-estimate of damages as opposed to a penalty clause.

[223] The representative plaintiffs argue that these are contracts of adhesion and they did not have the opportunity to negotiate such a provision. They point to the fact that the contracts were standard form contracts in which their specifics, such as name, position, and pay, were the only things to be filled into blanks.

[224] That submission is logically compelling, given that the subclass members were vulnerable as I have described. However, while the evidence is consistent with the contracts being standard form contracts, there is no evidence that an employee could not negotiate additional clauses. The representative plaintiffs and Mr. Cajes deposed about the circumstances in which they entered the contracts. None of them have deposed to circumstances by which the court could conclude that they were practically precluded from asking for terms or clarity about what would happen if they were terminated from their jobs with Mac’s before the two year fixed terms of the contract ran out.

[225] I conclude that there is no basis to interpret the contract to conclude that the parties agreed that if the subclass members were able to mitigate their damages, their earnings during the notice period would be non-deductible. Having concluded that, and given the lack of a liquidated damages clause, any earnings of the subclass members during the notice period are deductible.

Conclusion on Common Issue A6

[226] The answer to common issue A6 is yes.

“Matthews J.”