IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Linza v. Metric Modular,* 2025 BCSC 646

Date: 20250415
Docket: S230655
Registry: New Westminster

Between:

Byron Linza

Plaintiff

And

Metric Modular and Triple M Modular Ltd. and Triple M Housing Ltd.

Defendants

Pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50

Before: The Honourable Justice Norell

Reasons for Judgment

Counsel for the Plaintiff:	M. Sheard
Counsel for Triple M Housing Ltd.:	M. Watt K. McGoldrick
Counsel for Triple M Modular Ltd.:	A. Konikowski
Place and Dates of Hearing:	New Westminster, B.C. October 31 and November 1, 2024
Written Submissions of Triple M Housing Ltd.:	November 15, 2024
Written Submissions of the Plaintiff:	November 29, 2024
Place and Date of Judgment:	New Westminster, B.C. April 15, 2025

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Overview

[1] Mr. Linza applies to certify this action as a class proceeding against Triple M Housing Ltd. ("Housing"), on behalf of approximately 100 employees whose indefinite term employment contracts with Triple M Modular Ltd. dba Metric Modular ("Modular") were terminated between May and September 2020.

[2] This application was originally heard in late 2022. In reasons indexed at 2023 BCSC 1196 (the "Reasons"), I struck some of Mr. Linza's claims; and pursuant to s. 5(6) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*], adjourned the certification application and granted Mr. Linza leave to apply to amend his pleadings, and to reformulate the class definition and proposed common issues based on his submissions at the hearing.

[3] This decision should be read in conjunction with the Reasons, which sets out the legal framework, original notice of civil claim ("NOCC") and law governing the claims advanced therein, the evidence, submissions, and the findings on the original application. I adopt those into this decision.

[4] Following the Reasons, Mr. Linza applied for leave to file an amended notice of civil claim ("ANOCC") along with revised application materials seeking certification. This is the decision on that hearing.

[5] The defendant Housing submits that Mr. Linza's amended certification materials still do not meet the five criteria for certification in s. 4 of the *CPA*.

[6] For the reasons that follow, I grant the application to amend to a further amended notice of civil claim tendered at the hearing (the "FANOCC"), and dismiss the application for certification. While there are common issues, I find that a class proceeding is not the preferable procedure for resolving the common issues. I will address the five certification criteria. The application to amend will be addressed within the first criterion.

Do the Pleadings Disclose a Cause of Action?

[7] At para. 95 of the Reasons, I summarized my findings with respect to the NOCC:

a) the claim for wrongful dismissal was sufficiently pleaded, except that no material facts were pleaded to support the allegation that the termination clause (the "Termination Clause") in the employment contracts was void;

b) the claim that Housing was a common employer was sufficiently pleaded;

c) the pleading for unjust enrichment and *quantum meruit* damages did not disclose a reasonable cause of action and was struck; and

d) the pleadings alleging breach of duty of good faith, and claims for punitive damages and to pierce the corporate veil, were not sufficient as no material facts in support of the allegations were pleaded.

[8] The ANOCC removed the claims in (c) and (d) above, and amended the pleadings with respect to the Termination Clause. There were two amendments, both in the Legal Basis section. The first amendment was under the heading "Common Employer". Former para. 45 of the NOCC (now para. 38 of the ANOCC) was amended to state (with deletions and non-consequential amendments made):

> 38. The facts set out herein establish that the Defendants operated as joint and/or common employers. Further, the Defendants consistently represented themselves to all persons as common employers. As such they are jointly and severally liable for all contractual damages stemming from the wrongful dismissal of the Class Members.

[9] As the claim that Housing was a common employer was already sufficiently pleaded, I do not need to address this additional allegation of fact.

[10] The second amendment was under the heading "Wrongful Dismissal" and concerned the basis upon which the Termination Clause was alleged to be void. Former para. 47 of the NOCC (now para. 39 of the ANOCC) was amended to state (with deletions and non-consequential amendments made):

> 39. All Class Members had contractual terms governing their entitlement to notice of termination without cause:
>
> (a) Some of the Class Members had _ contractual clauses speaking to this entitlement __all of which were all illegal, and thus void ab initio due to, inter alia, their breaches or alternatively potential breaches of s. 63 and s. 64 of the *ESA* (the "Statutory Breaches").
>
> (b) In the alternative, those termination clauses which are binding were, nonetheless, breached and contractual damages are due as because of that breach.
>
> (c) For all other Class Members, the common law mandates that it was an implied term of their Employment Contract that each of them was entitled to reasonable notice of termination.

[11] For ease of reference, the Termination Clause states:

> 9.1 The Employer may terminate an Employee's employment without just cause, and will fully discharge its severance obligations by providing such Employee with the statutory notice and/or pay in lieu of notice (at the Employer's discretion), pursuant to the provisions of the BC Employment Standards Act, as amended from time to time.

[12] Sections 63 and 64 of the *Employment Standards Act*, R.S.B.C. 1996, s. 113 [*ESA*] set out the benefits that must be provided to employees terminated without cause. Section 63 applies to individual terminations, and provides for compensation or notice in lieu of compensation, based on length of service after three consecutive months of employment. The maximum amount of compensation payable is eight "weeks' wages" calculated by a formula in s. 63(4). Liability is deemed to be discharged if an employee is given the requisite number of "weeks' notice" of termination that coincides with the weeks of compensation payable, or a combination of written notice and the money equivalent to the amount the employer is liable to pay: s. 63(3). Section 64 applies to group terminations and provides additional benefits where there are terminations of 50 or more employees at a single location in a two-month period. It provides for notice of termination or pay in lieu, based on the number of employees terminated. In this case, if s. 64 applies, this could be an additional eight to 12 weeks of notice of termination or pay in lieu, or a combination of the two.

[13] At this hearing, Mr. Linza argued that the ANOCC remedied any deficiencies in the NOCC with respect to the Termination Clause being void. Mr. Linza outlined

his arguments as to how the Termination Clause breached ss. 63 and 64, some of which involved clauses in the employee handbook (the "Handbook") which he alleged formed part of the employment contract. Housing argued that the ANOCC still did not plead any material facts that would establish how the Termination Clause was void. None of the allegations of fact outlined by Mr. Linza in argument were in the ANOCC. In reply to Housing's submissions, Mr. Linza tendered the FANOCC. Given the interests at stake, I permitted Mr. Linza to seek leave to file the FANOCC, and directed that Housing could provide written response submissions and Mr. Linza could reply. The parties did so.

[14] The FANOCC sets out the alleged factual basis and particularizes the legal basis of the arguments made by Mr. Linza at the hearing. The new paragraphs in the Facts section are:

> The Employment Terms
>
> 32. At the time of their terminations, the Class Members were subject to the Defendants' employment policies, inclusive of an employee handbook (the "Handbook").
>
> 33. The Handbook was provided generally to Class Members during their orientation.
>
> 34. The Handbook contained a code of conduct policy (the "Code").
>
> 35. The Handbook stated, *inter alia*:
>
> a) "The first 480 hours of employment is a probationary period in which employees learn their new job duties. [T]he probationary period refers to 480 hours of actual, continuous employment and does not include any period or periods of absence from employment duties.
>
> A probationary employee deemed by Triple M to be unsuitable or unsatisfactory for work-related reasons may be discharged without notice [or] pay in lieu of notice" (the "Probation Clause");
>
> b) "Any employee who violates the provisions of the Code will be subject to disciplinary action including, in appropriates cases, dismissal for cause. […] [I]n addition, any employee may be subject to dismissal for cause for violations of the intent of this Code"; and
>
> c) Improper conduct under the Code includes general "dishonesty or failure to be truthful" "violation of any Metric Modular or Customer policy" "[…] practical jokes, or horseplay that could result in personal injury" a failure to "avoid any activity […] which might appear to create a conflict with the interests of Metric Modular" (collectively s. 35(b) and (c) and the "Just Cause Clauses").

> 36. The Class Members were also subject to purported termination provisions, which stated that the Defendants would "fully discharge" their severance obligations to the Class Members by providing employees terminated without cause with "statutory notice and/or pay in lieu of notice (at the Employer's discretion), pursuant to the provisions of the BC *Employment Standards Act*, as amended from time to time" (the "Without Cause Clause").

[15] The Without Cause Clause in para. 36 of the FANOCC is the same as the Termination Clause. In the Legal Basis section, the FANOCC further amends the existing former para. 47 of the NOCC (now para. 44 of the FANOCC) to state:

> 44. All Class Members had contractual terms governing their entitlement to notice of termination without cause.
>
> (a) Some of the Class Members had _ contractual clauses speaking to this entitlement _ all of which were all illegal, and thus void ab initio due to, *inter alia*, their breaches or alternatively potential breaches of s. 63 and s. 64 of the ESA (the "Statutory Breaches"). The Statutory Breaches took the form of, inter alia:
>
> (A) impermissibly extending the length of the Class Members' "Probationary Period" via the Probation Clause, and purporting to allow the Defendants to terminate the Class Members without pay or notice during this time;
>
> (B) impermissibly expanding the scope of what constitutes just cause for termination via the Just Cause Clauses, and purporting to allow the Defendants to terminate the Class Members without pay or notice for these acts;
>
> (C) impermissibly restricting the Class Members' entitlements to notice and pay in the event of a group termination; and
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> (D) impermissibly allowing the Defendants to calculate the Class Members' entitlements to pay upon termination in a forward-looking manner ("pay in lieu") not contemplated by the BC *Employment Standards Act*, via the Without Cause Clause.
>
> (b) In the alternative, those termination clauses which are binding were, nonetheless, breached and contractual damages are due as because of that breach.
>
> (c) For all other Class Members, the common law mandates that it was an implied term of their Employment Contract that each of them was entitled to reasonable notice of termination.

[16] I will refer to the four allegations in (A) to (D) above as the "Void Claims". If successful, any one would result in the Termination Clause being void. Void Claims (A) and (B) concern portions of the Handbook. Mr. Linza argues that the Probation

Clause and the Just Cause Clauses in (A) and (B) violate the *ESA*, and therefore make the Termination Clause void. Void Claims (C) and (D) concern the Termination Clause itself.

[17] Housing argues that the Void Claims concerning the Handbook are still not sufficiently pleaded because Mr. Linza pleads only that at the time of the proposed class members' terminations, they were "subject to the Defendants' employment policies", including the Handbook, and not that the Handbook was part of each employee's employment contract. Mr. Linza has pleaded only that the Handbook was "provided generally" to proposed class members "during their orientation". Housing submits that this "would be after the employment relationship has crystalized" and therefore could not be part of the employment contract. Housing also submits that Mr. Linza has not pleaded any additional facts with respect to Void Claim (D) that concerns the Termination Clause.

[18] Mr. Linza submits that when the proposed class members received the Handbook is immaterial at this stage. The pleadings are assumed to be true. The plain language of the pleadings and the heading "The Employment Terms" show that Mr. Linza is pleading that the Handbook formed part of the terms of employment. With respect to Void Claim (D), he has pleaded that the Termination Clause is void for its impermissible manner of calculating entitlement to pay upon termination in a forward-looking manner.

[19] In my view, the FANOCC sufficiently pleads the material facts and legal basis upon which the Void Claims are being pursued. Reading the pleadings generously, I find that for the reasons given by Mr. Linza, the allegation is that the Handbook forms part of the employment contract. The allegation that the Handbook was given to the employees during their orientation, does not necessarily mean that it did not form part of the contract. I will return to this below. I also find that the FANOCC pleads the factual allegations concerning the Termination Clause itself, although some of this is found in the Legal Basis section. The FANOCC pleads that the Termination Clause impermissibly restricts payments to s. 63 in the event of group

termination, and impermissibly calculates entitlement to pay in lieu in a "forward-looking manner" for individual terminations.

[20] Housing's main argument is that the court should strike the Void Claims because, as a matter of law, they are bound to fail. Housing argues that: (a) the court has a gatekeeping function at certification; and (b) previous binding or persuasive case authority either on all fours with this case, or in similar circumstances, has dismissed all of those arguments. Housing analyzes each of the allegations on this basis. More specifically, Housing argues that it is plain and obvious that the Void Claims will fail because the employment contract does not impermissibly:

a) extend the probationary period because: (i) the Handbook does not form part of the employment contract; and (ii) in the alternative, the Probation Clause is severable;

b) expand the scope of what constitutes just cause for termination because: (i) the Handbook does not form part of the employment contract; (ii) in the alternative, the Just Cause Clauses cannot be reasonably interpreted to expand the scope of what constitutes just cause pursuant to the *ESA*; and (iii) in the further alternative, the Just Cause Clauses are severable;

c) restrict a production employees' entitlements to notice of termination or pay in lieu, in the event of group termination; and

d) provide for the calculation for compensation pay in lieu of notice for individual termination, in a manner other than contemplated by the *ESA*.

[21] In reply, Mr. Linza argues that Housing is impermissibly asking the Court to weigh evidence in order to invalidate the pleadings and assess the merits of the claims. Housing's lengthy submissions speak to the fact that there are triable issues. Mr. Linza points to contrary case authorities and distinguishes cases relied upon by Housing.

[22] For the reasons below, I find that it is not plain and obvious that Void Claims (A) and (B) are bound to fail. The arguments advanced by Housing are not issues of law, but involve issues of mixed fact and law and contested facts that cannot be considered under s. 4(1)(a) of the *CPA*. I find that it is not plain and obvious that Void Claim (C) is bound to fail as there are arguments that the case authorities cited by Housing are distinguishable. Finally, I find that Void Claim (D) can be determined on the pleadings, and that it is bound to fail.

[23] Whether pleadings disclose a cause of action is an issue of law: *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2021 BCCA 85 at para. 30. The cases cited by Housing that discuss s. 4(1)(a) of the *CPA*, the gatekeeping function of courts, and the ability to strike pleadings, reflect this: *Finkel v. Coast Capital Savings Credit Union*, 2017 BCCA 361 at para. 18; *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, at para. 18.

[24] In *Sharifi v. WestJet Airlines*, 2022 BCCA 149, the Court discussed the application of the s. 4(1)(a) test in the context of statutory interpretation, which is a question of law. At para. 38, the Court cited *Trotman v. WestJet*, 2022 BCCA 22, in which then Chief Justice Bauman stated:

> [46] … While the burden is on the plaintiff, the bar is not high. Where the question turns on statutory interpretation, "if it is arguable," the certification judge should not engage in a merits-based analysis. The gate-keeping role of the certification judge at this stage is to avoid squandering judicial resources when it is clear that the correct statutory interpretation would leave the pleadings bound to fail. This could be the case where there is previous binding case law squarely on point or where the interpretive exercise is so straightforward the answer is plain and obvious even without previous case authority.
>
> [Emphasis in original.]

[25] Contractual interpretation is usually a question of mixed fact and law: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [*Sattva*] at para. 50. A judge must "read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": *Sattva* at para. 47.

[26] In *Sherry v. CIBC Mortgages Inc*., 2016 BCCA 240 [*Sherry #1*], the Court discussed the application of the s. 4(1)(a) test in the context of contractual interpretation. *Sherry #1* concerned prepayment clauses in a standard form mortgage. Justice Newbury for the Court struck two allegations as disclosing no viable claim. The first allegation was that there were discretionary aspects of the prepayment clauses that made them void due to uncertainty. The chambers judge had reviewed conflicting Australian and Canadian jurisprudence, and determined that she could not conclude that the allegation was bound to fail. Justice Newbury concluded that the Canadian authority was binding, and that the allegation that the prepayment clauses were void by reason of the lender's discretion, was bound to fail: at para. 66. The second claim was breach of contract based on an alleged miscalculation of the prepayment amount by not discounting it to present value. This argument had been rejected in a prior BC Court of Appeal decision concerning a similar clause. Justice Newbury concluded that the Court's ruling in that prior case "provides a full answer" to the assertions, and the claim was bound to fail as the trial court and the Court of Appeal would be bound by that previous decision: at paras. 71, 77, 92 and 95. Justice Newbury addressed the chambers judge's reasoning that this was a matter of contractual interpretation, the two clauses were not identical, and therefore it could not be determined that the claim was bound to fail:

> [76] With respect, the judge failed to give effect to the fact that as a matter of law, the two clauses are functionally equivalent. Although contractual interpretation is now said to be a matter of mixed fact and law (see *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC 53 at para. 50), we are concerned here with standard form contracts that are not individually negotiated or written. Thus the factual matrix is much less important than the contractual terms. …

[27] Subsequently, in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, the majority of the Supreme Court of Canada, recognized an exception to the holding in *Sattva*, stating that for standard form contracts "where the interpretation is of precedential value and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process", the interpretation may

be a question of law: at para. 24. See also *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198 at para. 82.

[28] The Void Claims involve contractual interpretation. Whether the Void Claims fall within the exception in *Ledcor* and can be decided on the pleadings alone as a question of law, or whether the Void Claims raise issues of mixed fact and law which can only be decided on evidence and an examination of the surrounding circumstances, lies at the base of the parties' different positions. I turn to those now.

Void Claims (A) and (B)

[29] With respect to the Probation Clause and the Just Cause Clauses, Housing first argues that the Handbook does not form part of the employment contract, so the claims regarding those clauses fail from the start. I have found that the FANOCC does plead that the Handbook was part of the employment contract. When determining whether s. 4(1)(a) has been met, the facts pleaded are assumed to be true unless they are patently unreasonable or incapable of proof.

[30] The allegation that the Handbook is part of the contract is not patently unreasonable. One of Housing's arguments is that a passage in the Handbook states that it will be given to the employees during the orientation procedure. From this, Housing argues that the Handbook "would be [given] after the employment relationship has crystalized", and therefore it cannot be part of the employment contract. Although the Handbook may be incorporated by reference into the pleadings, it cannot used to prove contested facts through inadmissible hearsay evidence. That must be the subject of admissible evidence at trial or summary trial. Further, there are other facts that suggest that the Handbook may have been known to the employees prior to the employment contract in issue. The Handbook was referenced in an earlier nearly identical contract for production employees, and is referenced in the contract presently in issue.

[31] Housing's next argument concerns Void Claim (B) only. Housing argues that the Just Cause Clauses cannot be reasonably read as expanding the scope of what constitutes just cause for termination, and therefore are not void. The Just Cause

Clauses are found in the Code of Conduct Policy (the "Code") in the Handbook. The Code is five pages long. It has a clause which states:

> Any employee who violates the provisions of the Code will be subject to disciplinary action including, in appropriate cases, dismissal for cause. Any employee who engages in theft or fraud is subject to discipline up to and including immediate dismissal for cause and prosecution under the law. In addition, any employee may be subject to dismissal for violations of the intent of this Code.

[32] Mr. Linza argues that the violation clause on its face is illegal as it purports to permit termination for things such as practical jokes or horseplay referenced in the Code. It permits dismissal for violating the "intent" of the Code. This particular sentence does not state "up to dismissal" or "in appropriate cases". Mr. Linza submits that these are contrary to the principles in *McKinley v. BC Tel*, 2001 SCC 38, where the Court held that dishonesty will not always constitute just cause for dismissal. Rather, dismissal must be proportionate to the alleged misconduct, upon consideration of all of the surrounding circumstances of a particular case, including its level of seriousness, and the extent to which it impacted the employment relationship: at paras. 55–56. Mr. Linza submits that at this preliminary stage, the Court should not search for a valid and legal meaning.

[33] Housing argues that the term "just cause" is not defined in the *ESA*. It emphasizes the permissive language of the violations clause that will only apply in "appropriate cases". There is no unfettered right to dismiss for breaching the Code. Housing submits that if there is any ambiguity, the language will be interpreted to comply with the law, and this would be "an issue of contractual interpretation".

[34] In my view, Mr. Linza's allegation with respect to the Just Causes Clauses involves a matter of contractual interpretation, where the surrounding circumstances may be important. The issue cannot be determined on the pleadings alone. As stated in *Sattva*, contractual interpretation is inherently fact specific to determine the objective intent of the parties: at para. 47, 55. Housing did not argue that there was any binding case authority on all fours that upholds the Code and the Just Cause

Clauses, and which would make this issue functionally equivalent to a question of law.

[35] Housing did not make any argument as to whether Void Claim (A) concerning the Probation Clause is bound to fail. In my view, it is not plain and obvious that this claim is bound to fail. The Probation Clause refers to 480 hours as the probationary period during which the employer may terminate employment without notice or pay in lieu of notice. Section 63 of the *ESA* states that compensation for length of service becomes payable after "three consecutive months of employment".

[36] Finally, with respect to Void Claims (A) and (B), Housing argues that if the Probation Clause and the Just Cause Clauses form part of the contractual terms, and if they breach or potentially breach the *ESA*, the allegations concerning them are bound to fail because there is a severability clause in the employment contract.

[37] The severability clause states:

> 42.1 Should any provision or provisions in these Terms of Employment be determined to be illegal, void or unenforceable, it and they will be considered separate and severable from these Terms of Employment and its remaining provisions will remain in force and be binding upon the parties.

[38] Housing argues that *Miller* v*. Convergys CMG Canada Limited Partnership*, 2014 BCCA 311 at para. 15, leave to appeal to SCC refused, [2014] S.C.C.A No. 424, makes it plain and obvious that the severability clause would apply to sever the Probation Clause and Just Cause Clauses, and they therefore could not be a basis for finding the Termination Clause is void.

[39] In *Miller*, the employee had a termination clause very similar to the Termination Clause in issue here which the Court found was compliant with the *ESA*. The employee argued that this clause was inextricably linked to a probation clause in his contract, which in his submission, was non-compliant with the *ESA* and applied to him. Although the probationary clause imposed a probationary period of 90 days, the employee argued the probationary clause's application to him in a new position with the company he had been employed with for years, violated the *ESA*. The Court concluded that it did not need to determine whether the probation clause

had been intended to apply to the employee or had been inadvertently included in the contract as “boilerplate”, because it was subject to a valid severability clause, which distinguished it from other cases: at para. 40.

[40] In *Miller*, Justice Neilson reviewed the test for severance in Fridman, *The Law of Contract in Canada*:

> …The true test for determining whether severance is possible is whether the subtraction of the void part of a contract affects the meaning of the remainder, or merely the extent. …

[41] The Court found that the parties had anticipated the possibility of severance, and had chosen contractual language to govern this eventuality. The starting point was to give effect to what the parties reasonably intended: at para. 42. The clear intent of the severability clause was that if one clause was invalid, the balance of the contract would remain enforceable to the extent possible: at para. 43. The severability clause should therefore be given effect if possible, bearing in mind the test in Fridman. The issue was whether the removal of the probation clause affected the substance of the remainder of the contract. The answer did not depend on the “similarity of subject matter” but “on the impact of severance on the scope and intention” of the contract: at para. 44. The Court concluded:

> [45] I am satisfied the trial judge made no error in concluding the probation clause could be severed from the Agreement. Its removal has no impact on the termination clause, the balance of the contract, or the employment relationship. By stipulating notice in accordance with the Act, the termination clause retains a virtually identical term regarding absence of notice for the first three months of employment. Thereafter, the requirement for notice in accordance with the Act is clear, and unaffected by the severance of the probation clause. Nor does the removal of that provision have any impact on the other terms of the Agreement.
>
> [Emphasis added.]

[42] In reply, Mr. Linza argues that whether or not an illegal clause is severable, is a matter of contractual interpretation and the weighing of evidence. In any event, other appellate authorities have confirmed that severability clauses in similar contexts to the one in this case, cannot have any effect on clauses of an

employment contract that have been made void by statute, as affirmed in *Waksdale v. Swegon*, 2020 ONCA 391.

[43] In *Waksdale*, the employment contract contained a Termination for Cause provision that did not comply with Ontario's employment standards legislation ("OESA"), and a separate Termination with Notice provision that did comply. The employer argued that these were two discrete termination provisions that apply to different situations, and that there is no reason the invalidity of one should impact the other. Further, there was a severability clause. The Court rejected those submissions:

> [10] We do not give effect to that submission. An employment agreement must be interpreted as a whole and not on a piecemeal basis. The correct analytical approach is to determine whether the termination provisions in an employment agreement read as a whole violate the ESA. Recognizing the power imbalance between employees and employers, as well as the remedial protections offered by the ESA, courts should focus on whether the employer has, in restricting an employee's common law rights on termination, violated the employee's ESA rights. While courts will permit an employer to enforce a rights-restricting contract, they will not enforce termination provisions that are in whole or in part illegal. In conducting this analysis, it is irrelevant whether the termination provisions are found in one place in the agreement or separated, or whether the provisions are by their terms otherwise linked. Here the motion judge erred because he failed to read the termination provisions as a whole and instead applied a piecemeal approach without regard to their combined effect.

[44] The Court declined to apply the severability clause to termination provisions that purport to contract out of the OESA, stating that a severability clause cannot have any effect on clauses that have been made void by statute, and citing *North v. Metaswitch Networks Corporation*, 2017 ONCA 790, 417 D.L.R. (4th) 429.

[45] In *North,* the trial judge had used the severability clause to excise what she found to be the offending part of a termination clause that did not comply with the OESA. The Court of Appeal found this was an error of law. The Court declined to follow *Miller*, stating:

> [40] The problem with this approach is that, to the extent that it effectively rewrites or reads down the offending provisions, it has the very effect referred to by Iacobucci J. in *Machtinger* – employers will be incentivized to contract out of the *ESA* but include a severability clause to save the offending

> provision in the event that an employee has the time and money to challenge the contract in court. …

[46] *Waksdale* was followed in *Rahman v. Cannon Design Architecture Inc.*, 2022 ONCA 451 at para. 30, where the Court stated that it has "repeatedly held that if a termination provision in an employment contract violates the *ESA* all the termination provisions in the contract are invalid." *Waksdale* has been referred to in our Court of Appeal in *Egan v. Harbour Air Seaplanes LLP*, 2024 BCCA 222, but only for the proposition that the validity of a term must be assessed at the time the parties entered into the contract.

[47] I am not satisfied Void Claims (A) and (B) are bound to fail because there is a severability clause. In my view, it is arguable that *Miller* is distinguishable on its unique facts. A case "only stands for a proposition in the context of the facts on which the decision was made": *Watson v. Bank of America Corporation*, 2015 BCCA 362, at para. 51. *Miller* does not hold that every severability clause is effective to remove clauses that breach the *ESA*. It held that the approach was to determine what the parties intended and to give effect to that intent to the extent possible while applying the test for severability.

Void Claims (C) and (D)

[48] I turn to the Void Claims (C) and (D) which allege that the Termination Clause itself is contrary to s. 63 and s. 64 of the *ESA* and therefore void. Neither Mr. Linza nor Housing argue that any fact or surrounding circumstance could have an impact on the interpretation of the Termination Clause. There is evidence that the production employee contracts were the same. Although not on the same scale as a standard form contract used in thousands of transactions, there is no evidence these were individually negotiated contracts. For these reasons, this is closer to a question of law, than a question of mixed fact and law.

[49] For Void Claim (C), Mr. Linza argues that the Termination Clause breaches s. 64, as "on its face" it only gives "an" employee s. 63 benefits upon that employee's termination, and not s. 64 benefits, and it purports to "fully discharge" the employer's

"severance obligations" under the *ESA*. For convenience, I again replicate again the Termination Clause:

> 9.1 The Employer may terminate an Employee's employment without just cause, and will fully discharge its severance obligations by providing such Employee with the statutory notice and/or pay in lieu of notice (at the Employer's discretion), pursuant to the provisions of the BC Employment Standards Act, as amended from time to time.

[50] Housing also argues that the plain meaning of the Termination Clause is that it provides for only s. 63 benefits. However, Housing argues that the Termination Clause does not breach the *ESA* by not providing s. 64 benefits, and relies on *Forbes v. Glenmore Printing Ltd.*, 2023 BCSC 25, as well as appellate authority from Ontario on which the Court relied in that case. In the alternative, Housing submits that if s. 64 rights are covered by the Termination Clause, then the clause expresses an intention to comply with the *ESA* as a whole, and is not void.

[51] In *Forbes* at paras. 34 and 36, Justice Ahmad observed that s. 63 of the *ESA* has the same purpose as reasonable notice at common law – to provide a dismissed employee with a reasonable opportunity to seek suitable alternative employment – but that the objective of s. 64 of the *ESA* is different. Section 64 is purely statutory. There is no analogous common law right, and, therefore, no common law right to expressly oust by contract: at para. 39-40.

[52] The termination clause in *Forbes* at para. 3 provided as follows:

> […] After three consecutive years of employment Mr. Forbes would be entitled to three weeks notice or wages, plus one additional week's notice or wages for each additional year of employment to a maximum of eight weeks' notice or wages.

[53] The employee argued that by imposing an eight-week maximum for notice, the employer purported to circumvent the minimum notice requirements on group terminations imposed by s. 64, which voided the termination clause. Justice Ahmad rejected this argument, for two reasons: first, at para. 50, because "there was no express provision waiving the employer's obligation to comply with s. 64" and "a court will not imply a contractual right to circumvent the minimum notice

requirements of the *ESA* or to render terms of the contract in any other way that is contrary to the legislative requirements of the *ESA*"; and second, at paras. 57–58, relying on Ontario appellate authority, because "silence on severance pay did not denote an intention to contract out of" employment standards legislation, and the employer was still bound by the *ESA* to provide group termination benefits.

[54] In *Nemeth v. Hatch Ltd.*, 2018 ONCA 7, referred to by Justice Ahmad, the Court considered whether a termination clause contravened the OESA because it purported to contract out of the statutory entitlement to severance pay by the absence of any reference to this entitlement. The termination clause stated that the employee could be terminated on notice and that "the notice shall amount to one week per year of service with a minimum of four weeks or the notice required by the applicable labour legislation." The Court concluded that silence on severance pay (as opposed to notice) did not denote an intention to contract out of the severance pay provisions of the OESA, and thus that the termination clause was not void: at paras. 15–17.

[55] Justice Ahmad acknowledged that the clause before her did not expressly reference the *ESA*, unlike in *Nemeth*. However, she found that the key feature of the clause that made it similar to *Nemeth* was that it did not purport to expressly exclude any statutory notice requirements.

[56] In my view, contrary to the arguments of both Mr. Linza and Housing, there is an issue as to whether the Termination Clause excludes s. 64 benefits. However, assuming without deciding that issue, Mr. Linza's argument that the Termination Clause breaches s. 64 by limiting benefits to those in s. 63 only, is not bound to fail. It is arguable that both *Forbes* and *Nemeth* are distinguishable because the termination clauses in those cases are different. In *Forbes*, the clause does not refer to the *ESA*, and is silent as to s. 64. In *Nemeth*, the termination clause referred to notice under the applicable labour legislation, and was silent as to any severance payable. In contrast, the Termination Clause here states that the notice or pay in lieu

will “fully discharge” the employer’s severance obligations under the *ESA*. This is arguably not silence regarding s. 64 benefits.

[57] I turn to Mr. Linza’s final Void Claim (D). I find the issue concerning this claim is tantamount to a question of law for two reasons. First, both Mr. Linza and Housing argue that a straightforward reading of the Termination Clause itself shows that it does or does not breach s. 63 the *ESA*. Neither Mr. Linza nor Housing argues that any fact or surrounding circumstance could have an impact on the interpretation of the Termination Clause. Second, I find that as a matter of law, the Termination Clause is functionally equivalent to the termination clause which was upheld in *Miller* as not offending s. 63. It would be contrary to this Court’s gatekeeping function to not strike this allegation as disclosing no reasonable claim.

[58] Mr. Linza submits that the Termination Clause breaches s. 63 because on a plain reading, “pay in lieu of notice” is forward-looking and contrary to the calculation of termination pay in s. 63 which is backward-looking. The calculation of compensation payable is set out in s. 63(4) which provides:

> (4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by
>
> > (a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,
> >
> > (b) dividing the total by 8, and
> >
> > (c) multiplying the result by the number of weeks' wages the employer is liable to pay.

[59] Mr. Linza argues that the “pay in lieu of notice” in the Termination Clause does not refer to the statutory pay required, but instead refers to the amount the employee would have worked in the future notice period. Mr. Linza submits that because these are hourly employees, their hours may vary, and this forward-looking calculation under the Termination Clause could be different than a backward-looking calculation under the *ESA* if the employee was going to work less in the future. Mr. Linza submits that even the potential for a contractual clause to provide less

than the *ESA* is sufficient to render the Termination Clause void: *Shore v. Ladner Downs*, 1998 CanLII 5755 (BC CA)

[60] Mr. Linza submits that this is similar to the circumstances in *Waddell v. Cintas Corp.,* 2001 BCCA 717 where a termination clause calculated pay in lieu of notice in a forward-looking manner, different from the *ESA*. Anticipating Housing's argument, Mr. Linza also distinguished *Miller* in which the Court upheld a similar termination clause as not offending the *ESA*. Mr. Linza argued that *Miller* involved a salaried employee with no variable pay. As such, the issue never arose and was never considered by the Court.

[61] Housing argues that on a plain reading, the Termination Clause does not mandate that the employer calculate entitlement to pay in lieu of notice in a "forward-looking" manner, contrary to the formula provided in s. 63(4) of the *ESA*. Housing distinguishes *Waddell* on which Mr. Linza relies.

[62] I find that Void Claim (D) is bound to fail. I agree that the potential for a contractual term to provide less than the *ESA* benefits is sufficient to void that term. I also acknowledge that if an employee is paid hourly and his or her work hours varied, it is possible that a statutory backward-looking formula and a contractual forward-looking determination of what the employee would have worked in the notice period, could be different.

[63] However, on a straightforward interpretive exercise, I cannot agree with Mr. Linza's interpretation of the Termination Clause. I disagree that "pay in lieu of notice" in the Termination Clause does not refer to the statutory pay in lieu of notice required by the *ESA*, but instead to a different contractual calculation of what an employee would earn in the future notice period. First, the words "notice or pay in lieu of notice" in the Termination Clause are preceded by the word "statutory". The word "statutory" qualifies both "notice" and "pay in lieu of notice". There is no indication that the word "statutory" only qualifies the first word "notice" and that the phrase "or pay in lieu of notice" which immediately follows it, refers to something entirely different, being what the employee would have worked in the future notice

period. Second the words “notice or pay in lieu of notice” are followed by the words “pursuant to the provisions of the BC Employment Standards Act”. These words also qualify the preceding words, making it clear that they refer to the statutory notice or statutory pay in lieu of notice required under the *ESA*. Third, the Termination Clause does not state “pay that the employee would have earned in the future notice period”. Finally, even if the interpretation advanced by Mr. Linza were possible, once notice is given to an employee, s. 67 of the *ESA* prevents an employer from altering an employee's wage rate, or any other condition of employment, without the written consent of the employee. “Conditions of employment” is widely defined in s. 1 of the *ESA* as “all matters and circumstances that in any way affect the employment relationship of employers and employees. It includes hours of work: *Ardakani (Re),* 2014 CanLII 149858 (BC EST). Therefore, the “pay in lieu of notice” in the Termination Clause is the same as the back-ward looking calculation in the *ESA*.

[64] *Waddell* is distinguishable on its facts. In *Waddell*, the termination clause expressly provided for termination in accordance with the OESA, and the Court was required to consider whether the clause complied with the *ESA*. Both statutes provided for the same notice periods; however, the OESA calculated the amount payable by considering what the employee would have made during the notice period, while the *ESA* based it on an average of the employee’s previous eight weeks’ wages. The Court concluded that the BC formula was potentially more favourable if the employee’s scheduled hours for the notice period were less than what they worked in the previous eight weeks. Therefore, the termination provision was void. No such language as in *Waddell*, exists in this case. The plain meaning of “pay in lieu of notice … pursuant to the provisions of” the *ESA* in the Termination Clause is that the pay will be calculated in the manner prescribed by the *ESA*.

[65] In *Miller*, the termination clause was:

> Convergys may terminate your employment for cause, or by providing you with notice, or pay in lieu of notice in accordance with the Employment Standards Act of British Columbia.

[66] The termination clause in *Miller* is functionally equivalent in law to the Termination Clause in this case. The employee in *Miller* had argued that the second comma in his termination clause led to two different interpretations and the clause therefore failed to clearly identify what notice he will receive. In rejecting that argument, the Justice Neilson stated:

> [52] I am unable to agree. The phrase "notice or pay in lieu of notice" is well-known in the field of employment law as the term that defines an employee's severance entitlement when dismissed without cause. I am satisfied a reasonable person would not let the position of a comma interfere with an interpretation of the termination clause, which is clearly intended to provide the traditional choice of notice or pay in lieu of notice for the period stipulated in the Act.

[67] Mr. Linza argues that the argument he is advancing here was not advanced in *Miller*. That is true, but I find that it is plain and obvious that Mr. Linza's claim is bound to fail on a plain reading of the Termination Clause. As Justice Groberman stated in *Scott v. Canada (Attorney General)*, 2017 BCCA 422 at para. 37, "an unarguable claim will not survive a challenge … simply because the plaintiff wishes to characterize it as 'novel'".

[68] In summary, the FANOCC adequately pleads a cause of action for wrongful dismissal, but Void Claim (D) is bound to fail and is struck. The FANOCC adequately pleads that the Termination Clause is void on the basis of Void Claims (A), (B) and (C). I find those allegations are not bound to fail. I have already found that the NOCC adequately pleads a claim that Housing is a common employer. The FANOCC which makes an addition to that claim, does not change that conclusion. Mr. Linza is granted leave to file the FANOCC as amended in accordance with these reasons.

Is there an Identifiable Class of Two or More Persons?

[69] At paras. 102 to 106 of the Reasons, I found that Mr. Linza's proposed class definition would require amendment to delete words that had made it impermissibly merits-based, consider the scope of employees to be included, clarify wording to use plain language, and remove unnecessary references.

[70] Mr. Linza has revised his proposed class definition and submits that it addresses the concerns raised in the Reasons. He now submits the following class definition:

> All persons employed by Triple M Modular Ltd. dba Metric Modular in the Agassiz, BC Facility under a contract of employment of indefinite duration who were terminated from their employment in the period May 1 to September 30, 2020 inclusive. This class does not include employees:
>
> a) who have executed a full and final release in favor of the Defendants; or
>
> b) who were dismissed for just cause.

[71] In the alternative, Mr. Linza submits the same class definition, except with the addition of a subparagraph to exclude non-production employees:

> c) who were not production employees.

[72] Mr. Linza submits that the proposed class is objectively and readily identifiable as employees were terminated *en masse*. Mr. Linza submits that the proposed class members are rationally linked to the common issues he proposes.

[73] Housing submits that the class definition still cannot be objectively determined and is overbroad. More specifically Housing argues:

a) the proposed class must be limited to production employees. There is no basis in fact for the claims of non-production employees as Mr. Linza has adduced no evidence for claims by them;

b) the determination of whether an employee was dismissed for just cause requires an individual analysis and determination on the merits with respect to each employee;

c) the proposed class definition must exclude: (i) employees who resigned from employment; (ii) employees who accepted a retention agreement with a fixed end date; and (iii) employees who accepted employment with Housing on the “Gibsons Project”; and

d) the word “Facility” is not defined and should be lower case.

[74] At para. 106 of the Reasons, I found that there is a basis in fact that there are two or more individuals who fall within the proposed class. In my view, there is a rational connection between the 92 production employees and the common issues which are proposed, which relate to whether Housing is a common employer and whether the Termination Clause is void, resulting in either contractual or common law damages. There is a basis in fact that the production employees have an employment contract with the Termination Clause. There is also a basis in fact that the Handbook applied to production employees. The Handbook forms part of Mr. Linza's claim that Housing is a common employer.

[75] In my view, the non-production employees cannot be part of the proposed class as there is no rational connection between them and the proposed common issues. There is no basis in fact that the non-production employees share anything other than an interest in the result of a finding that Housing is a common employer. There is no basis in fact that the non-production employees share the same circumstances as those alleged by Mr. Linza as to why Housing is a common employer such that the issue could be determined on a class-wide basis with them. The Handbook, which forms part of the basis of Mr. Linza' claim of common employer, does not apply to non-production employees. There is no evidence of the non-production employees' employment contracts or whether they contain a Termination Clause.

[76] In my view, an individual analysis will not be required for each employee to determine whether that employee was dismissed with or without cause. There is no evidence to support that any employee in this time period was dismissed for cause. However, if there were terminations for cause, it appears likely it would involve a very small number. While this may require an individual determination, in my view, that could easily be accommodated within the *CPA* procedures. In *Gregg v. Freightliner Ltd.,* 2003 BCSC 241, the Court approved "for just cause" language in the class definition. In *Webb v. K-Mart Canada Ltd.* (1999), 45 O.R. (3d) 389, 1999 CanLII 15076 (Ont. S.C.J.), the Court approved "persons *proven* to have been

terminated for just cause". In this way, persons alleged to be so excluded would stay in the class until Housing proved otherwise in the adjudication process.

[77] I agree that the proposed class must exclude employees who resigned from employment and that it would be prudent to make clear that clear. There is no evidence to conclude that all employees who accepted a retention agreement with a fixed end date, and those who accepted employment on the Gibsons Project, necessarily gave up rights under their original contracts of employment but some did. This would require further submissions and evidence. I agree the word “Facility” is not defined and should be lower case.

[78] In summary, the second definition proposed by Mr. Linza that limits the proposed class to production employees is generally suitable, subject to the points raised above regarding just cause, employees who accepted a retention agreement, and those who accepted employment on the Gibsons Project. Had I determined certification was appropriate, I would have done so conditionally subject to submissions of counsel to suitably refine the class definition.

Do the Claims of the Proposed Class Members Raise Common Issues?

[79] At the original application, Mr. Linza proposed the following common issues:

> #1: Are the defendants common employers?
>
> #2: Was the employment of each of the class members subject to a contract that was terminable without cause only upon contractual notice?
>
> #3: Did the defendants terminate the employment contracts of the class members without notice or cause?
>
> #4: Are the class members entitled to damages from the defendants equal to the compensation they would have earned during a period of contractual notice?
>
> #5: Are the class members entitled to punitive damages?

> #6: Should this Court lift the corporate veil to affix liability to Housing?

[80] At paras. 132–146 of the Reasons, I found that proposed common issues #2 to #4 did not significantly advance the litigation. Proposed common issue #3 was a common issue, but given the evidence and submissions, I anticipated there would likely be an admission if certified. Given Housing's latest submissions with respect to the class definition and some employees potentially being terminated for cause, I would include that issue as a further proposed common issue if this matter were certified. At paragraph 150, I found that there was no basis in fact to support proposed common issues #5 and #6.

[81] At para. 125–131 of the Reasons, I concluded that the proposed common issue #1 was framed too broadly, that it contained non-production employees, and it could necessitate individual trials. Mr. Linza had submitted that he could craft common issues on the basis of something narrower, and that the issue could be advanced and determined only on the basis of "common" as opposed to individual circumstances. In the interests of justice, I permitted him to apply to amend his pleadings and reformulate his proposed common issues to something narrower.

[82] Mr. Linza now seeks certification of two proposed common issues:

> #1: Are the defendants common employers of the class members?
>
> #2: Are the written contracts of the class members void on their face for failing to provide the minimum entitlements under s. 63 and s. 64 of the *ESA*?

Proposed Common Issue #1: Are the defendants common employers of the class members?

[83] At paras. 61–65 of the Reasons, I summarized the legal principles which guide the assessment of whether a party is a common employer. It is an issue of contractual formation, being whether in all the circumstances the plaintiff and the alleged common employer had entered into a contract of employment: *Sinclair v. Dover Engineering Services (1987)*, 11 B.C.L.R. (2d) 176, 1987 CanLII 2692 (S.C.),

aff'd [1988] B.C.J. No. 265, 1988 CanLII 3358 (C.A.), at para. 9. As discussed at para. 63 of the Reasons:

> [63] Simply being a related corporation does not make a corporation a common employer. A related corporation will be found to be a common employer only where it is established that there was an intention to create an employer/employee relationship between the employee and the related corporation. This is a question of contractual formation. The parties' subjective thoughts are irrelevant. The question is assessed objectively: "did the parties objectively act in a way that shows they intended to be parties to an employment contract with each other, on the terms alleged?". What is relevant is "how each party's conduct would appear to a reasonable person in the position of the other party.": *O'Reilly v. ClearMRI Solutions Ltd.*, 2021 ONCA 385, at paras. 2, 49–65, leave to appeal to SCC ref'd, 39834 (10 March 2022).

[84] At this hearing, Mr. Linza proposes the same broad issue as he did at the original hearing, which is the ultimate issue, but not anything narrower such as common issues of fact related to the common employer issue. Mr. Linza argues this proposed common issue could be determined on the basis of the employment contracts and Handbook and what he alleges were the circumstances and representations "to all persons" which closely mirrored the alleged facts in paras. 23 and 24 of the FANOCC. He argues that Housing did not sufficiently make clear to the employees that it and Modular were separate corporations. Consistent with this argument, as previously noted, he proposes to amend para. 38 of the NOCC to include the allegation of fact that "the Defendants consistently represented themselves to all persons as common employers".

[85] Mr. Linza argues that there is a sufficient basis in fact that the following circumstances and representations are common across the class:

a) Modular and Housing have common directors, owners, and/or management and "share employees";

b) Modular and Housing hold themselves out as the Triple M Group of Companies;

c) The policies by which Modular and Housing expected the proposed class members to abide by included the Handbook, which:

   i. defines the employer interchangeably as “Triple M Modular”, “Metric Modular", “Triple M Modular Ltd. dba Metric Modular”, “Triple M”, “the Triple M Group of Companies”, and “Triple M Housing” and describing all of the foregoing as “one of the largest commercial modular companies in North America”;

   ii. describes the employees as “Triple M employees” and refers to “our benefit program” with the word “our” being a reference to the Triple M group of companies;

   iii. describes the employer as “Triple M Housing based in Lethbridge AB” and as the “parent company" and describes the Agassiz plant as a “facilit[y]”;

   iv. refers to the protection of “Metric Modular” but also "its affiliates" within several restrictive covenants;

   v. requires employees to adhere to BC and Alberta legislation, notwithstanding that Modular was ostensibly, exclusively based in BC;

   vi. imposes many policies upon the employees, some of which are exclusively ascribed to “Triple M” (such as the “Protection of Personal Information (Privacy) Policy") whereas others are said to pertain exclusively to "Metric Modular” (for example the “Drug and Alcohol Policy”);

d) Modular and Housing “admit” that Triple M Modular Ltd. “carried on business” under the name Metric Modular and refer to Triple M Modular Ltd. as Metric Modular;

e) Both Modular and Housing have the registered and records office located at the same legal firm in Vancouver;

f) Modular is the sole proprietor of Metric Modular;

g) Modular and Housing own social media posts which hold themselves out to the world as interchangeable entities;

h) Modular and Housing "consistently made similar representations via presentations, written communications, emails (including stock signature lines) and a variety of other written communications with employees;

i) communications published by the Modular and Housing described Housing as the employer and the other entities as 'divisions';

j) in the case of Metric Modular, having the slogan "A Triple M Company" displayed on its logo;

k) the road-side sign in front of the Penticton facility, had the words "Metric Modular" and "Triple M Housing";

l) a press release from the website "metricmodular.com" states that Housing and Metric Modular have "join[ed]" and details how they operate as one company;

m) Modular and Housing would ship all of their products in custom branded wrap with the "Metric Modular" and the "Triple M Housing" logos on them;

n) Modular and Housing used the Agassiz facility to conduct Housing business including, without limitation, board meetings;

o) Modular and Housing used Modular employees on Housing projects, including projects outside of BC without any additions or changes to their existing employee contracts;

p) Modular and Housing sent employees on multiple work trips to a Housing worksite in Lethbridge and continued to pay them through Modular for those work trips;

q) Modular and Housing “routinely treated employees of one corporation as interchangeable with employees of the others. This includes, without limitation, Sim Bains, Rick Weste, Rod Weinkauf and Miguel Verstaskis”; and

r) in the bankruptcy proceeding, Modular assigned a BC Housing Contract in Gibson, BC, to Housing on the basis that Housing was a “related party” as defined by s. 65.13(5) of the *BIA*. According they had “admitted” they are related.

[86] Mr. Linza submits that the way Housing held itself out to the world is enough to establish a common employer relationship and can be determined on a common basis.

[87] For the reasons that follow, which are largely the reasons given by Housing, I conclude that Mr. Linza has not established there is some basis in fact that there are common class-wide circumstances and representations that would enable the common employer issue to be answered in common across the class. In my view, this proposed common issue would inevitably break down into individual trials.

[88] Mr. Linza has continued to frame the proposed common issue broadly as the ultimate issue and has not narrowed it, or addressed the concern identified at the first hearing. He has not, for example, identified common issues of fact that would advance the litigation. Instead, Mr. Linza proposes to certify the common employer issue solely on the basis of alleged facts that purport to show that Modular and Housing held themselves out “to all persons” as interchangeable entities.

[89] The test for common employer cannot be limited in that fashion. Whether an employment contract was formed involves the manifest objective intentions of the employee and the alleged employer in all the relevant circumstances. Mr. Linza cannot choose certain alleged circumstances and representations of how Housing allegedly held itself out, and from that alone, argue that a common employer relationship is established.

[90] Mr. Linza cannot limit Housing's ability to inquire into and present other relevant circumstances. While the test for common employer involves the objective evaluation of whether the individual employee and alleged employer would have understood an employment relationship to exist, the objective evaluation is applied to the individual circumstances and representations made to each particular employee. The alleged common circumstances and representations can only aid the common employer analysis on a class-wide basis if each employee was exposed to the same common circumstances and representations.

[91] Further, there is no basis in fact that many of the alleged representations and circumstances are common across the class. For example, there is no basis in fact that all or even most production employees were aware of the alleged social media posts, the signage at the Penticton facility, where board of directors' meetings took place, and the circumstances described by the three non-production employees, Calvin Benson, Gary Dewhirst, and Nicolas Laan. I acknowledge that there is a basis in fact that some alleged circumstances are common across the class. There is a basis in fact that the Handbook was given to each production employee, but Housing would still be entitled to question each employee whether they read the Handbook, and how that informed their alleged reasonable belief that Housing was their employer.

[92] Mr. Linza's proposal does not prevent the claims from breaking down into individual trials. Housing would be entitled to question each employee as to their knowledge of the alleged circumstances and representations alleged by Mr. Linza as establishing a common employer relationship, as well as all the other potentially relevant circumstances which might inform that determination. For example, Housing would be entitled to make inquiries into each employee's job title and duties, what may have been said to the employee at hiring and during the employment, whether the employee read the employment contract which is with Modular, who paid the employee, any interactions with representatives of Housing, and any involvement with the business of Housing. There may be credibility issues for some of these, requiring other evidence. As Housing points out, about half of the proposed class

filed complaints with the Employment Standard Branch, and some of those complaints may not be consistent with the allegations here. These issues could only be meaningfully explored in cross-examination at trial, and possibly require an examination for discovery.

[93] Currently, there are seven related individual actions which have been filed outside this litigation, and they (along with the employee affidavits which were filed on this application) exemplify the conclusion that determination of the common employer issue would require individual trials. Proposed class counsel in this action is counsel of record in those seven actions. Four of those seven actions claim additional "specific indicia of common employer status" and each is unique to each of the plaintiffs.

[94] Housing referred to a number of case authorities in the employment context where certification was dismissed on the basis that the issues required individual determination. None of them concern the issue of whether a party was a common employer. However, they are illustrative of the many facets of an employment relationship that are individual. The reasoning and discussion in the "overtime" cases where employees alleged that their positions were misclassified are instructive: *Brown v. Canadian Imperial Bank of Commerce*, 2014 ONCA 677; and *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445, 111 O.R. (3d) 745.

[95] In *Huras v. Com Dev Ltd.*,1999 CanLII 14861 (ON SC), O.J. No. 2560, the plaintiff sought to certify an action for breach of contract arising from the defendant employer's failure to provide shares to which entitlement was claimed under an employee stock option plan. The plan was not part of the written employment contracts, but the plaintiff argued that it was part of an employee handbook provided at orientation, and that the handbook constituted a term of employment. In my view, the comments of Justice Swinton are applicable to this case:

> [18] … in order to determine the terms of an individual's contract of employment and their entitlement to participate in the Plan, there will, of necessity, be an individualized inquiry to determine what was said in the course of the several interviews held with each individual. In determining that question, there will be important issues of credibility. For example, even with

> the named plaintiffs, there will be an issue as to whether they reasonably believed that they were members of the Plan, given that they never raised the fact of representations and entitlement with anyone in management throughout the years.
>
> [19] This is not a case where there has been a single representation to a group of people, and litigation can be moved forward by a determination whether the representation was misleading, as in *Peppiatt v. Nicol* (1993), 1993 CanLII 5485 (ON SC), 16 O.R. (3d) 133 (Ont. Gen. Div.). Rather, this is a case more similar to *Rosedale*, supra or *Mouhteros v. DeVry Canada Inc.* (1998), 1998 CanLII 14686 (ON SC), 41 O.R. (3d) 63 (Ont. Gen. Div.), where there have been a number of representations made to different individuals in different contexts. Most significantly, there is no common issue with respect to the content of the employment contract that will move the litigation forward in a legally meaningful way, as the Employee Handbook can not be considered in isolation from the larger factual context. …

[96] The common issue proposed by Mr. Linza will not avoid duplication of fact-finding or legal analysis. An individual determination for one member would not benefit another because of the individual nature of the inquiry. The finding could not be extrapolated and have an objective application across the class.

> **Proposed Common Issue #2: Are the written contracts of the proposed class members void on their face for failing to provide the minimum entitlements under s. 63 and s. 64 of the *ESA*.**

[97] There is some basis of fact that there is common issue across the class with respect to the Void Claims. The Probation Clause and the Just Cause Clauses are in the Handbook and there is a basis in fact that the Handbook was given to the production employees. There is a basis in fact that the Termination Clause is in the production employees' contract.

[98] Housing argues that to the extent the alleged breaches relate to the Handbook, this could not be a common issue as it would depend on if and when each individual production employee received the Handbook.

[99] In my view, that is something that could be addressed at a common issues trial. The 2018 employment contract in issue was preceded by a nearly identical 2017 employment contract which also explicitly addressed the Handbook. It may be that those employees who were hired prior to the 2018 contract will be in a different

situation than those who were hired after that contract came into existence, but if necessary, a sub-class could be created.

[100] I would amend the proposed common issue to better reflect the FANOCC as: Is the Termination Clause in the written employment contracts void as breaching s. 63 and/or s. 64 of the *ESA*?

Further Proposed Common Issue

[101] As discussed near the beginning of this section of these reasons, at the original hearing, Mr. Linza had sought to certify:

> #3: Did the defendants terminate the employment contracts of the class members without notice or cause?

[102] In the Reasons, I found that this was a common issue, but unlikely to advance the litigation significantly, as on the basis of the evidence and submissions, I expected that Housing would make the admission if the proceeding were certified. Given Housing's position at this hearing that all proposed class members may not have been terminated without notice and without cause, I would add a variation of this as a proposed common issue. There is some basis in fact that the proposed class members were terminated without notice and cause, and this can be determined on a class-wide basis. As discussed in the second criteria, if there are some employees which Housing alleges were dismissed for cause, those can be accommodated within the *CPA* procedures by modifying the class definition to put the onus on Housing to prove otherwise. I would amend the proposed common issue to: "Were the employment contracts of the class members terminated without cause, notice, and pay in lieu of notice?"

Summary

[103] In summary, the proposed common issues for which I find there is some basis in fact are:

a) Is the Termination Clause in the written employment contracts void as breaching s. 63 and/or s. 64 of the *ESA*?

b) Were the written employment contracts of the class members terminated without cause, notice, and pay in lieu of notice?

Is a Class Proceeding the Preferable Procedure?

[104] Section 4(1)(d) requires that "a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues". Section 4(2) states that in determining this, the court must consider all relevant matters including:

> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[105] The preferability analysis must be conducted through the lens of the three principal purposes of class proceedings: judicial economy, access to justice, and behavior modification: *Hollick v. Toronto (City),* 2001 SCC 68 at para. 27; *Pro-Sys Consultants v. Microsoft Corporation*, 2013 SCC 57 at para. 137. The preferability requirement has two concepts at its core: a) whether the class proceeding would be a fair, efficient and manageable method of advancing the claim; and b) whether the class proceeding would be preferable to other reasonably available means of resolving the claims of class members: *Hollick* at para. 28; *Rumley v. British Columbia*, 2001 SCC 69 at para. 35. The determination requires an examination of the common issues in their context, taking into account the importance of the common issues in relation to the claim as a whole: *Hollick* at paras. 28–31.

[106] For the reasons that follow, I find that a class proceeding would not be the preferable procedure for the fair and efficient resolution of the common issues. This is largely because the limited common issues do not predominate, will not establish liability, and will simply be the beginning of approximately 100 individual trials that

would be more practically and efficiently addressed by separate actions. I find that the preferable procedure is individual claims, whether in the Supreme Court or in the Provincial Court.

[107] The common issues do not predominate over any questions affecting only individual members. It is the opposite. Important individual issues predominate. As noted previously, whether Housing is a common employer is the most important issue as it determines liability, and it is not a common issue. It will require individual trials that examine the relationship between each employee and Housing.

[108] While I agree with Mr. Linza that the foundational cause of action is wrongful dismissal, the allegation that employees were dismissed without notice or pay in lieu of notice, is unlikely to be a significant issue. In terms of time or complexity, the issues concerning the Termination Clause pale in comparison to the individual issue of common employer which would have to be decided for every class member before there could be any possible recovery.

[109] After the common issues are decided, the bulk of the litigation will remain. Resolution of the common issues in favour of the proposed class will simply serve as the beginning of approximately 100 individual trials on liability, being the common employer issue, and possibly (if one of the Void Claims is successful) a full damages trial for wrongful dismissal considering the character of the employment, the length of employment, the age of the employee, and the availability of similar employment having regard to the employee's experience, training and qualifications: *Bardal v. Globe and Mail Ltd.* (1960), 24 D.L.R. (2d) 140 at 145, 1960 CanLII 294 (Ont. H.C.). It would also include a consideration of mitigation efforts, and any compensating payments. If the Void Claims are not successful, I do not expect a trial would be required for damages. An efficient method of determining those claims likely could be crafted. Section 7(a) of the *CPA* states that a court must not refuse to certify "merely" because the proceeding includes a claim for damages that would require individual assessment, but it does not prevent the Court considering the potential impact of individual damages assessments on the preferability analysis.

[110] There is nothing to indicate that a significant number of the members of the proposed class have indicated an interest in individually controlling the prosecution of separate actions. As note previously, currently there are seven outstanding individual claims which were filed and served in March 2023 by proposed class counsel under Rule 15-1, the “fast track” rule. However, the predominance of individual issues and variation in circumstances of proposed class members suggest that the employees may have an interest in controlling their own litigation after considering the merits and value of their claim. If an employee feels their circumstances indicate that they have a good claim against Housing as a common employer, they may well wish to proceed individually as it is likely that the claim will be heard earlier than in a class proceeding. I have also considered that once one case is decided on the Termination Clause, it will likely be a precedent for other claims.

[111] About half of the proposed class members filed complaints with the Employment Standards Branch, and those claims against Housing were dismissed. All the proposed class members pursued and obtained benefits through the Wage Earner Protection Program. These avenues of redress have been exhausted. There are no other avenues of redress other than a civil claim.

[112] Mr. Linza submits that individual class actions would:

a. be onerous and prohibitive for the members as individuals;
b. force Housing to defend multiple claims, rather than just one;
c. risk inconsistent findings;
d. take longer; and
e. waste scarce judicial resources.

[113] I am not persuaded that certifying this action as a class proceeding is less expensive and more expeditious than the alternative of individual actions, since a certified proceeding is largely going to break down into individual trials. I accept, as argued by Mr. Linza, that litigation can be expensive and complex, and that one benefit of a class action is the sharing of costs. Sharing those costs favours a class

action when the potential value of claims is relatively small. But that sharing becomes illusory if the litigation turns into, as it must in this case, individual trials for each class member. There may be some sharing of costs for the limited common issues, but I do not anticipate those taking significant court time. It follows that I do not agree with Mr. Linza's submissions that the number of claims, and their potential amounts, make a class proceeding the only practical means of providing meaningful access to justice.

[114] In my view, the administration of the class proceeding would likely create greater difficulties than those that would be experienced if relief were sought by individual actions. This is because I find it will largely become approximately 100 individual trials, possibly managed by one judge, limiting the resources to the parties.

[115] The predominance and complexity of the individual issues requiring separate trials undermines the benefits of judicial economy and access to justice. Judicial economy would not be achieved, because although approximately 100 actions would not have to be commenced, there would be 100 individual assessments on liability, and possibly on damages if any one of the Void Claims is successful. There are little, if any, savings. Delays are a significant concern when considering access to justice. Behaviour modification may be a factor, however, there is evidence that the closure of Modular and the termination of the proposed class was brought about by a business that was financially struggling when it was purchased by Modular, and the subsequent effects of the COVID-19 pandemic. Any financial consequence would be brought home through individual actions by those believing they have a basis to establish a contract of employment with Housing.

Is there an Appropriate Representative Plaintiff?

[116] As I have found that a class action is not the preferable procedure, it is not necessary to address this criterion, but I will do so briefly on what I consider to be the most significant basis which is related to the preferability analysis.

[117] Section 4(1)(e) of the *CPA* requires that there is a representative plaintiff who:

> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[118] Mr. Linza submits that he meets all three sub-criteria and Housing submits that he does not. I only need address the second sub-criteria in detail, as it is the one I find is critical.

[119] With respect to s. 4(1)(e)(ii), while the representative plaintiff "need not detail every step that will be required in the proceeding", they must "set out a framework for how the case may proceed and a plan to address the complexities of the case". The court should bear in mind that plans will likely require modification and therefore should not be scrutinized too closely: *Service v. University of Victoria*, 2019 BCCA 474 at para. 67.

[120] However, the plan must demonstrate that "the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case and plan to address them". This includes a plan for resolving individual issues: *Harrison v. Afexa Life Sciences Inc.*, 2016 BCSC 2123 at para. 70.

[121] In *Kafka v. Allstate Insurance Company of Canada*, 2011 ONSC 2305, aff'd, 2012 ONSC 1035, the Court described the requirements this way:

> [221] The production of a workable litigation plan serves a two-fold purpose: (a) it assists the court in determining whether the class proceeding is the preferable procedure; and (b) it allows the court to determine if the litigation is manageable: *Carom v. Bre-X Minerals Ltd.* (1999), 1999 CanLII 14794 (ON SCDC), 44 O.R. (3d) 173 (Sup. Ct.), aff'd (1999), 1999 CanLII 19916 (ON SCDC), 46 O.R. (3d) 315 (Div. Ct.), rev'd on other grounds (2000), 2000 CanLII 16886 (ON CA), 51 O.R. (3d) 236 (C.A.). The plan must provide sufficient detail that corresponds to the complexity of the litigation. The litigation plan will not be workable if it fails to address how the individual issues that remain after the determination of the common issues are to be addressed: *Caputo v. Imperial Tobacco Ltd.* (2004), 2004 CanLII 24753 (ON SC), 236 D.L.R. (4th) 348 (Sup. Ct.) at para. 76.
>
> [222] It is recognized that litigation plans are a work in progress and may have to be amended during the course of the proceeding: *Cloud* at para. 95.

[122] The litigation plan submitted by Mr. Linza is not adequate. The plan is fairly described as a statement that Mr. Linza will follow the *Supreme Court Civil Rules* as to the timelines, take the usual steps for discovery and preparation of the case, attempt to settle or have the common issues trial heard, and keep in contact with proposed class members. The only statement regarding individual issues is that he will "instruct [hi]s counsel forthwith to resolve any individual matters such as with respect to damages". The plan does not meaningfully grapple with how the individual issues will be addressed. More than this is required in a case such as this where there are significant individual issues. Here, the deficiencies in the litigation plan are in indicative of the difficulties I have described above.

Orders

[123] In summary, I grant Mr. Linza's application to amend his pleadings in the form of the FANOCC, but not including Void Claim (D).

[124] Not having satisfied s. 4(1)(d) and (e) of the *CPA*, Mr. Linza's application to certify this action as a class proceeding is dismissed.

"Norell J."