CITATION: Omarali v. Just Energy, 2016 ONSC 4094
COURT FILE NO.: CV-15-527493-CP
DATE: 20160727

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Haidar Omarali / Plaintiff

AND:

Just Energy Group Inc., Just Energy Corp., and Just Energy Ontario LP / Defendants

BEFORE: Justice Edward P. Belobaba

COUNSEL: *David Rosenfeld and Jody Brown* for the Plaintiff / Moving Party

Paul J. Martin, Laura F. Cooper and Janna L. Young for the Defendants / Responding Parties

HEARD: June 21 and June 28, 2016

Proceeding under the *Class Proceedings Act, 1992*

CERTIFICATION DECISION

Introduction

[1] This is a motion to certify a proposed class action of some 7000 sales agents who were hired by the defendants as independent contractors and worked door-to-door selling their products. The plaintiff says the sales agents were misclassified - that they are not independent contractors but employees and are therefore entitled to the benefits and protections of the *Employment Standards Act*[1] such as minimum wage, overtime pay, and vacation and public holiday pay.

[2] Class counsel says this is "the archetypal misclassification case." He says this to suggest that the proposed class action should be easily certified. The reality, of course, is

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[1] *Employment Standards Act, 2000*, S.O. 2000, c. 41 ("ESA").

otherwise. Misclassification cases are generally difficult to certify because individualized assessments are often required and commonality cannot be established.[2]

[3] Misclassification cases have been certified in two situations: one, where the issue was job function but the class was carefully defined to ensure class-wide job function similarity;[3] and two, where the common issues were focused on the systemic nature of the defendant company's policies and practices rather than on class member entitlements.[4] Otherwise, most misclassification cases that ask whether the class member is an employee (rather than say a manager) collapse under the weight of an "it depends" reality.[5] I am not saying that an "archetypal misclassification case" can never be certified,[6] only that the challenge in doing so should not be underestimated.

[4] That is why the defendants in this action argue that the determination whether the sales agents herein are independent contractors or employees can only be made on an individualized basis and, because there is no commonality, the matter cannot proceed as a class action. The defendants submit that the motion for certification must therefore be dismissed.

[5] When I first reviewed the parties' submissions, I was inclined to agree with the defendants. However, as I considered the matter further, and reviewed the applicable case law and the actual record before me, I realized that the evidence in this case was quite different from what was before the court in *Brown*[7] and *McCracken*[8]. More specifically, I realized that the defendants really had little in the way of "it depends" evidence and the plaintiff, on the other hand, had significant evidence of systemic commonality. I therefore came to the conclusion that the plaintiff has satisfied the commonality as well as the other

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[2] See, for example, *McCracken v. Canadian National Railway*, 2012 ONCA 445, and *Brown v. Canadian Imperial Bank of Commerce*, 2014 ONCA 677.

[3] *Rosen v. BMO Nesbitt Burns Inc.,* 2013 ONSC 2144.

[4] *Baroch v. Canada Cartage,* 2015 ONSC 40. Also see *Fulawka v. Bank of Nova Scotia,* 2012 ONCA 443 and *Fresco v. Canadian Bank of Commerce*, 2012 ONCA 444.

[5] *Brown v. Canadian Imperial Bank of Commerce*, 2012 ONSC 2377, at para. 175.

[6] Indeed, in *McCracken, supra*, note 2, at para. 44, the Court of Appeal agreed that "there is no rule that misclassification cases are automatically incapable of raising common issues." As in every certification motion, it depends on the evidence.

[7] *Brown, supra,* note 2.

[8] *McCracken, supra,* note 2.

requirements under s. 5(1) of the *Class Proceedings Act*[9] and that the proposed action should be certified as a class proceeding.

[6] The defendants may well prevail on the merits whether by way of summary judgment or a common issues trial. But overall merits are not relevant at certification. On a motion for certification, which is primarily a procedural decision, the plaintiff simply has to show a cause of action and some basis in fact for the four remaining s. 5(1) requirements: an identifiable class, common issues that will advance the litigation, procedural preferability and a suitable representative plaintiff.

[7] In my view, for the reasons set out below, the plaintiff has satisfied each of these requirements. The motion for certification is granted. The common issues, as proposed and certified, are attached in the Appendix.

Outline of decision

[8] To explain why this "archetypal misclassification case" has been certified as a class action on the evidence herein, I will proceed as follows. First, I will describe the defendants' 'independent contractor' sales structure. Next, I will provide a brief overview of how the law decides who is an "employee" and a summary of the key provisions of the *Employment Standards Act* as they apply here. I will then discuss the commonality requirement in detail because this is the core issue on the motion. I will end by considering the certification requirements in s. 5(1) of the CPA.

Background

Just Energy's sales structure

[9] Just Energy is a "family of companies" that provide electricity and natural gas supply to residential and commercial customers across North America. They commenced operations in Ontario in 1997, initially marketing fixed price natural gas contracts. After the provincial market for electricity was deregulated in 2002, Just Energy began to market electricity in addition to natural gas. Just Energy currently carries on business in six provinces and fifteen American states.

[10] From the time it began operating in Ontario, Just Energy has hired what it believes are independent sales agents to solicit customer contracts for natural gas and electricity. The sales agents work door-to-door and are paid entirely by commission. In 2009 about 95 per cent of the company's sales revenues came from door-to-door selling. Today, on-

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[9] *Class Proceedings Act,* 1992, S.O. 1992, c.6 ("CPA").

line sales generate most of the company's revenue and about 21 per cent of the revenue comes from door-to-door selling. Nonetheless, even at 21 per cent, door-to-door selling remains a significant component of the defendants' business. As the company's vice president explained in his affidavit, "Our success has been built one door at a time."

[11] Just Energy has about 130 sales agents working in Ontario as independent contractors ("ICs"). However, because of the high turn-over rate in the door-to-door workforce (close to 18 times a year) the defined class over the four-year class period includes some 7000 former and current sales agents.

[12] Each of these putative class members work or worked in a team or "crew" supervised by a crew coordinator. The crew coordinators are supervised, in turn, by regional distributors who run the regional sales office. The crew coordinators and regional distributors are also IC's and are also paid on commission, drawing "over-rides" from the commissions earned by the door-to-door sales agents under their supervision. The sales agents can become crew coordinators and regional distributors. Some of the latter have been be hired by Just Energy as senior employees.

[13] The regional distributors are trained by Just Energy and report to the national distributors employed by the company. Every regional distributor signs an agreement with Just Energy which provides that the sales agents are ICs working for Just Energy, that the regional distributor must recruit, educate, motivate and guide the activities of the ICs, solicit customer contracts using forms and solicitation material approved and supplied by Just Energy, implement the compliance materials provided by Just Energy and generally comply with "all directions" provided by the company. Every sales agent is recruited and hired by Just Energy. All sales agents must wear a Just Energy identification badge.

[14] As an independent energy retailer, Just Energy is regulated by the Ontario Energy Board ("OEB"). Just Energy is responsible for the training, monitoring and conduct of its sales agents and must ensure that all sales agents adhere to internal and external codes of conduct.

The independent contractor agreement

[15] Every sales agent is required to execute an IC agreement. The plaintiff signed his IC agreement in July, 2012 and worked as a sales agent until December, 2013.

[16] In their submissions, the defendants go to great lengths to identify the many provisions in the IC agreement that assert that the sales agents are not employees. Let me simplify this part of the analysis by agreeing with the defendants that, except for clause 2 of the agreement (which requires the sales agents to "follow all instructions or directions" provided by Just Energy), there is no doubt, based on the IC agreement alone, that the defendants intended to hire the sales agents as ICs and not as employees.

[17] The IC agreement provides that the sales agents are generally on their own to do as they please. They must, of course, comply with applicable provincial regulations, such as the codes of conduct promulgated by the OEB and they are required to wear the prescribed identification badge and not engage in any misleading or deceptive sales practices. Otherwise, they can pursue sales as they wish.

[18] According to the IC agreement, there is no requirement to attend the morning meetings at the regional office or wear the defendants' clothing or use the defendants' suggested sales scripts or work door-to-door in any particular location. The IC agreement provides that the sales agents are free to choose when, where and how they will solicit contracts. Thus, I say again, if the IC agreement alone was determinative, it is reasonably clear (except for clause 2) that sales agents were being hired as ICs and not as employees.

[19] But the hiring agreement alone is not determinative.[10]

Who is an employee - the "economic realities" test

[20] Little weight is given by courts as to how the parties describe their relationship in the contractual agreement because this is often self-serving.[11] Nor does the ESA provide any assistance in this regard. The ESA applies to employees.[12] But "employee" is not defined. Thus, both courts and administrative adjudicators have had to look beyond the labels and examine the "economic realities" of the parties' relationship in practice.[13] It is in the common law that one finds the factors that must be considered. A leading Canadian text summarizes the key factors as follows:

> Canadian courts and administrative tribunals use various formulations of the test for determining employee status, but three elements are common: (1) the employer must exercise a relatively high degree of bureaucratic control over the when and the where of employment; (2) the worker must be economically dependent on the employer; and (3) the worker must not be an entrepreneur operating a business as a going concern but must form part of the employer's business.[14]

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[10] England, *Individual Employment Law* (2008) at 22.

[11] *Ibid.*

[12] ESA, s. 3.

[13] England, *supra,* note 10, at 22.

[14] *Ibid.,* at 19.

[21] The application of this common law test is invariably fact-specific and more often than not requires a nuanced analysis. Different courts or agencies in different regulatory contexts can come to different conclusions. A worker can simultaneously be an employee under the ESA and an IC under, say, the *Income Tax Act.*[15] Rulings by the CRA or the WSIB or other administrative agencies that the Just Energy sales agents are ICs and not employees are interesting and to a point relevant, but they are not determinative.[16] What counts, and the only thing that counts here, is whether the ICs are employees under the ESA as determined by the application of the common law test set out above.

[22] I pause here to note that of the three primary factors that are typically considered, the one that is the most determinative on the facts herein is the "control" factor, that is, the degree of control over the how, when and where of what's being sold.

[23] The other two factors are not seriously contested by the defendants:

- There is no serious dispute about the fact that the sales agents are economically dependent on Just Energy. Other than one example of a sales agent in the Ottawa area who also tries to sell LED lights while going door-to-door, the bulk of the evidence is that the sales agents sell only Just Energy products and are economically dependent on the defendants.

- There is also no serious dispute about the fact that the sales agents are not operating stand-alone businesses that service Just Energy as just one of several clients. The evidence is uncontroverted that the sales agents put in full days working exclusively for Just Energy and in doing so form a significant part of the defendants' business. (Recall the fact that door-to-door sales account for more than 20 per cent of Just Energy's total revenues.)

[24] Thus, when we come to consider whether there is "some basis in fact" or "some evidence" for the proposed common issues - for example, whether the sales agents are employees rather than ICs - the question will really be whether the plaintiff has presented some evidence that Just Energy exercises a degree of control over the how, where and when of the sales agent's job – because, as discussed, this is the determinant factor on the facts herein.

[25] I recognize that the Court of Appeal listed five factors in *Belton*[17] not three. The two that were added were these: whether the sales agent is limited exclusively to the

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[15] England, *supra,* note 10, at 18 and cases cited therein.

[16] *Ibid.*

[17] *Belton v. Liberty Insurance Co. of Canada*, [2004] O.J. No. 3358 (C.A.)

service of the principal; and the cost and ownership of any tools required for the job. Neither factor, on the facts herein, is significant. In practice, virtually all of the sales agents work exclusively for Just Energy (except for the individual working out of the Ottawa office who also sells LED lights); and both sides agree that no special tools are needed to do door-to-door sales. Thus, the three-factor test outlined above is more than sufficient.

[26] A final point before turning to the applicable ESA provisions. “Control” is not defined either in the ESA or in the case law. One must therefore resort to the definition of “control” that can be found in most on-line and in-print dictionaries: “the power to influence or direct people’s behavior.” Note that “control” does not mean ‘compel at gunpoint’ but simply *“influence or direct”* people’s behavior. I will return to this definition later in these reasons.

The applicable ESA provisions

[27] As already noted, because the ESA does not define “employee” it is necessary to apply the “economic realities” test described above. If the IC sales agents are found to be employees, then (unless they fall within a statutory exemption) they are entitled to a range of benefits and protections as set out in Parts VII to XI of the Act, such as minimum hourly wages, overtime pay and vacation and public holiday pay. These benefits and protections, as already noted, cannot be waived. One cannot contract out of the ESA.[18]

[28] A number of exemptions are set out in the legislation The exemption that applies here is found in s. 2(1)(h) of O. Reg. 285/01:

> *Exemptions from Parts VII to XI of Act*
>
> 2. (1) Parts VII, VIII, IX, X and XI of the Act do not apply to a person employed…
>
> (h) as a salesperson, other than a route salesperson, who is entitled to receive all or any part of his or her remuneration as commissions in respect of offers to purchase or sales that,
>
> > (i) relate to goods or services, and
> >
> > (ii) are normally made away from the employer’s place of business.

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[18] ESA, s. 5(1).

[29] In other words, a sales agent who is found to be an “employee” under the common law test is exempted from receiving ESA benefits if she is a sales person who is paid in commission and works outside the employer’s place of business. Thus, because Just Energy’s door-to-door sales agents are outside salespersons they would fall within this exemption[19] and would not be entitled to minimum wage, overtime pay, or vacation or public holiday pay, *unless* they were found to be “route salespersons”. If they come within the “route salesperson” exception to the general exemption, then they would be entitled to minimum wage and related benefits already noted.

[30] The ESA does not define “route salesperson.” However, according to the Act’s interpretation manual and related case law, the key consideration is the degree of control exercised by the employee relative to the employer.[20] Whether the "routes" are determined by the employer or the employee, the chance of profit or risk of loss and the level of entrepreneurial activity by the employee are also relevant questions.[21]

[31] The case law follows suit. “The key characteristics driving the conclusion that a person is either a salesperson or a route salesperson are the degree of control the employer exercises over the scheduling and order of sales calls and the degree of entrepreneurial initiative the employee at issue exercises."[22] The adjudicator typically considers such facts as whether the employees were given scripts, were pre-assigned work locations, were driven to the assigned locations, were given direction and coaching on how to perform sales, wore a uniform provided by the employer and were subjected to supervisory phone calls.[23]

[32] It is important to remember as we begin to consider whether there is some evidence of commonality for the two key issues – that is, whether there is some evidence that the sales agent is an employee or route salesperson – that the most important evidence for each of these determinations is evidence about the defendants’ degree of control over the how, when and where of what is being sold.

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[19] The plaintiff argues that the sales agents do not fall within the exemption because they are not paid commissions with respect to “offers to purchase or sales.” I explain below why this is not a reasonable interpretation of the s. 2(1)(h) provision.

[20] *Employment Standards Act 2000 Policy and Interpretation Manual,* at 31-18.2.

[21] *Ibid.*

[22] *VanGrootel v. Advance Beauty Supply Limited*, 2016 CanLII 17209 (OLRB).

[23] *Schiller v. P & L Corporation Ltd*, 2012 CanLII 12611 (OLRB); *Kognitive Marketing Inc. v. Director of Employment Standards*, 2015 CanLII 61657 (OLRB); and *Orlov v. Amato*, 2003 CanLII 2984 (OLRB).

Commonality

[33] As already noted, this motion for certification turns on commonality – whether the proposed common issues can be answered on a class-wide basis. In *Brown* and *McCracken,* the defendant adduced extensive evidence to show that individualized inquiries were needed (to decide whether the employee was also a manager). And the plaintiff, in turn was unable to adduce sufficient evidence of systemic, class-wide commonality. Here however, the defendants' "individualized inquiries" evidence was surprisingly weak and the plaintiff's "systemic commonality" evidence was quite compelling.

[34] The proposed common issues ("PCIs") are set out in the attached Appendix. The key issues are PCI No. 1 (are the sales agents employees?) and PCI No. 4 (are they route salespersons?). In both cases, as already noted, the most relevant evidence is evidence about the degree of control that Just Energy has over the how, when and where of what is being sold.

[35] I will therefore take some time discussing the s. 5(1)(c) commonality requirement. I will set out the reasons why in my view commonality has been established for PCI Nos. 1 and 4, and I will then go on to consider the other certification requirements and the remaining PCIs.

[36] The law of commonality is well established. Under s. 5(1)(c) of the CPA, the plaintiff must show that his claim raises common issues. In order to satisfy the commonality requirement, the plaintiff only needs to adduce some basis in fact for the existence of the common issue.[24] This has been generally interpreted in the case law as involving two-steps - some evidence that the proposed common issue actually exists and some evidence that the proposed issue can be answered in common on a class-wide basis.[25] This must be coupled with the over-arching proposition that an issue cannot be common if its resolution is dependent upon individual findings of fact that have to be made with respect to each individual claimant.[26]

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[24] *Fulawka v. Bank of Nova Scotia,* 2012 ONCA 443, at para. 79 ("…some evidentiary basis indicating that a common issue *exists* beyond a bare assertion in the pleadings.")

[25] *Dine v Biomet,* 2015 ONSC 7050 at paras. 15-19; affd, 2016 ONSC 4039 (Div.Ct.).

[26] *Fehringer v. Sun Media Corp.,* [2002] O.J. No. 4110 (S.C.J.), aff'd, [2003] O.J. No. 3918 (Div. Ct.).

Step one: Some evidence that the "employee" and "route salesperson" issues exist

[37] The first step, some evidence that the proposed common issue actually exists, is typically satisfied with affidavit evidence from the plaintiff about his or her own experience. Here the plaintiff has adduced more than enough evidence to show that PCI Nos. 1 and 4 exist – that is, some evidence that Just Energy controls the how, where and when of the door-to-door sales and that the questions about whether the sales agents are "employees" and "route salespersons" are legitimate questions.

[38] I refer specifically to the evidence presented by sales agents Omarali, Awal, Nazerally and Filipovic. They make the following points. They work twelve-hour days, the morning portion dedicated to meetings and role-playing, and the balance of the day, 12 noon to 9 p.m., to door-to-door selling. They are required to wear Just Energy clothing. They are given sales scripts. They are driven in vans to pre-assigned locations, picked up at day's end and returned to the regional sales office. They cannot change their pre-assigned work areas without explicit permission. They are reprimanded if they take time off work and sanctioned if they breach internal or external codes of concduct. In short, say the affiants, they are told how, when and where to sell the defendants' products.

[39] The plaintiff has therefore satisfied the first step of the commonality analysis by showing some basis in fact that the "employee" and "route salesperson" issues exist.

Step two: Some evidence of systemic or class-wide commonality

[40] This is always the more difficult challenge in misclassification cases. The plaintiff may well have some evidence that the PCI exists at least for one or more class members. But now, under the second step of the analysis, he must present some evidence that the PCI is common to the entire class. To do this, the plaintiff typically must find evidence of systemic commonality, ideally in the defendants' own practices and policies.

[41] Here the plaintiff does just that. He relies not only on the defendants' own documentation (such as Just Energy's training materials) but also on the representations made on behalf of the company to the OEB. The plaintiff provides the following evidentiary support for the proposition that the defendants influence or direct (that is, control) the sales agents' behavior on a class-wide basis.

[42] There is evidence in the company's own documentation that the completion of the sales agent's five-part training program is not optional but "must" be completed in its entirety. There is evidence that the morning meetings provide an opportunity "to practice the sales presentation and receive coaching and suggestions from the crew coordinator." There is evidence that a detailed sales script is provided and that the sales agents are trained in "what must and must not be said at each door."

[43] There is evidence in the defendants' documentation that the sales agents "will be dropped off by the crew coordinator at the location you will be working in for the day." The sales agents "will work from early afternoon to early evening in one area, contacting customers." There is evidence that they are provided with "do not solicit" lists for the assigned area and must "use only current and approved Just Energy sales and marketing materials."

[44] Customer contracts are finalized by Just Energy. All customer complaints are handled by Just Energy. There is evidence of ongoing quality-control supervision on the part of Just Energy with daily and weekly reports detailing sales agent productivity and customer complaints. The OEB was told by the defendants' legal counsel that "… Just Energy's Ontario operations and compliance teams commit more than 80 person hours per week on quality assurance and monitoring activities."

[45] There is evidence that the sales agents must comply with the company's internal Code of Business Conduct. Just Energy advises its sales agents that it "may discipline and/or terminate its relationship or affiliation with any representative who breaches this Code or related policies." There is evidence that violations of either the OEB or the Just Energy code of conduct can result in "progressive discipline" - from warning letters to monetary penalties, suspensions and terminations.

[46] Last but not least, Clause 2 of the IC agreement (executed by every sales agent) requires every IC to "follow all instructions or directions provided by JEC from time to time." Note the language: all "instructions and directions."

[47] In sum, I have no difficulty concluding that the plaintiff has presented some evidence that the defendants control (that is, influence or direct) the "how, when and where" behavior of the sales agents and do so on a class-wide basis.

Why this is not *Brown* or *McCracken*

[48] In *Brown* and *McCracken,* the plaintiff failed to provide some evidence that the job functions of class members were "sufficiently similar" that the misclassification claim could be resolved without considering the individual circumstances of class members.[27] In both cases, the defendants presented extensive evidence showing a "wide variability"[28] in the duties and responsibilities of employees having the same job title or

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[27] *McCracken, supra*, note 2, at para. 104.

[28] *Brown, supra,* note 2, at para. 44.

classification. Some had managerial duties; other did not. The court concluded that individual inquiries were required and thus there was no commonality.[29]

[49] Here, however, the issue is not whether the job functions of class members are “sufficiently similar” but whether the level or degree of control over the how, when and where of what is being sold is “sufficiently similar” that the misclassification claim can be resolved without considering the individual circumstances of class members.

[50] Here, the defendants did not present any evidence of wide variation in the nature or extent of control over the sales agents. The defendants pointed to the IC agreement which, as I have already noted, is not determinative. They pointed to several broad assertions in their affidavit evidence that the sales agents were under no obligation to attend the morning meetings, were not required to wear Just Energy branded clothing and were “at liberty” to work “at any time and at any location.” But these highly generalized assertions are akin to the “bald, sweeping and conclusory assertions” that were rejected by the Court of Appeal in *McCracken.*[30]

[51] The defendants also tried to suggest there were variations in job functions and related degrees of control by noting that not all of the class members worked door-to-door selling energy supply contracts to first-time residential customers. Some of the sales agents sometimes worked on residential “renewal” sales and others on commercial customers, both new and renewal.[31]

[52] However, the defendants presented no evidence showing any variation in the level of control relating to the residential renewal sales, or commercial new or renewal sales. There was no evidence, for example, that sales agents selling to commercial customers worked their own hours, used their own sales scripts, wore their own clothing, drove their own cars or finalized their own contracts.

[53] Instead, there is evidence to the contrary. Every sales agent was hired to perform just one job: door-to-door selling. Indeed, Just Energy instructed its recruiters that, "We can't tell people we have multiple positions as multiple positions imply different jobs. We have *one job* with multiple openings."

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[29] *McCracken, supra,* note 2, at para. 128.

[30] *McCracken, supra,* note 2, at para. 104.

[31] I note that some of the sales agents also sold water heaters at one time. However, no further information has been provided about the water heater sales.

[54] Also, the company's VP noted in his affidavit that the sales agents working the residential renewal or the commercial customers were still selling 'door-to-door':

> While these sales agents may sell different products to differing customer bases, the one constant is that each and every door-to-door sales person is an Independent Contractor and it is this business model that has remained constant at Just Energy since 1997.

[55] In short, unlike in *Brown* and *McCracken,* here the evidence adduced by the defendants does not show a "wide variability"[32] or "lack of core commonality"[33] in the nature or extent of control exercised by the company over its door-to-door sales agents.

[56] I am satisfied that there is some basis in fact for both the existence and the commonality of the key common issues, "employee" and "route salesperson."

Certification requirements

[57] I can now turn to the certification requirements as set out in s. 5(1) of the CPA - cause of action, identifiable class, common issues, preferable procedure and a suitable representative plaintiff. I will consider each of these in turn.

(1) Cause of action

[58] Section 5(1)(a) requires that the pleadings disclose a cause of action. I am satisfied that the pleadings disclose the following causes of action: breach of the ESA, breach of contract and the duty of good faith, negligence, and unjust enrichment.

[59] The defendants' complain that more facts should have been pleaded. However, Rule 25.06(1) requires "a concise statement of the material facts but not the evidence by which those facts are to be proved." In my view, there is nothing deficient or improper about the pleadings.

[60] The defendants also argue that because the pleadings refer to the IC agreement, and the IC agreement is clear that the sales agents were independent contractors, it follows that no cause of action is disclosed in the pleadings. However, as already noted, the contractual agreement is not determinative. The application of the so-called *Belton* factors may well result in a finding that the sales agents were actually employees even though they signed an IC agreement. The primary issue in this analysis is "control" and

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[32] *Brown, supra,* note 2, at para. 44.

[33] *Ibid.*

that issue is not decided by the content of the IC agreement but the "economic realities" of the parties' relationship in practice.[34] The fact that the pleadings refer to the IC agreement is simply not determinative.

[61] In short, the pleadings disclose the causes of action as noted above. The first requirement under s. 5(1)(a) is satisfied.

(2) Identifiable class

[62] The plaintiff, Haidar Omarali, signed the Just Energy IC agreement in July, 2012 and worked in Toronto as a Just Energy door-to-door sales agent from approximately August 2012 to December 2013. In his first month of employment, the plaintiff worked about 288 hours and made $956.40 or the equivalent of $3.32 per hour. The plaintiff's commission income in 2012 was $8,851 and in 2013 it was $23,515.

[63] To satisfy the section 5(1)(b) requirement of the CPA, there must be an identifiable class of two or more persons. The class must also be objectively defined and limited by rational criteria bearing a relationship to the common issues.[35] In my view, this second requirement has been satisfied.

[64] The plaintiff proposes the following class definition:

> Any person, since 2012, who worked or continues to work for Just Energy in Ontario as a Sales Agent pursuant to an independent contractor agreement.

[65] The defendants say the class definition should be narrowed to exclude claims that are, on the face of the pleadings, statute-barred. The statement of claim was issued on May 4, 2015. Therefore, all claims in respect of services provided prior to May 4, 2013 (or services for which commission payments were made prior to May 4, 2013) are barred by the two-year limitation period set out in the *Limitations Act, 2002*.[36] Every class member, say the defendants, would have known upon the receipt of his or her first commission payment, if not sooner, that he or she was not being paid a minimum wage or receiving any other benefits under the ESA. In other words, the class period should begin on May 4, 2013 not January 1, 2012.

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[34] *Supra,* note 13.

[35] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, at para. 38.

[36] S.O. 2002, c. 24, Sch. B, ss. 4-5.

[66] I am not persuaded that the class should be narrowed at this stage of the proceeding. The defendants may well prevail on the limitations point but more evidence on the issue of reasonable discoverability is needed, particularly where the defendants themselves were continually representing to the sales agents through words and actions (e.g. pay slips) that they were ICs and not employees. On these facts, I prefer to follow the case law as summarized in the leading text on class actions, that "the limitations issue should not be resolved on a pleadings motion or on a motion for certification."[37]

[67] The better approach, in my view, is to allow the defendants to add the limitations question as a common issue[38] and I have done so herein. On the defendants' motion, I have added Common Issue 15 to deal with the limitations argument.

[68] Returning then to the s. 5(1)(b) requirement. The class consists of an identifiable group of door-to-door sales agents who are recruited and trained in common, have the same job, and are all classified as independent contractors. The term "sales agent" is an objective term that is used by Just Energy and readily understood by the class members. The class definition is rationally connected to the common issues because the class members were allegedly misclassified as independent contractors in violation of the ESA.

[69] The "identifiable class" requirement is satisfied.

(3) Common issues

[70] I will now consider each of the PCIs in turn and decide whether the PCI should be certified as a common issue.

PCI No.1: Are the class members employees?

[71] PCI No. 1 asks if the class members are employees under the ESA. I have already found in my discussion of the commonality question[39] that there is some basis in fact that the issue exists and has class-wide commonality.

[72] PCI No. 1 is certified as a common issue.

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[37] Winkler, Perell, Kalajdzic and Warner, *The Law of Class Actions in Canada* (2014) at 294.

[38] *Ibid.*

[39] See above, at paras. 37-47.

PCI Nos. 2, 3 and 9: CPP and EI contributions

[73] PCI Nos. 2 and 3 ask about CPP and EI contributions. PCI No. 9 asks if the defendants failed to make these contributions on behalf of the class members. There is certainly some evidence that the issues exist and, because they focus on the defendants' conduct, they can be answered on a class-wide and common basis.

[74] I suggested to the plaintiff that because the answers to these PCIs were self-evident (obviously no such contributions were made) there was little to be gained in having these questions certified as common issues. But counsel on both sides insisted that there was value in doing so. I will yield to their joint request.

[75] PCI Nos. 2, 3 and 9 are certified as common issues.

PCI No. 4: Are the class members route salespersons?

[76] This is the second core common issue. If the answer to PCI No. 1 is "yes" and the class members are found to be employees, PCI No. 4 asks whether they are exempt from Parts VII, VIII, IX, X and XI of the ESA as outside salespersons or fall within the exception to this exemption as route salespersons? I have already found in my discussion of commonality above,[40] that there is evidence in the plaintiff's affidavit material that the issue exists and has class-wide commonality.

[77] There is one problem, however, with this common issue as drafted by the plaintiff. The first dozen or so words of PCI No. 4 suggest that s. 2(1)(h) of O. Reg. 285/01 should be interpreted as meaning that "class members are making offers to purchase" rather than the customer.[41] In my view, it is plain from the language in the Regulation that it is the customer that is making the offer to purchase not the sales agent. I therefore agree with the defendants that the opening language in PCI No. 4 should be revised to simply read, "If the answer to (1) is "yes", are the class members ... [etc]."

[78] With this revision, PCI No. 4 is certified as a common issue.

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[40] Recall above at paras.37-47.

[41] The plaintiff's PCI No. 4 reads as follows: "*If the Class Members are making offers to purchase or sales pursuant to s. 2(1)(h) of O. Reg. 285/01,* are the class members exempt from Parts VII, VIII, IX, X and XI of the *ESA*, or do the Class Members fall within the exception to this exemption as route salespersons?

PCI No. 5: ESA requirements as express or implied terms

[79] PCI No. 5 asks the following: if the class members are employees and route salespersons, do the ESA requirements regarding minimum pay and related benefits form express or implied terms of the class members' contracts?

[80] Here again, I suggested to the plaintiff that very little would be gained by adding this question to the common issues list. The answer is self-evident. If the ESA applies, and one cannot contract out of the ESA, then it follows that the ESA benefits and protections are payable and these requirements can be characterized as an implied term of the class member employment contracts.

[81] But here again, counsel for both sides requested that this question be added as a common issue. And here again, as I did with PCI Nos. 2, 3 and 9, I acceded to the joint request. I note that a similar issue was certified in *Rosen*, *Fulawka* and *Fresco.*

[82] PCI No. 5 is certified as a common issue.

PCI Nos. 6 and 7: Breach of contractual and good faith duties

[83] PCI No. 6 asks if the defendants owed contractual duties or a duty of good faith to ensure that the class members paid the minimum wage, that the hours of work were monitored and accurately recorded, that the class members were properly classified and advised of their rights to overtime pay and that they were compensated with vacation and public holiday pay.

[84] There is certainly some evidence that none of this was done and that the questions posed can be answered on a class-wide basis. The basis of the duties alleged are informed by the requirements of the ESA and the Supreme Court's decision in *Bhasin v Hrynew*[42] that requires honesty in contractual performance. I also note that similar questions have been certified in other employment class actions, including *Rosen, Fulawka, Fresco* and *Baroch.*

[85] PCI No. 7 is certified as a common issue.

PCI No. 8: Failure to comply with ESA requirements

[86] If the class members are found to be employees and route salespersons, PCI No. 8 asks if the defendants failed to pay minimum wage, overtime pay, and vacation and

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[42] *Bhasin v Hrynew,* [2014] S.C.R. 494.

public holiday pay. Here again, the answer is self-evident. But here again, because both sides requested that this issue be added, I will accede to the joint request.

[87] PCI No. 8 is certified as a common issue.

PCI Nos. 10 and 11: Negligence

[88] PCI Nos. 10 and 11 ask, in the alternative, if the various failures alleged under the contractual claim in PCI Nos. 6 and 7 can constitute breaches of a duty of care in negligence and if so, whether the defendants breached such a duty. As with PCI Nos. 6 and 7, there is sufficient evidence for PCI Nos. 10 and 11. I also note that negligence as a common issue was certified in other ESA cases such as *Fresco, Fulawka* and *Baroch.*

[89] PCI Nos. 10 and 11 are certified as common issues.

PCI No. 12: Unjust enrichment

[90] PCI No. 12 asks if the defendants were unjustly enriched by failing to make the payments required under the ESA or the contributions required under the CPP and EI legislation.

[91] I agree with the plaintiff that unjust enrichment is well suited to certification as a common issue because the focus is on the defendant's actions and not on the actions of individual class members. An unjust enrichment issue has been certified by the court in numerous employment class actions, such as *Rosen, Fulawka, Fresco* and *Baroch.*

[92] PCI No. 12 is certified as common issue

PCI No. 13: Aggregate damages

[93] PCI No. 13 asks if the damages sustained by class members should be assessed on an aggregate basis. Aggregate damages under s. 24(1) of the CPA may be certified as a common issue if there is a reasonable likelihood that the damages can be determined without proof by individual class members.

[94] If the class members are found to be employees and route salespersons, the bulk of the loss would consist of the unpaid ESA benefits, in particular minimum hourly wages and overtime pay. But the defendants kept no records of hours worked. Therefore, these losses cannot be determined without proof by individual class members. Aggregate damages are not appropriate.

[95] Further, to properly assess each sales agent's "loss" the court would likely have to subtract the 'commissions received' amount from the 'ESA benefits that should have been paid' amount – again, requiring individualized inquiries.

[96] I therefore conclude that for the bulk of the damages sustained, an aggregate damages common issue should not be certified. However, I recognize that the Court of Appeal in *Good* [43] concluded that aggregate damages can be certified as a common issue where it can be established that the class members are entitled to "a base amount" that does not depend on individualized proof.[44] Here, says the plaintiff, the amounts owing for CPP and EI contributions can be determined by reviewing the income records in the defendants' possession.

[97] I accept the plaintiff's submission about the CPP and EI amounts. But this action is not about CPP and EI. So, on balance, I prefer to leave the entire aggregate damages question to the common issues trial judge who will be able to decide on his or her own whether aggregate damages can or should be awarded.

[98] PCI No. 13 is not certified as a common issue.

PCI No. 14: Punitive damages

[99] PCI No. 14 asks if the class members are entitled to an award of aggravated, exemplary or punitive damages based on the defendants' conduct.

[100] A punitive damages common issue (asking about entitlement rather than amount[45]) is often certified because the focus is on the defendants' conduct and thus the commonality requirement is satisfied. But one still needs to adduce some evidence that the issue exists - that there is conduct that would justify a punitive damages question.[46]

[101] Punitive damages are awarded when the defendant's wrongful acts are "harsh, vindictive, reprehensible and malicious", indeed "so malicious and outrageous that they are deserving of punishment on their own."[47] There is no evidence in the record that the defendants' conduct in classifying and hiring sales agents as ICs rather than as employees was in any way "harsh, vindictive, reprehensible and malicious."

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[43] *Good v. Toronto (Police Services Board),* 2016 ONCA 250.

[44] *Ibid.,* at para. 75.

[45] See the discussion in *Dine v Biomet, supra,* note 25, at paras. 58-60.

[46] *Ibid.,* at para. 55.

[47] See the case law as discussed most recently by the Court of Appeal in *Strudwick v. Applied Consumer & Clinical Evaluations Inc.*, 2016 ONCA 520 at paras. 110-112.

[102] Instead, the evidence shows that over the years the 'independent contractor' issue was adjudicated before various administrative agencies including the CRA, the WSIB, and on at least one occasion, before an employment officer of the ESA. With each decision the defendants were reassured that their sales agents were indeed ICs not employees. This does not mean that the same result will necessarily follow in this case. But it does mean that the defendants' actions in the design and implementation of their IC sales structure cannot be characterized as "so malicious and outrageous that they are deserving of punishment on their own." In any event, and to repeat, there is no evidence of conduct that would support a punitive damages issue.

[103] PCI No. 14 is not certified as a common issue.

PCI No. 15: Limitations period

[104] As I have already explained in my discussion of the "identifiable class" requirement, I will add and certify a common issue dealing with the limitations question. There is some evidence that the class definition should be narrowed to confine the class period to the two years preceding the issuance of the statement of claim. The resolution of the limitations issue will have a common impact on all those affected.

[105] I will therefore add and certify the following issue:

> Are the claims that relate to services provided before May 4, 2013 (or services for which commission payments were made before May 4, 2013) barred by the two-year limitation period set out in the *Limitations Act, 2002*?

[106] This completes my analysis of the proposed common issues. In sum, for the reasons set out above, PCI Nos. 1 to 12 are certified, PCI Nos. 13 and 14 are not certified, and a new PCI No. 15 has been added.

(4) Preferability

[107] Section 5(1)(d) of the CPA requires that a class proceeding be the preferable procedure for the resolution of the common issues in the context of the claim as a whole.[48] Preferability is meant to capture two ideas: (i) whether the class proceeding would be a fair, efficient and manageable method of advancing the claim; and (ii)

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[48] *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (C.A.) at para. 67.

whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation or any other means of resolving the dispute.[49]

[108] Here, in my view, a class proceeding is the preferable procedure and would provide a fair, efficient and manageable method of advancing the claim. The individual claims of the class members may be small and not warrant the commencement of individual lawsuits. A common determination in a class proceeding about their employment status will significantly advance the litigation and provide meaningful access to justice some 7000 class members.

[109] One would still need individual damage assessments if the common issues are resolved in favour of the class members. However, this does not detract from the overall preferability of the class action. In any event, s. 6(1) of the CPA makes clear that the court shall not refuse certification just because individual damage assessments will be required after the conclusion of the common issues trial.

(5) Suitable representative plaintiff

[110] Finally, under s. 5(1)(e) of the CPA, the court must be satisfied that there is a representative plaintiff who (i) will fairly and adequately represent the interests of the class, (ii) has produced a workable litigation plan and (iii) does not have a conflict of interest with any of the other class members. The proposed representative need not be 'typical' of the class, but must be 'adequate' in the sense that he or she will vigorously prosecute the claim.[50]

[111] Mr. Omarali has proven to be a conscientious representative plaintiff by retaining and instructing class counsel, reviewing the evidence filed to date, providing his own evidence, being cross-examined and attending in court for the certification hearing. He shares interests in common with the other class members and has produced a workable litigation plan. He is more than suitable as a representative plaintiff.

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[49] *Hollick v. Metropolitan Toronto (Municipality),* 2001 SCC 68 at paras. 28-31; *Fischer v. IG Investment Management Ltd.,* 2013 SCC 69, at paras. 16 and 22.

[50] *Campbell v. Flexwatt*, 98 B.C.A.C. 22 (C.A.) at paras. 75-76, leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 13.

Conclusion

[112] For the reasons set out above, I find that the requirements in s. 5(1) of the CPA have been satisfied. The proposed action is certified as a class proceeding.[51]

[113] As noted in the attached Appendix, proposed common issues Nos. 1 to 12 are certified; Nos. 13 and 14 are not certified; and a new common issue dealing with limitations has been added. I would ask that counsel prepare a draft Order in the form contemplated by s. 8 of the CPA.

[114] If the parties are unable to agree on the costs, I would be pleased to receive brief written submissions from the plaintiff within 14 days and from the defendants within 14 days thereafter. Counsel are urged to review my costs awards in previous certification cases.[52]

[115] My thanks to counsel for their co-operation and for their additional written submissions.

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Belobaba J.

Date: July 27, 2016

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[51] I note that a similar class action was certified in 2013 by the U.S. District Court for the Northern District of Ohio: see, *Hurt et al v. Commerce Energy Inc.,* (Case No. 1:12-CV-00758). The defendant Commerce Energy is a Just Energy company. I also note that when another similar class action was litigated on the merits, the U.S. District Court for the Northern District of California granted Just Energy's motion for summary judgment finding that the IC's were "outside sales persons" under the California Labour Code and thus fell within the exemption: see *Dailey v. Just Energy Marketing Corp.,* (Case No. 14-CV-02012-HSG).

[52] See any of *Dugal v Manulife Financial,* 2013 ONSC 4083; *Rosen v BMO Nesbitt Burns,* 2013 ONSC 2144; *Crisante v DePuy Orthopaedics*, 2013 ONSC 5186; *Brown v. Canada (Attorney General)* 2013 ONSC 5637; or *Sankar v Bell Mobility*, 2013 ONSC 5916.

Appendix

Revised Proposed Common Issues

[Issues 1 to 12 are certified. Issues 13 and 14 are not certified. Issue 15 dealing with Limitation Periods has been added and certified.]

Statutory Claim

1. Are the Class Members "employees" of the Defendants pursuant to the *Employment Standards Act, 2000* ("*ESA*")?

2. If the answer to (1) is "yes", are the Class Members in "pensionable employment" of the Defendants pursuant to the *Canada Pension Plan* ("CPP")?

3. If the answer to (1) is "yes", are the Class Members in "insurable employment" of the Defendants pursuant to the *Employment Insurance Act* ("EI")?

4. If the answer to (1) is "yes", are the Class Members exempt from Parts VII, VIII, IX, X and XI of the *ESA*, or do the Class Members fall within the exception to this exemption as route salespersons?

5. If the answers to (1) and (4) are "yes", do the minimum requirements of the *ESA* with regard to minimum wage, overtime pay, vacation pay, and public holiday and premium pay form express or implied terms of the contracts with the Class Members?

Breach of Contract

6. If the answers to questions (1) and (4) are "yes", do the Defendants owe contractual duties and/or a duty of good faith to:

    a. Ensure that the Class Members were compensated with the minimum wage?

    b. Ensure that the Class Members' hours of work were monitored and accurately recorded?

    c. Properly classify and advise Class Members of their entitlement to overtime pay for hours worked in excess of 44 hours per week which the employer required or permitted?

    d. Ensure that the Class Members were compensated with vacation pay?

    e. Ensure that the Class Members were compensated with and public holiday and premium pay?

7. Did the Defendants breach any of their contractual duties and/or a duty of good faith? If so, how?

8. If the answers to (1) and (4) are "yes", did the Defendants fail to pay the Class Members minimum wage, overtime pay, vacation pay, and/or public holiday and premium pay as required by the *ESA*?

9. If the answers to (2) and/or (3) are "yes", did the Defendants fail to make the prescribed employer CPP and/or EI contributions on behalf of the Class Members?

Negligence

10. Alternatively, did the Defendant owe a duty of care to the Class Members to:

    a. ensure that Class Members are properly classified as employees;

    b. advise Class Members of their entitlement to the minimum wage, overtime pay, vacation pay and public holiday and premium pay;

    c. ensure that the Class Members hours of work are monitored and accurately recorded; and

    d. ensure that Class Members are appropriately compensated with minimum wage, overtime pay, vacation pay and public holiday and premium pay.

11. Did the Defendants breach any of the duties of care found to exist above? If so, how?

Unjust Enrichment

12. Were the Defendants unjustly enriched by failing to compensate Class Members with minimum wages, overtime pay, vacation pay and public holiday and premium pay owed to them, in accordance with the *ESA*, and/or failing to make the prescribed employer CPP and/or EI contributions on behalf of the Class Members?

Aggregate Damages

13. If the Defendants breached the *ESA*, or its contracts with Class Members, or its duties of good faith or duties of care owed to the Class Members, or was unjustly enriched, should damages be assessed on an aggregate basis?

Punitive Damages

14. Are the Class Members entitled to an award of aggravated, exemplary, or punitive damages based on the Defendants' conduct?

Limitation Period Issue (added at the request of the defendants)

15. Are the claims that relate to services provided before May 4, 2013 (or services for which commission payments were made before May 4, 2013) barred by the two-year limitation period set out in the *Limitations Act, 2002*?

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