Court File No. CV-17-584523

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

KAREN WALMSLEY

Plaintiff

and

2016169 ONTARIO INC., 2170616 ONTARIO INC. and 2429131 ONTARIO INC., alone or together o/a Blyth Academy

Defendants

FACTUM OF THE PLAINTIFF

February 11, 2020

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PART I - INTRODUCTION

1. The Plaintiff ["Walmsley"] brings this motion seeking: (a) approval of the settlement agreement they entered into with the Defendants [together, "Blyth Academy"]; (b) approval of Class Counsel's fees, disbursements, and HST; and, (c) an honorarium payment of $6,000 given Walmsley's tireless work seeking justice for fellow teachers.

2. The Parties entered into a settlement agreement on November 27, 2019 [the "Settlement Agreement"] which provides Class Members with substantial compensation on account of unpaid statutory minimum amounts, such as damages for overtime hours worked. Class Members can access remedies through a simple process and receive compensation in early 2021. The Settlement Agreement is fair, reasonable, and it is in their best interests that it be approved.

3. The proposed Class Counsel fee is consistent with the contingency fee retainer agreement Walmsley entered into. The payment of a percentage fee from the total compensation fund paid by a Defendant is generally fair and reasonable, as it rewards Class Counsel a reasonable and proportionate share of the settlement proceeds. Moreover, in this case, Class Counsel's fees contain, within the contingent percentage, only a modest premium component, well below the typical premium "multiplier" courts have rightly endorsed as fair compensation to reward class counsel for the risks taken. These risks are ones which should be encouraged and rewarded to ensure that the class action vehicle continues to be a viable means of securing justice.

4. Finally, Walmsley is deserving of an honorarium for their efforts to secure justice for the Class. Walmsley was never advised that an honorarium might be awarded yet took on the task of Representative Plaintiff with courage and diligence. The proposed honorarium compensates them for that effort, and the amount requested is below ones this Court has endorsed previously.

5. The Orders sought are found in two appendices to the Settlement Agreement. Those Orders are reproduced at the end of this factum for the sake of convenience.

PART II - SUMMARY OF FACTS

6. On October 16, 2017, Walmsley issued the Statement of Claim here. It sought redress on behalf of all those who taught at least one course at Blyth Academy, save and except those who exclusively taught private or semi-private courses. The Claim was later amended to include those who exclusively taught private or semi-private courses.

7. Among other things, the Amended Claim sought payment for all damages that flowed from Blyth Academy's failure to properly classify its teachers as employees. This included claims for damages for overtime, minimum wage, public holiday pay, and vacation pay. The Claim also requested damages on account of the overtime hours that the employee teachers worked but were not compensated for.

8. On November 27, 2019, the Parties executed the Settlement Agreement. It provides for over $2.5 million in payments to Class Members. The Settlement Agreement is the end product of over two (2) years of contested litigation, four (4) days of mediation, and intense, arm's length negotiations. The Settlement Agreement provides for payments to be made to Class Members from a $2.5 million fund (or, in the case of a high take-up, $2.6 million), with each Class Member's payment tailored based on the number of contracts they worked, the timing of these, and the types of agreements they signed.

9. To receive payment, Class Members need only fill out and email a simple claims form. Blyth Academy will receive these, review their records, and send a notification letter to each teacher explaining its conclusions. If a Class Member disagrees with the conclusions, they can appeal. Once all appeals are complete, Blyth Academy will calculate the amount of each teacher’s payment using a pre-determined formula.

10. All throughout this adjudication, Class Counsel are provided constant updates and information so as to monitor the process.

11. Additional facts concerning the Settlement Agreement are outlined as we review the legal issues below. The Settlement Agreement and the key evidence for this motion are set out in the extensive Class Counsel affidavit.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

12. This motion raises three (3) issues:

> (1) Should the Settlement Agreement be approved (and, to implement it, should consent certification be granted)?;
>
> (2) Should Class Counsel's fees be approved?; and,
>
> (3) Should an honorarium of $6,000 for Walmsley be approved?

A. APPROVAL OF THE SETTLEMENT AGREEMENT

(i) The law relating to the approval of a settlement

13. Pursuant to s. 29 of the *Class Proceedings Act*, a class action may only be settled with the approval of a judge. The test for approving a class action settlement is whether, in all of the circumstances, the settlement is fair, reasonable and in the best interests of the class as a whole, taking into account the claims and defences in the litigation and any objections to the settlement. A settlement need not be perfect. It need only fall "within a zone or range of reasonableness".

> ***Class Proceedings Act, 1992*, S.O. 1992, c 6, s. 29; *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 2811 at ¶13 ("Dabbs") [Book of Authorities of the Plaintiff ("BA"), Volume 1, Tab 1]; *Parsons v. Canadian Red Cross Society*, [1999] OJ. No. 3572 ("Parsons 1999") at ¶69 [BA, Volume 1, Tab 2].**

14. In determining whether to approve a settlement, the Court will take into account factors such as: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery evidence; (c) the terms and conditions of the proposed settlement; (d) the future expense and likely duration of litigation; (e) the recommendation of neutral parties, if any; (f) the number of objectors and nature of objections; (g) the presence of arm's length bargaining and the absence of collusion; (h) the degree and nature of

communications by counsel and the representative plaintiff(s) with class members during the litigation; and, (i) the information conveying to the Court the dynamics of, and the positions taken, by the parties during the negotiations. These factors are "guidelines rather than rigid criteria". In a particular case, some criteria may be given more weight than others, some criteria may not be satisfied, and other criteria may be irrelevant.

***Parsons 1999* at ¶69 [BA, Volume 1, Tab 2]**

15. What follows is a review of each factor in the context of this case to demonstrate that the proposed settlement is indeed fair, reasonable, and in the best interests of Class Members. This factum needs to be read alongside the Moreau affidavit found at TAB 3 of the Motion Record [hereafter, the "Moreau Affidavit"]. The Moreau Affidavit is over 100 pages long and details the facts, evidence, and conclusions that relate to the factors at play on the present motion. The present factum largely expands on a few points or makes a few additional points, where warranted.

(ii) A Note on Consent Certification

16. The Settlement Agreement and the proposed Order seek, on consent, certification of a Class definition and certification of a single common issue.

17. In a consent certification, the Plaintiff must demonstrate the Class meets the five criteria set out in s.5 of the *Class Proceedings Act, 1992*. However, while these conditions must be satisfied, they are not so rigorously applied as they would be in a contested motion.

***Gariepy v. Shell Oil Co*, [2002] O.J. No 4022 at ¶27 [BA, Volume 1, Tab 3]**

18. Walmsley has already made extensive arguments at the certification motion hearing outlining why this Class Action meets all five criteria. In short, the pleadings

disclose several legitimate causes of action, and ones that have been certified in the past. The Class was easily identifiable based on the definition put forward in the Amended Statement of Claim and remains easily identifiable in the definition proposed by the Settlement Agreement. Moreover, there was ample basis in fact to conclude that the issues raised could be answered in common for all class members due to common contracts and evidence of a common pattern of a high degree of control Blyth Academy exercised. Additionally, the Motion Record for certification demonstrated that Class Members were reluctant to bring individual claims forward due to a mixture of factors, including cost, lack of resources, and fear of reprisal. This rendered individual processes ineffective when compared to the class action vehicle. Lastly, the Parties agreed that Walmsley was an appropriate class plaintiff.

19. In sum, this is an appropriate case for certification.

(iii) The Factors Relevant to This Settlement Approval Motion

Factor (a) – The likelihood of recovery or success

20. Factor (a) is a critical factor because the degree of risk involved helps explain why the Settlement Agreement amounts to a fair and reasonable compromise. In the case at bar, Class Counsel was confident it had a strong case for certification. Class Counsel had obtained and adduced substantial evidence which showed that Blyth Academy systematically misclassified its teachers as independent contractors. As a result, Class Counsel was and remains of the opinion that there was also a high likelihood of recovering significant damages for teachers in a common issues trial.

Affidavit of Stephen J. Moreau, sworn January 30, 2020 ("Moreau Affidavit") at ¶20 [Motion Record of the Plaintiff ("MRP"), Tab 3, p. 29]

21. Nonetheless, litigation is inherently risky. In this case, balanced against Class Counsel's conclusion that the case was a strong one in terms of obtaining a finding of employment were a number of risks, and one significant one in particular. The significant one, a risk shared with other class actions in the misclassification world, is that, the presence of some "outlier" teachers, ones who might be held to be independent contractors, risks dragging the common issues trial down into a hopeless line-drawing exercise that risks bringing the edifice down on even those with strong claims.

22. This risk is explained in detail, with reference to the facts and evidence uncovered here, in the Moreau Affidavit.

23. The Moreau Affidavit likewise outlines a series of other risks and considerations including: (a) the risk of non-payment given Blyth Academy's owner's history; (b) the arbitration clause inserted in all teacher agreements in the 2018-2019 school year, which might have led to a stay for all 2018/2019 (and onward) Class Members; (c) the modest, even tiny, level of damages a sizeable portion of the Class could expect; (d) the need for a robust individual issues process to tease out those who could overcome limitations problems from the bulk who could not; and, (e) the exclusivity of work problem.

24. We simply touch on a few of the risks in this factum, particularly where more comments are required.

<u>Online-only teachers</u>

25. The Moreau Affidavit explains how, apart from Blyth Academy's evidence of the significant differences between Class Members teaching exclusively online courses and all others, virtually no evidence came forward from those teaching exclusively online. As

Moreau explains, the risk this posed was that the Court would either exclude such persons at certification or, potentially worse, allow such persons to fall within the broadly defined Class definition, resulting in the kind of impossible line-drawing exercise that would risk tearing apart the entire Action.

26. The only real way to deal with this concern is the one the Parties agreed to in the Settlement Agreement: the Action was simply discontinued for these persons. They will receive separate notice of discontinuance. The second Order appended to this factum addresses discontinuance.

Ability to pay

27. Class Counsel became aware, through litigation, that Blyth Academy had purchased insurance that covered defence costs but did not provide coverage in the event of liability. As a result, while Blyth Acadmey could have defended the Action through to trial, it remained a concern that it would sufficient funds to cover any amounts ordered.

Moreau Affidavit at ¶116 [MRP, Tab 3, p. 60]

28. We would simply ask that the Court consider the Moreau Affidavit, at ¶116 and at Exhibit "H", for further evidence concerning Blyth Academy's owner. This evidence fuelled the "ability to pay" concern. This concern remained modest, but could not be ignored entirely.

Limitations Period Problems

29. The Moreau Affidavit outlines, to the extent possible in a settlement approval motion, the extensive evidence Class Counsel had mustered to the effect that limitations periods posed an almost insurmountable problem for those with claims pre-dating

October 2015. As outlined in the affidavit, capping the Class Period as two years prior to issuance is increasingly the norm in these overtime and misclassification cases.

30. We address one legal point that follows from the evidence set out in the Moreau Affidavit. As that affidavit outlines, the main conclusion one can draw here is that Class Members were aware or could reasonably be said to have the necessary knowledge to the effect that something was "not quite right" but had decided, for understandable reasons, not to pursue such issues. Economic vulnerability associated with precarious employment and the fear of reprisal, all very real phenomena in the employer/employee relationship, would point to this fact.

31. The net effect of this is that the Class faced a serious limitations problem. While, at certification, we argued that the presence of the "discoverability" principle meant that the limitation period should not be addressed at certification (or, in fact, even as a common issue at the common issues trial), knowledge by the Class of the problem meant that one could foresee the inevitable outcome, post-trial, for stale claims.

32. Unfortunately, for the teachers who were aware of the facts that gave rise to their claim, even if they were not fully aware of their legal entitlements, the "clock" for the purposes of the *Limitations Act*, began running some time ago. The jurisprudence is clear that, in determining the beginning of the limitations period, the question is whether the individual knew or ought to have known of the *facts* underlying the legal claim. Ignorance of the law does not by itself prevent a limitation period from running.

> ***Nicholas v. McCarthy Tétrault*, 2008 CanLII 54974 at ¶¶26-27, aff'd 2009 ONCA 692 [BA, Volume 1, Tab 4], *Tender Choice Foods Inc v. Versacold Logistics Canada Inc*, [2013] OJ No 634 at ¶¶54 and 61, aff'd 2013 ONCA 474 [BA, Volume 1, Tab 5]**

33. Relatedly, while the *Limitations Act* links discoverability to knowledge of court action as an appropriate means of securing justice, this "appropriate means" feature has only tended to be accepted as pushing the limitations clock back where there are ongoing proceedings or steps being taken to potentially remedy a known problem.

> **See, for instance, *Presidential MSH Corporation v. Marr Foster & Co LLP*, 2017 ONCA 325 [BA, Volume 1, Tab 6] and *Brown v. Baum*, 2016 ONCA 325 [BA, Volume 1, Tab 7]**

34. By contrast, the fact that someone may not have the financial resources to pursue a claim does not mean that the clock does not start running, or is somehow paused.

> ***Fehr v. Sun Life Assurance Company of Canada*, 2015 ONSC 6931 at ¶433 [BA, Volume 1, Tab 8]; var'd, without commentary on this point, 2018 ONCA 718**

35. This is precisely the situation Class Members would have found themselves in given the evidence here, and the jurisprudence simply does not assist such persons by stopping the clock.

36. What this meant, all told, was both a serious risk of non-recovery on account of stale claims and, worse, the need for a robust individualized fact-finding process for everyone to enable the few with viable discoverability arguments to obtain redress. It would not have been fair or reasonable to the Class to sacrifice the Class's overall interests to accommodate the few who might overcome the significant limitations barriers presented.

37. That said, the Settlement Agreement, with its opt out option and the absence of any opt out thresholds, allows those with dated claims to take their chance with a Ministry of Labour complaint or Small Claim, all without jeopardizing the settlement itself. This is outlined below.

Conclusion on Factor (a)

38. The Settlement Agreement obtains a high level of recovery despite the presence of real risks. It obtains realistic recovery for those with stale claims and it offers an opt-out process that emulates the individualized assessment that would have been needed to allow stale claims to proceed successfully. The risks here all point to the fact that a high level of recovery is an excellent achievement.

Factor (b) – The amount and nature of discovery, evidence or investigation

39. There is sufficient evidence before the Court to allow it to exercise an objective, impartial and independent assessment of the fairness of the proposed Settlement Agreement.

Dabbs at ¶15 [BA, Volume 1, Tab 1]

40. In negotiating the Settlement Agreement, the range of damages that could be proven at trial, the litigation risk, and the many years it would take to bring this class action to trial, including the likelihood of appeal(s), absent this settlement were all considered.

41. As the Moreau Affidavit outlines, the number of Class Members who Class Counsel spoke to, the thousands of documents gathered, and the clarification of how a common issues trial on the key classification would play out once Blyth Academy's evidence was proffered and tested, meant that Class Counsel had more than enough to conclude that: (a) it had a strong case that the Class would be held to be employees; but, (b) there were risks a line-drawing exercise would be challenging to the trial judge, with the result that the common questions could not be answered.

Moreau Affidavit at ¶¶36, 39, 40, 42, 101 [MRP, Tab 3, pp. 34-36, 55]

42. In short, Class Counsel's assessment of risk would not have been altered by a discovery that would have produced "more of the same". To give a simple example, the Walmsley certification record appended dozens of the same contracts. Blyth Academy's Record then confirmed that the same contracts were used for the whole Class (except, of course, for those teaching purely online contracts). Those contracts were and are critical to the misclassification issue. But simply put, all that discoveries would have done was provide Class Counsel with "more of the same" contracts.

43. What was missing to turn a full appreciation of risk into a fair and reasonable settlement were specific facts about the number of Class Members and their teaching histories. As the Moreau Affidavit explains, that gap was amply filled in the mediation and discussions stages in the lead-up to the Settlement Agreement.

44. Class Counsel's view is that an excellent result has been achieved with very full and informed knowledge of the risks, all while avoiding the cost of a lengthy discovery process.

Factor (c) – The terms and conditions of the proposed settlement

45. The function of the Court in reviewing a settlement is not to reopen and enter into negotiations with litigants in the hope of improving the terms. It is within the power of the Court to indicate areas of concern and afford the parties an opportunity to answer those concerns with changes to the settlement. The Court's power to approve or reject settlements, however, does not permit it to modify the terms of a negotiated settlement.

Dabbs at ¶10 [BA, Volume 1, Tab 1]

46. The Moreau Affidavit explains the Settlement Agreement in exhaustive detail at paragraphs 72-99. That affidavit likewise explains where certain key elements originated from, why certain elements were agreed to, how the figures arrived at reflect the evidence and risks, and how a variety of problems of process and substance were addressed in what we submit is a more that satisfactory fashion.

47. All told, notwithstanding the presence of the risks outlined in the Moreau Affidavit and expanded upon at points above, the Settlement Agreement achieves substantial recovery for the Class within the limitations window, some recovery for those with claims that pre-date the limitations period, and a process that for recovery that is simple, expeditious, affords a right of appeal, and is heavily monitored by Class Counsel.

48. While the Settlement Agreement is reviewed at length in the Moreau Affidavit, there are a few points concerning the terms that merit additional submissions.

49. First, while the Moreau Affidavit explains how the average figures were arrived at (for instance, $5,300 per employment agreement and $125 per contract outside of a "Cluster of Contracts"), it is worth adding that this idea of using average numbers and providing variable amounts based on categories of employment is one that this Court has approved in similar class actions previously.

> ***Eklund v. Goodlife Fitness Centres Inc.*, 2018 ONSC 4146 ["*Eklund*"] at ¶34 [BA, Volume 1, Tab 9]; *Rosen v. BMO Nesbitt Burns Inc.*, 2016 ONSC 4752 ["*Rosen*"] at ¶20 [BA, Volume 1, Tab 10]**

50. Indeed, the payment of an average amount without an involved claims process is one of the Settlement Agreement's strengths:

> Here, of course, class members will receive an “equal share” payout that does not depend on months worked and thus does not require a costly

> claims process, individual adjudications and related appeals. This alone provides a significant benefit to every class member. As I noted in *Fulawka*, "The overall benefit to class members of an immediate and substantial payout, without further delay or uncertainty, is significant and justifies judicial approval."
>
> ***Rosen* at ¶20 [BA, Volume 1, Tab 10], citing *Fulawka v. Bank of Nova Scotia*, 2016 ONSC 1576, at ¶13 [BA, Volume 1, Tab 11]**

51. The Moreau Affidavit explains how the averages were then translated into the full $2.5-$2.6 million amounts Blyth Academy is paying into the Main Settlement Fund, an explanation that considers the potential take-up rates here. It is appropriate for courts to consider the expected take-up rate in determining whether a settlement is fair, reasonable, and in the best interests of Class Members — particularly where there is a fixed settlement fund.

> ***Smith v. Vancouver City Savings Credit Union*, 2012 BCSC 990 at ¶¶21-26 [BA, Volume 1, Tab 12]**

52. While the above describes the amounts that will be awarded to Class Members who taught from September 2015 to August 2019, Blyth Academy will also maintain a fund of $25,000 intended to pay out the older claims. The Settlement Agreement provides that each of these teachers will be awarded a maximum of $100 as compensation. The reasons for this are explained in the Moreau Affidavit and expanded upon above. We would simply add, here that, if there are some Class Members that can overcome the limitations hurdles, they are afforded the same individualized assessment they inevitably faced even if the Class Action had been allowed to proceed: they will still be able to opt out of the Action and pursue their own remedy. As the Moreau Affidavit points out, the Settlement Agreement does not contain any opt out thresholds. The absence of such thresholds means that, if those with stale claims opt out (in fact, even if a large number opt out), the Settlement Agreement remains in effect and the remaining Class Members

share in the net proceeds. The presence of an effective opt-out mechanism is a consideration pointing to the reasonableness of the settlement, one that balances those with strong claims and those without.

> ***Mont-Bleu Ford Inc. v. Ford Motor Co. of Canada*, [2004] O.J. No. 1270 at ¶56 [BA, Volume 1, Tab 13]**

53. We otherwise rely on the Moreau Affidavit for its outline of the many significant benefits the Settlement Agreement provides for and for the conclusion that the processes agreed to mean that the settlement is fair and reasonable. These include: the fact Blyth Academy is separately paying for all notices and for the administration and appeals; the presence of an independent appeals mechanism; Class Counsel's extensive rights and monitoring role; and, the simplified Claims Form process agreed upon so that Class Members are not unduly burdened. Indeed, Class Members could literally take but minutes to complete and email a Claims Form in order to then receive potentially thousands of dollars, or more, in compensation.

Factor (d) – The future expense and likely duration of litigation

54. As against the significant benefits afforded by the Settlement Agreement now, continued litigation risks a wait of many years. As the Moreau Affidavit explains, Justice Belobaba's *Just Energy* decision in 2019 spells the likely end of any form of summary judgment motion in this area. The *Just Energy* class action must now wait many years for the month-long trial now scheduled by the Court. In addition, in order to get to summary judgment, the parties had spent a couple of years post-certification on discoveries.

55. Further, depending on the outcome of the "Uber" appeal at the Supreme Court, Blyth Academy may have taken a shot at having the Action stayed for Class Members who had agreed to arbitration clauses in their contracts. Such a motion may have taken the better part of a year to deal with, assuming no appeal.

56. The Moreau Affidavit's estimate of several years of waiting to get to trial may in fact be an optimistic prediction.

57. The Moreau Affidavit outlines how over $42,000 in disbursements have been incurred (not including HST). A lengthy litigation process will eat up more funds for disbursements.

58. All told, since the parties and Class Counsel had such a clear picture of the facts and the risks through the certification process, the few potential gains associated with fighting on would have been far outweighed by the cost and time to do so. Unlike wine, this matter would not have improved with age.

Factors (e) and (g) – The recommendation of a neutral party and arm's length bargaining

59. This Settlement Agreement was negotiated after Counsel attended four days of mediation before two well-respected and experienced mediators. The Moreau affidavit can only go so far in revealing what was exchanged in negotiations, but the negotiations were intense, there was significant disclosure to permit informed discussions, and the discussions were held entirely at arm's length.

60. Further, there is no evidence of collusion. Indeed, the opposite is quite true here: the Moreau Affidavit reveals that no stone went unturned, Cavalluzzo LLP pushed the

matter hard, even aggressively, and little love was lost between the parties, all in the service of getting into frank discussions before experienced mediators who helped resolve the Action.

61. These facts underscore the fairness and reasonableness of the Settlement Agreement.

Factor (f) – The number of objections and nature of the objections

62. As detailed in the Moreau Affidavit, Cavalluzzo LLP has received 230 emails to its Blyth Class Action email account and 54 voicemails to its toll-free number since Notice of the Class Action was first posted in the Ontario College of Teachers' newsletter in December 2019. Since this time, there have also been over 30,000 views of the Blyth Academy Class Action page on Cavalluzzo's website.

Moreau Affidavit at ¶¶318-19 [MRP, Tab 3, p. 120]

63. The Class Members are offering widespread support for the settlement, suggestive of widespread take-up. As of late January, ten letters and emails of support have been sent to Class Counsel's attention.

64. Conversely, only one objection has been sent to Cavalluzzo LLP. Mr. Moreau attaches this objection email and responds to it in some detail at paragraphs 269 to 278 of his affidavit. The objector's objections are largely founded on his distaste for private schools, his erroneous conclusion that "pennies on the dollar" were recovered, his views that his pension losses ought to be compensated for (when Blyth Academy is not part of a pension), and conclusions that the Settlement Agreement perpetuates systemic racism. While one might applaud some of the objector's policy and pollical positions, when the

objections touch on the terms of the Settlement Agreement, they either start from false conclusions or a misunderstanding as to what the Class Action could realistically accomplish as a legal, and not political, vehicle.

65. The fact that Class Counsel have received such strong support, with only this one dissenting voice, supports our position that this Settlement Agreement is fair and reasonable. As a result, the Class will, if the Settlement Agreement is approved, benefit from an excellent recovery through an excellent process.

66. In spite of the objections, the settlement ought to be approved because "the fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole". Simply put, the Court and Class Counsel cannot satisfy every Class Member. In *Manuge*, the Court considered a relatively small number of objections and found that most of them were based on erroneous facts or law. The Court concluded that the objections were of insufficient weight to reject the proposed settlement.

> ***Parsons 1999* at ¶79 [BA, Volume 1, Tab 2], *Manuge v. Canada*, 2013 FC 341 [“*Manuge*”]at ¶¶20-25 [BA, Volume 1, Tab 14]**

67. It would not serve the interests of the vast majority of Class Members who did not object to send the parties back into further discussion to address the concerns of one objector.

> ***Manuge* at ¶¶20-23 [BA, Volume 1, Tab 14]**

68. The absence of any cogent objections and the widespread support should weigh heavily in favour of approving the Settlement Agreement.

Factor (h) – The degree and nature of communications with Class Members

69. Class Counsel did everything that reasonably could have been done to communicate with Class Members.

70. Upon the commencement of the Action and until now, the main points of contact between Class Counsel and the Class have been through the website maintained by Cavalluzzo LLP, which includes Class Counsel's phone and email information. This resulted in email updates throughout the litigation. Since the notice of the proposed settlement was distributed in December 2019, Class Counsel have also set up a toll-free phone line and dedicated email address for Blyth Class Members. As noted above, Cavalluzzo LLP has received approximately 300 communications from Class Members since December 2019, not to mention over 30,000 web page views.

71. In addition to the notice Blyth Academy has given Class Members, Class Counsel has distributed the notice of proposed settlement to all of the Class Members who registered with Class Counsel and provided valid e-mail addresses. In addition, and in an effort to properly disclose all information to the Class Members, Class Counsel also posted the Settlement Agreement on the website for Class Members to review.

72. Class Counsel have made consistent efforts to be in touch with Class Members throughout this litigation, including regularly updating the website and posting all key documents on the website. The Class are as informed as they could be about ongoing developments and the contents of the Settlement Agreement.

Final Comments – the recommendation of experienced counsel and the representative plaintiff

73. In Class Counsel's opinion, the proposed settlement is fair, reasonable and in the best interests of the Class Members. Counsel are experienced class actions litigators. Their tactics, analysis and thought processes have been disclosed to the Court in a long and detailed affidavit by the lead lawyer on this file. Their decisions reflect their best exercise of judgment. Class Counsel's recommendations are significant and are deserving of substantial weight in the approval process.

74. Walmsley was briefed regularly throughout the litigation. They were involved in making all major decisions, including instructing Class Counsel to sign the Settlement Agreement and recommending approval to the Court. If the Class Plaintiff, whose evidence demonstrates that they had a significant claim for high amounts of unpaid overtime, supports this Class Action, that should not go unnoticed.

Affidavit of Karen Walmsley, sworn January 31, 2020 ("Walmsley Affidavit") at ¶¶25-26 [MRP, Tab 2, pp. 14-15]

(iv) Conclusion

75. There are ranges of acceptable settlements. This principle recognizes the reality of the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.

76. This Action was ably prosecuted and the litigation risks and the risks relating to damage issues were fully canvassed by Class Counsel. This Court should conclude that the Settlement Agreement is fair, reasonable and in the best interests of the Class and ought to be approved.

B. CLASS COUNSEL'S FEES OUGHT TO BE APPROVED

77. Class Counsel's fee request is made pursuant to the terms of Class Counsel's retainer agreement with Walmsley. That agreement was designed to appropriately incentivize Class Counsel to achieve the excellent result achieved here. The fee reflects the significant recovery secured for the Class, the serious risks inherent in hotly contested litigation, and the substantial investment of time and money made by Class Counsel.

78. The fee requested is consistent with past precedent. It is fair and reasonable.

(i) The Retainer Agreement Complies with the Requirements of the Class Proceedings Act

79. The *Class Proceedings Act* gives proposed representative plaintiffs the right to enter into contingent fee arrangements with Class Counsel. Such agreements are not enforceable until they have received Court approval.

***Class Proceedings Act, 1992*, SO 1992, c 6, ss. 32(1) and 32(2)**

80. Retainer agreements must be in writing and must: (a) state the terms under which fees and disbursements shall be paid; (b) give an estimate of the expected fee contingent on success in the proceeding; and, (c) state the method by which payment is to be made.

***Class Proceedings Act, 1992*, SO 1992, c 6, s 33**

81. All of this was done in the case at bar. Walmsley entered into a plainly worded retainer agreement that accomplished these objectives.

Moreau Affidavit, Ex. "S" [MRP, Tab 3S, p. 398]

82. The retainer agreement entered into between Class Counsel and Walmsley comply with these requirements and ought to be approved by the Court.

(ii) The Percentage of Success Approach in the Retainer Agreement Results in an Appropriate Fee

83. Here, the retainer agreement provided for a 25% fee had settlement been achieved early and an increased fee of 30% of total recovery if the matter proceeded further along, as it did in the present case.

84. Applying this 30% fee to the $2.5 million Main Settlement Fund payment, a $750,000 fee results. Class Counsel accordingly seek approval for a fee of $750,000, HST of $97,500 on this fee, disbursements of $42,301.91, and HST of $5,154.42 on most of these disbursements (a few of the disbursements are not taxable).

85. Class Counsel does not seek to be paid a fee from the $100,000 amounts Blyth Academy may pay as part of the administration if the take-up rate is high. No fee is sought on monies paid out of the Pre-Limitations Fund either.

86. Contingency fee retainer agreements worth up to 33% of the settlement amount have been held to be presumptively valid, with the caveat that there may be an upper limit to the size of the fund to which a one-third contingency fee may presumptively be applied. This approach works especially well for all-cash settlements, as is the case here.

> **See, for instance, *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 at ¶11 [BA, Volume 1, Tab 15]; *Brown v. Canada (Attorney General)*, 2018 ONSC 3429 at ¶47 ["*Brown*"][BA, Volume 1, Tab 16]; *Sheridan Chevrolet v. Nishikawa Rubber*, 2019 ONSC 4124 at ¶11 [BA, Volume 1, Tab 16]**

87. Compensating Class Counsel through a percentage of recovery is "generally considered to reflect a fair allocation of risk and reward as between lawyer and client". Contingency fees induce the lawyer to maximize recovery and are fair to the client

because there is no pay without success. They help to promote access to justice in that they allow counsel, not the client, to finance the litigation.

> ***Baker (Estate) v. Sony BMG Music (Canada) Inc.,* 2011 ONSC 7105 at ¶64 [BA, Volume 1, Tab 19]; *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752 at ¶21 [BA, Volume 1, Tab 19]**

88. Here, the lower contingency rate for early success and the increased contingency rate if the matter proceeded further both encouraged Class Counsel to probe for an early means of fair resolution while incentivizing Class Counsel, with a higher rate, to pursue the litigation with vigour, if that is what was required.

89. Cumming J. put it best when extolling the benefits of fees based on a percentage of recovery:

> Using a percentage-based calculation in determining class counsel fees "properly places the emphasis on the quality of representation, and the benefit conferred to the class. A percentage-based fee rewards "one imaginative, brilliant hour" rather than "one thousand plodding hours."
>
> ***Vitapharm Canada Ltd. v. F. Hoffman-La Roche Ltd.*, [2005] O.J. No.1117 at ¶107 [BA, Volume 1, Tab 20]. See also Strathy J.'s (as he then was) comments in *Helm v. Toronto Hydro-Electric System Limited*, 2012 ONSC 2602 at ¶25 [BA, Volume, 1, Tab 21] ["The proposed fee represents a significant premium over what the fee would be based on time multiplied by standard hourly rates. Is that a reason to disallow it? If the settlement had only been achieved four years later, on the eve of trial, when over a million dollars in time had been expended, would the fee be any more or less appropriate? Should counsel not be rewarded for bringing this litigation to a timely and meritorious conclusion?"]**

90. By contrast, awarding Class Counsel fees by taking their base fee based on hours worked multiplied by hourly rates and then multiplying the base fee by a multiplier encourages inefficiency and fighting to the end to essentially pad one's hours and base fee, all at the expense of a properly incentivized result. For this reason, the percentage fee approach has gained traction at the expense of the multiplier approach.

See, for a recent summary of Ontario case law on this point, *Condon v. Canada*, 2018 FC 522 at ¶¶84-88 [BA, Volume 1, Tab 22]

91. More broadly, if, in approving a contingency fee, Class Counsel are rewarded a premium over and above their base fee, the premium is more than justified as a means of encouraging risk-taking and good work. The class action as a vehicle for securing justice would, absent a robust contingent fee system that rewards counsel in this fashion, be placed in serious jeopardy.

***Cannon v. Funds for Canada Foundation*, 2017 ONSC 2670 at ¶11 ["*Cannon*"] [BA, Volume 2, Tab 23]; *Ironworkers Ontario Pension Fund v. Manulife Financial*, 2017 ONSC 2669 at ¶24 ["*Ironworkers*"][BA, Volume 2, Tab 24]**

92. Applying this reasoning, the proposed 30% fee should be approved. This Court has approved fees of 30-33% of recovery in a number of other recent cases.

See, for example, *Seed v. Ontario*, 2017 ONSC 3534 [31.5% fee] [BA, Volume 2, Tab 25]; *Cannon* [33% fee] [BA, Volume 2, Tab 23]; *Dow v. 407 ETR Concession Company Limited*, 2016 ONSC 7086 [30% fee] ["*Dow*"] [BA, Volume 2, Tab 26]; *Brigaitis v. IQT, Ltd. c.o.b. as IQT Solutions*, 2016 ONSC 6746 [33% fee] [BA, Volume 2, Tab 27]; *Middlemiss v. Penn West Petroleum Ltd*., 2016 ONSC 3537 [33% fee] [BA, Volume 2, Tab 28]; *Abdulrahim v. Air France*, 2011 ONSC 512 [30% fee] [BA, Volume 2, Tab 29]

(iii) A Multiplier Cross-Check Confirms the Reasonableness of the Proposed Fee

93. While the multiplier has fallen out of favour of late, some recent decisions indicate that, in cases involving large settlements, it may be appropriate to consider a multiplier on docketed time as a crosscheck on the reasonableness of counsel's fee request.

***Mancinelli v. Royal Bank of Canada*, 2018 ONSC 4206 at ¶¶35-36 ["*Mancinelli*"] [BA, Volume 2, Tab 30]; *Brown* at ¶¶59-62 [BA, Volume 1, Tab 16]**

94. The concern of excessive fees using a contingency approach has arisen in cases involving settlements in the hundreds of millions of dollars (with fees in the many tens of

millions using a contingency approach), which is not the case at bar. Nevertheless, applying the multiplier cross-check here confirms the reasonableness of the fee sought.

95. Here, the fee of $750,000, when divided by the base fee as of late January (just over $500,000), results in a multiplier of just under 1.5. The estimated total base fee of $550,000, when all is said and done, results in a 1.36 multiplier. Either multiplier is well below the typical multiplier approved in Ontario and in other courts. Thus, the Court of attachal has noted that a multiplier of 2.0 is on the lower-end of court approved multipliers.

> ***Lavier v. MyTravel Canada Holidays Inc*, 2013 ONCA 92 at ¶37 [BA, Volume 2, Tab 31]**

96. This Court has approved multipliers of 2.5 and over in many of its approval decisions.

> ***The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.*, 2018 ONSC 6447 [BA, Volume 2, Tab 32]; *Fantl v Transamerica Life Canada*, 2009 O.J No. 4324 [BA, Volume 2, Tab 33]; *Mancinelli* [BA, Volume 2, Tab 30]; *Brown* [BA, Volume 1, Tab 16]; *Fulawka v. Bank of Nova Scotia*, 2014 ONSC 4743, BA, Volume 2, Tab 34]; *Fanshawe College v. Hitachi, Ltd et al*., 2016 ONSC 8212 [BA, Volume 2, Tab 35]; *Smith v. Krones Machinery Co*, 2000 CanLII 22618 [BA, Volume 2, Tab 36]; *Martin v. Barrett*, 2008 O.J. No. 2105 [BA, Volume 2, Tab 37]; *Hislop v. Canada (Attorney General)*, 2004 CanLII 1123 [BA, Volume 2, Tab 38]; *Parsons v Canadian Red Cross Society*, [2000] OJ No 2374 (S.C.J.) [BA, Volume 2, Tab 39]; *Marcantonio v. TVI Pacific Inc*, 2009 CanLII 43191 [BA, Volume 2, Tab 40]**

97. The 1.36-1.5 multiplier that results in the case at bar is below these previously approved multipliers, confirming that Class Counsel's proposed fee is well within the range of reasonableness. In *Eklund*, an overtime and misclassification case, the approved fee incorporated a 1.6-1.8 multiplier. In *Nutech*, a 1.46 multiplier was approved, while in *Châteauneuf*, a 1.5 multiplier was approved.

> ***Eklund* at ¶46 [BA, Volume 1, Tab 9]; *Nutech Brands Inc. v. Air Canada*, [2009] O.J. No. 709 [BA, Volume 2, Tab 41]; *Châteauneuf v. Canada*, 2006 FC 446, at ¶10 [BA, Volume 2, Tab 42]**

98. Applying the multiplier approach to the fee requested confirms its reasonableness.

(iv) A Final Cross Check: the Reasonableness of the Fees and Some Comments on Disbursements Too

99. Stepping even further back, the courts have indicated that, in assessing the reasonableness of Class Counsel's fees, the factors to be considered include: the results achieved, the risks taken, the time expended, the complexity of the issues, the importance of the litigation or issue to the plaintiff, the degree of responsibility assumed by counsel, the quality and skill of counsel, the ability of Class Members to pay for the litigation, the expectations of the class, and fees in similar cases.

> ***McCrea v. Canada*, 2019 FC 122, at ¶¶98-101 ["*McCrea*"] [BA, Volume 2, Tab 43], reviewing jurisprudence from this Court and the Federal Court**

100. In particular, Courts have focused on the first two as the main factors in assessing the fairness and reasonableness of a fee request: (1) the risk that class counsel undertook in conducting the litigation; and (2) the degree of success or result achieved. By risk, one considers the risk measured at the start of the Action, with risk encompassing liability risk, recovery risk, and the risk that the Action will not be certified. It is the risk incurred that "most justifies" a premium in class proceedings.

> ***McCrea* at ¶¶98-101 [BA, Volume 2, Tab 43]; *Brown* at ¶41 [BA, Volume 1, Tab 16]**

101. The risk and success factors have been reviewed in the settlement approval section already. Class Counsel took on a real risk of failure, non-payment, and an adverse costs award. They did so nonetheless and achieved an excellent result. On a risks and success basis alone, the proposed fee hits all the right boxes: Class Counsel submits that it earned its fee.

102. Looking to some of the other factors noted above, here, the issues were of real importance to Walmsley. Walmsley, and all Class Members, could not realistically have paid to pursue their claims on their own. The proposed fees compare well to those approved in other cases cited earlier, either on a percentage basis or a multiplier basis.

103. As a whole, the proposed fees are fair and reasonable.

104. Class Counsel likewise seeks approval of disbursements in the amount of $42,301.91 (plus HST of $5,154.42 on these). These amounts are frankly quite modest compared to the hundreds of thousands that are routinely incurred in other class actions. Of these, nearly half constitute the mediation fees Class Counsel paid and carried for well over a year. Those fees proved beneficial. All told, the modest disbursements incurred by Class Counsel reinforce our submission that Class Counsel were prudent with their expenditure. They used reasonable resources, hard work, ingenuity, and a clear strategy to prevail upon Blyth Academy to come to the table and reasonably settle the dispute early, with an excellent result for the Class.

105. The fees, HST, and disbursements should, respectfully, be approved.

C. THE REQUESTED HONORARIUM OF $6,000 FOR THE REPRESENTATIVE PLAINTIFF IS APPROPRIATE AND SHOULD BE APPROVED

106. The Court should award an honorarium of $6,000 to Walmsley for their contributions as Representative Plaintiff. Blyth Academy agreed to pay this in the Settlement Agreement. They consent to the requested relief by Order.

107. The proposed honorarium would be paid as an amount separate and apart from the settlement amounts each individual Class Member is entitled to receive.

108. In deciding whether to exercise discretion in awarding a representative plaintiff an honorarium, courts have considered several factors, including the representative plaintiff's active involvement in the initiation of the litigation and retainer of counsel, significant personal hardship or inconvenience in connection with the prosecution of the litigation, time spent and activities undertaken in advancing the litigation and, communication and interaction with other class members.

> ***Robinson v. Rochester Financial Ltd,*** **2012 ONSC 911 at ¶43 [BA, Volume 2, Tab 44]**

109. As set out in their affidavit, Walmsley had substantial duties and responsibilities as a Representative Plaintiff and spent a significant amount of time carrying out those duties. Specifically, Walmsley invested substantial time in reviewing the issues in the litigation as well as preparing various materials that were used in the course of the litigation. This included strategizing with Class Counsel throughout the litigation, attending Court dates and mediation, preparing an affidavit for the certification motion, preparing to be cross-examined on their affidavit for the certification motion, being cross-examined on their affidavit for the certification motion, expressing their opinion to Class Counsel on the proposed settlement agreement, and assisting in the preparation and execution of affidavits regarding settlement and fee approval.

> **Walmsley Affidavit at ¶15 [MRP, Tab 2, pp. 11-12]**

110. Notably, Walmsley has shared very personal details of their position with Blyth Academy with the media and with the public, including in a Toronto Star article. This

included sharing details about their working conditions and compensation, all because they "care about justice for every teacher who works [at Blyth Academy]". In every practical sense Walmsley was the "face" of the class action throughout the litigation.

Moreau Affidavit, Exhibit "E" [MRP, Tab 3E, p. 281]

111. Walmsley was not promised an honorarium at any time. Prior to the settlement negotiations which led to the Settlement Agreement, Walmsley was unaware that there was a possibility that they could be compensated over and above the amounts they anticipate receiving as part of the proposed settlement agreement.

Walmsley Affidavit at ¶17 [MRP, Tab 2, pp. 12]

112. For their efforts and contributions, Walmsley is deserving of a $6,000 honorarium. The proposed honorarium is appropriate and is in line with honoraria that have recently been awarded to representative plaintiffs who made similar contributions to the litigation which they brought on behalf of a class. Indeed, honoraria of $10,000 have been awarded in similar situations, notably in *Eklund,* a misclassification case that was settled early in the proceedings.

***Riddle v. Canada*, 2018 FC 901 [BA, Volume 2, Tab 45]; *Eklund* [BA, Volume 1, Tab 9]; *Ironworkers* [BA, Volume 2, Tab 24]; *Dow* [BA, Volume 2, Tab 26]**

113. This Class Action would not have happened and would not have been a success but for Walmsley's efforts. Walmsley is more than deserving of the proposed honorarium.

PART IV - ORDER REQUESTED

114. Walmsley accordingly requests the relief outlined in the two Orders found as Schedules to the Settlement Agreement and reproduced as Appendices to the present factum.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of February, 2020.

Stephen J. Moreau

Kaley Duff

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Lawyers for the Plaintiff

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 2811
2. *Parsons v. Canadian Red Cross Society,* [1999] O.J. No. 3572
3. *Gariepy v. Shell Oil Co.,* [2002] O.J. No. 4022
4. *Nicholas v. McCarthy Tétrault,* 2008 CanLII 54974
5. *Tender Choice Foods Inc. v. Versacold Logistics Canada Inc.,* [2013] O.J. No. 634
6. *Presidential MSH Corporation v. Marr Foster & Co. LLP*, 2017 ONCA 325
7. *Brown v. Baum*, 2016 ONCA 325
8. *Fehr v. Sun Life Assurance Company of Canada*, 2015 ONSC 6931
9. *Eklund v. Goodlife Fitness Centres Inc*., 2018 ONSC 4146
10. *Rosen v. BMO Nesbitt Burns Inc*., 2016 ONSC 4752
11. *Fulawka v. Bank of Nova Scotia,* 2016 ONSC 1576
12. *Smith v. Vancouver City Savings Credit Union*, 2012 BCSC 990
13. *Mont-Bleu Ford Inc. v. Ford Motor Co. of Canada,* [2004] O.J. No. 1270
14. *Manuge v. Canada*, 2013 FC 341
15. *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686
16. *Brown v. Canada (Attorney General),* 2018 ONSC 3429
17. *Sheridan Chevrolet v. Nishikawa Rubber*, 2019 ONSC 4124
18. *Baker (Estate) v. Sony BMG Music (Canada) Inc*., 2011 ONSC 7105
19. *Osmun v. Cadbury Adams Canada Inc.*, 2010 ONSC 2752
20. *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd*., [2005] O.J. No. 1117
21. *Helm v. Toronto Hydro-Electric System Limited*, 2012 ONSC 2602
22. *Condon v. Canada*, 2018 FC 522
23. *Cannon v. Funds for Canada Foundation*, 2017 ONSC 2670

24. *Ironworkers Ontario Pension Fund v. Manulife Financial*, 2017 ONSC 2669

25. *Seed v. Ontario*, 2017 ONSC 3534

26. *Dow v. 407 ETR Concession Company Limited,* 2016 ONSC 7086

27. *Brigaitis v. IQT, Ltd. c.o.b. as IQT Solutions,* 2016 ONSC 6746

28. *Middlemiss v. Penn West Petroleum Ltd*., 2016 ONSC 3537

29. *Abdulrahim v. Air France*, 2011 ONSC 512

30. *Mancinelli v. Royal Bank of Canada,* 2018 ONSC 4206

31. *Lavier v. MyTravel Canada Holidays Inc,* 2013 ONCA 92

32. *The Trustees of the Drywall Acoustic Lathing and Insulation Local 675 Pension Fund v. SNC-Lavalin Group Inc.,* 2018 ONSC 6447

33. *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 4324

34. *Fulawka v. Bank of Nova Scotia*, 2014 ONSC 4743

35. *Fanshawe College v. Hitachi, Ltd et al*., 2016 ONSC 8212

36. *Smith v. Krones Machinery Co.,* 2000 CanLII 22618

37. *Martin v. Barrett*, [2008] O.J. No 2105

38. *Hislop v. Canada (Attorney General)*, 2004 CanLII 1123

39. *Parsons v Canadian Red Cross Society,* [2000] OJ No 2374 (S.C.J.)

40. *Marcantonio v. TVI Pacific Inc*, 2009 CanLII 43191

41. *Nutech Brands Inc. v. Air Canada,* [2009] O.J. No. 709

42. *Châteauneuf v. Canada*, 2006 FC 446

43. *McCrea v. Canada*, 2019 FC 122

44. *Robinson v. Rochester Financial Limited,* 2012 ONSC 911

45. *Riddle v. Canada*, 2018 FC 901

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. Class Proceedings Act, 1992, S.O. 1992, c 6, s. 29

Discontinuance, abandonment and settlement

29 (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate. 1992, c. 6, s. 29 (1).

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court. 1992, c. 6, s. 29 (2).

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members. 1992, c. 6, s. 29 (3).

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

(a) an account of the conduct of the proceeding;

(b) a statement of the result of the proceeding; and

(c) a description of any plan for distributing settlement funds. 1992, c. 6, s. 29 (4).

2. Class Proceedings Act, 1992, SO 1992, c 6, ss. 32(1) and 32(2)

Costs

31 (1) In exercising its discretion with respect to costs under subsection 131 (1) of the *Courts of Justice Act*, the court may consider whether the class proceeding was a test case, raised a novel point of law or involved a matter of public interest. 1992, c. 6, s. 31 (1).

Court to approve agreements

32 (2) An agreement respecting fees and disbursements between a solicitor and a representative party is not enforceable unless approved by the court, on the motion of the solicitor. 1992, c. 6, s. 32 (2).

3. Class Proceedings Act, 1992, SO 1992, c 6, s 33

Agreements for payment only in the event of success

33 (1) Despite the *Solicitors Act* and *An Act Respecting Champerty*, being chapter 327 of Revised Statutes of Ontario, 1897, a solicitor and a representative party may enter into a written agreement providing for payment of fees and disbursements only in the event of success in a class proceeding. 1992, c. 6, s. 33 (1).

Interpretation: success in a proceeding

(2) For the purpose of subsection (1), success in a class proceeding includes,

(a) a judgment on common issues in favour of some or all class members; and

(b) a settlement that benefits one or more class members. 1992, c. 6, s. 33 (2).

Definitions

(3) For the purposes of subsections (4) to (7),

"base fee" means the result of multiplying the total number of hours worked by an hourly rate; ("honoraires de base")

"multiplier" means a multiple to be applied to a base fee. ("multiplicateur") 1992, c. 6, s. 33 (3).

Agreements to increase fees by a multiplier

(4) An agreement under subsection (1) may permit the solicitor to make a motion to the court to have his or her fees increased by a multiplier. 1992, c. 6, s. 33 (4).

Motion to increase fee by a multiplier

(5) A motion under subsection (4) shall be heard by a judge who has,

(a) given judgment on common issues in favour of some or all class members; or

(b) approved a settlement that benefits any class member. 1992, c. 6, s. 33 (5).

Idem

(6) Where the judge referred to in subsection (5) is unavailable for any reason, the regional senior judge shall assign another judge of the court for the purpose. 1992, c. 6, s. 33 (6).

Idem

(7) On the motion of a solicitor who has entered into an agreement under subsection (4), the court,

(a) shall determine the amount of the solicitor's base fee;

(b) may apply a multiplier to the base fee that results in fair and reasonable compensation to the solicitor for the risk incurred in undertaking and continuing the proceeding under an agreement for payment only in the event of success; and

(c) shall determine the amount of disbursements to which the solicitor is entitled, including interest calculated on the disbursements incurred, as totalled at the end of each six-month period following the date of the agreement. 1992, c. 6, s. 33 (7).

Idem

(8) In making a determination under clause (7) (a), the court shall allow only a reasonable fee. 1992, c. 6, s. 33 (8).

Idem

(9) In making a determination under clause (7) (b), the court may consider the manner in which the solicitor conducted the proceeding. 1992, c. 6, s. 33 (9).

Appendix 1

Court File No. CV-17-584523

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	DAY, THE
	)	
MR. JUSTICE GLUSTEIN	)	DAY OF , 2020

B E T W E E N:

(Court Seal)

KAREN WALMSLEY

Plaintiff

and

2016169 ONTARIO INC., 2170616 ONTARIO INC. and 2429131 ONTARIO INC., alone or together o/a Blyth Academy

Defendants

ORDER
(Settlement Approval)

WHEREAS the Plaintiff and the Defendants have entered into a final settlement agreement dated November 27, 2019, which agreement is attached to this Order as a Schedule [the "Settlement Agreement"];

AND WHEREAS this Honourable Court approved the form of notice and plan for distribution of the notice of this motion by Order dated [insert date] [the "Notice Order"];

AND UPON READING the Plaintiff's motion record and written submissions;

UPON BEING ADVISED of the Defendants' consent to the form of this Order;

AND UPON HEARING the motion made by oral submissions of counsel for the Plaintiff, and all interested parties, including any objections, written and oral;

THIS COURT ORDERS THAT:

1. For the purposes of this Order, the definitions set out in the Settlement Agreement apply to and are incorporated into this Order.

2. In the event of a conflict between this Order and the Settlement Agreement, this Order shall prevail.

3. The Class Members shall be defined as follows:

> Any person who, from 2002 until August 31, 2019 [the "Class Period"], worked for Blyth Academy in Ontario and taught at least one course, but excluding those who worked exclusively as Principals or Vice-Principals or who exclusively taught Blyth Academy online courses.

4. The Class Action is certified on the basis of the following common issue:

> Whether any Class Member worked hours of work, including overtime hours, during the Class Period, for which they were not properly paid or otherwise compensated, as alleged

5. The Settlement Agreement is fair, reasonable and in the best interests of the Class.

6. The Settlement Agreement is hereby approved pursuant to section 29 of the *Class Proceedings Act, 1992* and shall be implemented and enforced in accordance with its terms.

7. Upon the Final Approval Date, each Settlement Class Member has released and shall be conclusively deemed to have forever and absolutely released the Defendants from the matters set out in paragraphs 27-28 of the Settlement Agreement.

8. Notice of the Final Approval Order shall be provided in the manner provided for in Schedule "A" to the Settlement Agreement.

9. The legal fees, disbursements and applicable taxes owing to Class Counsel shall be determined by further order of this Court.

10. The Plaintiff, Karen Walmsley, shall receive the sum of $6,000 as an honorarium to be paid in accordance with paragraph 9 of the Settlement Agreement.

11. This Order and the Settlement Agreement are binding upon all Class Members, including those persons who are under a disability.

12. For the purposes of administration and enforcement of the Settlement Agreement and this Order, this Court will retain an ongoing supervisory role.

13. This Action be and is hereby dismissed against the Defendants, without costs and with prejudice.

_____

Justice Benjamin Glustein

Appendix 2

Court File No. CV-17-584523

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	DAY, THE
	)	
MR. JUSTICE GLUSTEIN	)	DAY OF , 2020

B E T W E E N:

(Court Seal)

KAREN WALMSLEY

Plaintiff

and

2016169 ONTARIO INC., 2170616 ONTARIO INC. and 2429131 ONTARIO INC., alone or together o/a Blyth Academy

Defendants

ORDER
(Discontinuance)

THIS MOTION made by the Plaintiff was read this day at the City of Toronto.

ON READING the Notice of Motion, the Plaintiff's Motion Record, and on the consent of the parties, filed

1. THIS COURT ORDERS that the Action on behalf of those teachers who exclusively taught Blyth Academy online courses, and who were previously proposed Class Members, be hereby discontinued as a class proceeding;

2. THIS COURT ORDERS that any and all limitation periods of those teachers who exclusively taught Blyth Academy online courses that have been suspended on the commencement of this action will resume running again on July 1, 2020;

3. THIS COURT ORDERS that the notice to the teachers who exclusively taught Blyth Academy online courses is to be given in the form attached to this Order as Schedule "A", and that such notice shall be given within 30 days of the date of this Order, as follows:

(a) a copy of the Notice will be posted on the Blyth Academy class action website at cavalluzzo.com/blythacademyclassaction;

(b) a copy of the Notice will be mailed to all individuals that Blyth Academy has identified as teachers who exclusively taught Blyth Academy online courses; and,

(c) a copy of the Notice will be emailed to all individuals that Blyth Academy has identified as teachers who exclusively taught Blyth Academy online courses.

4. THIS COURT ORDERS that there be no costs payable to either party for this motion.

_____
Justice Benjamin Glustein

KAREN WALMSLEY
Plaintiff

-and-

2016169 ONTARIO INC. et al.
Defendants

Court File No. CV-17-584523

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

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