Court File No.: CV-17-584523-CP

*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 RESPONDING DEFENDANTS
## (Re: Motion for certification as class action returnable December 5-6, 2018)

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## PART I - INTRODUCTION

1. To get off the ground, this proposed class action needs to certify the common issue of whether teachers were misclassified as independent contractors. The plaintiff would have the Court accept that this case is perfect for certification - that the nature of the labour relationship between Blyth Academy and all of the proposed class members is and was the same.

2. This is simply not the case. The plaintiff's position relies on superficialities to demonstrate commonality and entirely ignores evidence which clearly demonstrates that individual teachers stood in unique and differing relationships with Blyth Academy. The idiosyncrasies of these relationships are necessarily part of the analysis of whether any given teacher was an employee or an independent contractor, and are fatal to certification.

3. The defendants do not dispute that the plaintiff has pleaded valid causes of action. That said, the plaintiff has over-pled her case, including superfluous and redundant causes of action that add nothing to the action but unnecessary complexity and confusion.

4. The defendants similarly do not dispute that the plaintiff has objectively defined the class. However, the class cannot include those whose claims are clearly barred by the operation of the *Limitations Act*.

5. The defendants' primary objection to certification is that there cannot possibly be a common determination of whether all of the class members are or were "employees" under the *Employment Standards Act*. It is trite to say that determination of whether a

worker is an employee or an independent contractor is fact-specific. The various fact-specific circumstances of individual teachers – evident on the record before this Court – illustrates that such an assessment cannot be determined in common for the proposed class. How could one possibly find the commonality between the plaintiff Karen Walmsley (who taught multiple courses over a couple of years at the Yorkville campus), and the artist (who taught one course to Blyth students out of his art studio), and the on-line instructor (who taught whenever and from wherever he wanted and invoiced through his personal corporation), and a software engineer (who runs over to a Blyth school to teach one course on his lunch break), and a professional animator (who teaches an online animation course for Blyth)? It is clear that individual assessments of the factors related to these labour relationships are necessary.

6. The defendants' secondary objection to certification is that a class action is not the preferable procedure given the multitude of issues that need to be adjudicated on an individual basis. Individual proceedings, including before the Ontario Labour Relations Board, would not only be preferable but would also offer the quickest and most economical manner to obtain justice for those who seek it.

## PART II - THE FACTS

7. At the outset, it must be emphasized that Blyth Academy is not a traditional school. The entire structure and philosophy of its program is different from regular schools in Ontario. As discussed below, the unique nature of the Blyth schools leads to unique relationships with its teachers.

## A. The Defendants

### 2016169 Ontario Inc. o/a Blyth Academy

8. The defendant 2016169 Ontario Inc., operating as Blyth Academy ("Blyth Academy"), opened its first school in 2003. Blyth Academy provides a unique way for Ontario students to obtain Ontario Secondary School Diploma credits ("OSSD credits") and secondary school diplomas. It offers courses on an à la carte basis, allowing a student to take as little as one course at a time[1].

9. Blyth Academy originally began as one school located in the Yorkville neighborhood of Toronto. Over the years, Blyth Academy has opened more schools and currently there are 11 "bricks and mortar" schools across southern Ontario[2].

10. As will become more apparent below, each of these campuses is unique and the experience of teachers at each campus varies considerably.

11. Blyth Academy Online ("BAO"), the online school, is also part of the corporate entity of Blyth Academy. BAO has a head office in London, Ontario, but does not teach classes out of any fixed location. Its teachers work remotely from all over Ontario, and in some cases internationally.

### 2170616 Ontario Inc. o/a Blyth Educational Travel

12. The defendant 2170616 Ontario Inc. ("Blyth Educational Travel"), consists of two programs, both of which provide the opportunity for students to obtain OSSD credits by taking courses abroad:

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[1] Affidavit of Patrick Shaw (the "Shaw Affidavit"), sworn June 1, 2018, para 3, **Tab 1 to the Responding Motion Record of the Blyth Defendants (The "Blyth Record").**
[2] The Shaw Affidavit at para 4, **Tab 1 to the Blyth Record.**

a) "International Summers" allows students to earn OSSD credits while studying abroad over the summer. Programs are offered in a wide selection of countries including France, Italy, Spain, Japan, Costa Rica and the Galapagos. The teachers who work for International Summers all teach during the school year at various other public and private schools; and

b) Blyth Global High School, a travelling four-term high school, allows students to obtain OSSD credits while spending up to a full academic year abroad[3].

13. All of the teaching for International Summers and Blyth Global High School takes place overseas. Indeed, some of the teachers who work for these programs do not reside in Ontario at all. While many teachers have their homebase in Ontario, others reside in other provinces or other countries[4].

14. Blyth Educational Travel's involvement in this action is limited to the fact that Blyth Academy pays the contractors and employees it engages using Blyth Educational Travel's payroll processing account with Ceridian, a payroll processing company. As a result, Blyth Educational Travel appears on the T4s and the T4As Blyth Academy issues to its contractors and employees. Although there may be some putative class members that have also done work for Blyth Educational Travel, the contractual relationships relevant to this proposed class action are all with Blyth Academy[5].

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[3] The Shaw Affidavit at para 4, **Tab 1 to the Blyth Record**
[4] Affidavit of Frances Hatcher, sworn May 31, 2018 (The "Hatcher Affidavit") paras. 26-31, **Tab 2 to the Blyth Record.**
[5] The Shaw Affidavit at para 6, **Tab 1 to the Blyth Record.**

**2429131 Ontario Inc. o/a Blyth Academy Downsview Park**

15. The defendant 2429131 Ontario Inc. ("Blyth Academy Downsview") is a separate corporate entity from Blyth Academy. It provides courses to students who are involved in high level athletics[6].

16. Blyth Academy Downsview was formed in March 2016 after another private school unrelated to Blyth Academy, Premier Elite Athletes' Collegiate ("PEAC"), was suddenly evicted leaving its students with the possibility of losing their semester[7].

17. Blyth Academy Downsview stepped in and, working together with the Ministry of Education, provided a seamless transition to the new school thereby allowing the students to save their semester. It also provided free tuition in the overall amount of $250,000 to families who had already paid their full-year tuition fees to PEAC.

18. For a brief four month period, the former PEAC teachers were kept on at Blyth Academy as independent contractors calculated by pro-rating the amount PEAC had already been paying them annually, for the rest of the semester. These contracts were not specific to a particular course; rather they stated that the teacher would teach the full course load as had been taught prior to PEAC's bankruptcy, until the end of the semester[8].

19. As soon as the semester ended, Blyth hired the teachers it would be keeping on for the following year as employees. Since that time Blyth Academy Downsview has

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[6] The Shaw Affidavit at para 8, **Tab 1 to the Blyth Record.**
[7] The Shaw Affidavit at paras 57-59, **Tab 1 to the Blyth Record.**
[8] The Shaw Affidavit at para 61, **Tab 1 to the Blyth Record.**

been staffed almost exclusively by employee teachers, only occasionally engaging independent contractors[9].

## B. Philosophy and approach of Blyth

20. Blyth Academy caters to students who benefit from a non-traditional school environment; its classes are smaller and schedules are more flexible than traditional public or private schools. Blyth Academy schools generally offer four types of courses: "Full Time", "Private/Semi-Private", "Part-Time" (usually on evenings or weekends), "Summer", and "Online" courses. Students enroll à la carte (i.e. on a course-by-course basis), and can select a mixture of course delivery options[10].

21. The average Blyth Academy class size is around 7 students, but the size of the class depends on the popularity of that particular course. The maximum class size that Blyth Academy currently permits is 14 students[11].

22. Blyth Academy offers its courses in "blocks", which is a model that allows students to focus on a small number of courses over a shorter period of time. A full-time course at most Blyth Academy locations runs for 10 weeks, 5 days a week (excluding holidays), for slightly over two hours each day. In total, there are 110 hours of instruction per course, as mandated by the Ministry of Education. However, some of these hours take place outside of the classroom through self-directed learning. A high

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[9] The Shaw Affidavit at paras 57-65, **Tab 1 to the Blyth Record**; The Hatcher Affidavit at paras 5-9, **Tab 2 to the Blyth Record.**
[10] The Shaw Affidavit at para 10, **Tab 1 to the Blyth Record.**
[11] The Shaw Affidavit at para 10, **Tab 1 to the Blyth Record**

school student who enrolls in a full weekly course load at Blyth Academy could take a maximum of 3 courses per day[12].

23. Part-Time courses are taught over 16 weeks, two days a week. These courses also run for 110 hours but as there are fewer classes per week, the hours are more spread out. These courses are often taken by students who are also enrolled in traditional schools, or for whatever reason require more flexibility in their class schedules[13].

24. Summer courses are offered at most Blyth Academy schools and are taught over a period of one month in July or August[14].

25. Private/Semi Private courses are generally very flexible. Private courses are taught either one-on-one, or with a maximum class size of three students. These courses are also 110 hours long, but often there are fewer hours of instruction due to self-directed learning. The allowed time period to complete a Private/Semi-Private course is often determined based on the student's needs, in coordination with the teacher's schedule. There is significant room for flexibility in setting class schedules and class times[15].

26. Blyth Academy Online provides courses entirely online, which comply with the requirements set by the Ministry of Education for OSSD credits. There are no class schedules and these courses can take anywhere from weeks to a year to complete[16].

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[12] The Shaw Affidavit at para 15, **Tab 1 to the Blyth Record.**
[13] The Shaw Affidavit at para 16, **Tab 1 to the Blyth Record.**
[14] The Shaw Affidavit at para 17, **Tab 1 to the Blyth Record.**
[15] The Shaw Affidavit at paras 18-19, **Tab 1 to the Blyth Record.**
[16] The Shaw Affidavit at para 20, **Tab 1 to the Blyth Record.**

## C. Timing of Student Enrollment

27. Across all the Blyth schools, approximately 30 percent of student enrollment occurs in the first few weeks of September; the hiring of teachers is therefore by necessity somewhat ad hoc and cannot be predicted. Many teachers are not engaged until early in the block term in which they would be teaching a course.

## D. Blyth Campuses

28. Blyth Academy opened its first campus in 2003, in the Yorkville neighborhood of Toronto. Since then, it has opened ten more: Thornhill in 2007; Lawrence Park in 2010; Burlington in 2011; Mississauga in 2011; Whitby in 2012; London in 2013; Ottawa in 2013; Blyth Academy Online in 2014; CIHA, in 2015; and Waterloo in 2016[17].

29. Apart from all schools being operated by the same corporation, the campuses operate independently of one another and there are significant operational differences among the campuses. For instance, the Yorkville campus (where the proposed representative plaintiff Karen Walmsley taught) is perhaps the closest to a "traditional" school model. In recent years, student enrolment at the Yorkville campus has increased in a somewhat predictable fashion.

30. As a contrasting example, the Waterloo location is a much smaller school, with less predictability in enrolment and far fewer operational protocols. When it first opened in 2016, it had only fourteen (14) students. Courses were delivered by five (5) teachers, all of whom offered their services as independent contractors. For the 2017-2018 school

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[17] The Shaw Affidavit, paras. 21-22, **Tab 1 to the Blyth Record.**

year, it had forty-nine (49) students from Grade 9 to 12, although most of the students were in Grade 12[18].

31. At the Waterloo campus, the number of students actively taking a particular course varies significantly from term to term. For example, this past year one term had only 28 active students whereas another term had approximately 40. Courses are delivered by nine (9) teachers, all of whom who offer their services as independent contractors. Because the number of active students varies from term to term, so too does the number of teachers actively delivering courses[19].

## E. Unique and variable teaching experiences

32. As part of its goal of providing a unique and meaningful education experience, Blyth Academy engages not only trained teachers but also individuals who are currently engaged in a variety of other pursuits or who have a full-time career engaged in a non-teaching field[20].

33. The record demonstrates that, but for the fact that the proposed class members teach, not all can be painted with the same brush. There is clear variance of economic dependence, control, use of resources, and certain clear examples of those who are in fact in business for themselves. The below chart exemplifies such differences:

| **Teacher** | **Contrasting aspects of labour relationship** |
|---|---|
| C.G., a computer science teacher | • Full-time software engineer.<br>• Teaches grade 12 computer science at the Waterloo Campus. |

[18] Affidavit of Kathy Young, sworn May 24, 2018 (the "Young Affidavit") at para 4, **Tab 5 to the Blyth Record.**
[19] The Young Affidavit at paras. 3-4, **Tab 5 to the Blyth Record.**
[20] The Shaw Affidavit at para 23, **Tab 5 to the Blyth Record.**

| | |
|---|---|
| | • At his choice, only holds his class during the lunch hour of his job as a software engineer three days a week, combines in-person teaching with on-line program through which remainder of course is taught.<br>• Arranges to meet with students directly for extra help, without input from school re: scheduling [21]. |
| E.H., a teacher of psychology, sociology, and anthropology | • Teaches as a supply teacher in the Waterloo Region District School Board.<br>• Chooses to teach in-person two days a week and deliver the remainder of her course online, which is done to maintain flexibility to keep open the possibility of supply teaching.<br>• In-person hours and schedule determined by teacher and students, so long as in compliance with Ministry guidelines[22]. |
| C.R., a teacher of psychology, sociology, and anthropology, as well as Grade 12 math | • Taught a private course for the Waterloo campus out of Guelph, Ontario. The teacher and the student's father arranged for the course to be taught at the University of Guelph, and the schedule was arranged between the student and the teacher[23]. |
| N.G., a teacher of P.E., French, Drama, Dance, and Music | • Teaches a wide variety of courses at the Whitby Location.<br>• In addition to teaching with Blyth Academy, she also teaches in-home music lessons, performs as a musician, teaches fitness as a fitness trainer, and sells her own crafted woodworking creations[24]. |
| Kim Hacker, current principal of Blyth Whitby | • Taught as an independent contractor in the summers of 2011 and 2012 for the Yorkville school; hired as an employee thereafter at the Whitby school.<br>• As contractor, did not have to clear rescheduling of classes with administration, and had much more flexibility and control over class administration and delivery of instruction[25]. |

[21] The Young Affidavit, at para 17(a), **Tab 5 to the Blyth Record.**
[22] The Young Affidavit at para 17(b), **Tab 5 to the Blyth Record.**
[23] The Young Affidavit at para 17(c), **Tab 5 to the Blyth Record.**
[24] Affidavit of Kim Hacker, sworn May 24, 2018 (the "Hacker Affidavit") at para 14, **Tab 4 to the Blyth Record.**
[25] The Hacker Affidavit at paras 24 - 34, **Tab 4 to the Blyth Record.**

| | |
|---|---|
| L.J., who teaches animation online[26] | • Professional animator by trade, engaged by Blyth Academy to build the online Grade 11 Animation course, and continues to teach it on contract. |
| M.H., a teacher of creative writing and English | • A professional, published author by trade who teaches English and creative writing on contract for BAO, also teaching those courses at Fanshawe College in London[27]. |
| J.A., a contractor with BAO | • Teaches with Blyth Academy Online in conjunction with a tutoring business[28]. |
| P.K., a teacher of Advanced Functions | • Contracted with B.A.O. through his numbered company.<br>• Issued invoices from numbered company and paid pursuant to those invoices[29]. |
| Nathan Bishop, current principal of Blyth Academy Online | • As a teacher (before becoming a principal): Taught two private courses in 2015 for the London Campus.<br>• Was free to teach what he wanted in the course so long as it conformed to the Ministry guidelines.<br>• Negotiated the hours and days of instruction directly with student; no need to involve principal except to ensure that a space was available.<br>• Communicated directly with students by text message, with personal cellular phone.<br>• Was not required to take part in school-organized professional development sessions[30]. |
| Karen Walmsley, proposed representative plaintiff | • Taught group and private courses for Blyth Academy at Yorkville.<br>• Was required to attend staff meetings on occasion.<br>• Often taught 3 courses per block[31].<br>• Could not reschedule time and place of courses with students without operating through a "private coordinator"[32]. |

[26] Affidavit of Nathan Bishop, sworn May 24, 2018 (the "Bishop Affidavit") at para 16(a), **Tab 3 to the Blyth Record.**
[27] The Bishop Affidavit at para 16 (b), **Tab 3 to the Blyth Record.**
[28] The Bishop Affidavit at para 16 (c), **Tab 3 to the Blyth Record.**
[29] The Bishop Affidavit at para 17, **Tab 3 to the Blyth Record**; Exhibit "C" to the Bishop Affidavit, **Tab 3-C to the Blyth Record.**
[30] The Bishop Affidavit at paras 20-27, **Tab 3 to the Blyth Record.**
[31] Affidavit of Karen Walmsley, sworn March 20, 2018 (the "Walmsley Affidavit") at paras 15-30, **Tab D to the Motion Record of Karen Walmsley (The "Walmsley Record").**

| | |
|---|---|
| B. W., an art teacher with the Lawrence Park Campus[33] | • Runs an art teaching business that primarily caters to adults that operates out of a location nearby to the Lawrence Park Campus.<br>• B.W. contracts with Blyth Academy, and in doing so is able to expand business and provide services to high school students in addition to adults. |
| C.B., a teacher with Blyth Lawrence Park[34] | • Teaches private and group courses with the Lawrence Park Campus.<br>• She often teaches many concurrently.<br>• Exercised full control over the scheduling and length of time her private courses ran. They could and did range from as little as one to up to seven months in duration. |
| Sarah Badger, a teacher for Blyth Downsview Park in 2016 | • Signed an independent contractor agreement with Blyth Academy after the previous school, PEAC, went bankrupt[35].<br>• Her contract was not for one course but for the remainder of a number of courses in a semester, for an amount pro-rated to reflect the remaining amount of her salary for the semester, and in that respect differed from most other contracts with Blyth Academy[36]. |
| Michael McNeely | • Taught exclusively private courses for the Blyth Academy Lawrence Park location, and briefly for the Thornhill location.<br>• Taught his courses at Blyth Academy locations, but was free to reschedule courses at will with students.<br>• Used his own equipment, such as lap-top and email address[37]. |
| Robert Kovanchak | • Taught 12 courses as an independent contractor, and was then hired as an employee. |

[32] Transcript of the Cross-Examination of Karen Walmsley (the "Walmsley Transcript") at pp. 29, **Tab 5 to the Joint Supplementary Motion Record of the Parties (the "Joint Record")**.
[33] The Shaw Affidavit at paras 24-25, **Tab 1 to the Blyth Record.**
[34] The Shaw Affidavit at para 28, **Tab 1 to the Blyth Record.**
[35] Affidavit of Sarah Badger, sworn March 19, 2018 (The "Badger Affidavit") at paras 7-12, 17, **Tab F to the Walmsley Record.**
[36] The Shaw Affidavit at para 61, **Tab 1 to the Blyth Record**; Exhibit "J" to the Shaw Affidavit, **Tab 1-J to the Blyth Record.**
[37] Affidavit of Michael McNeely, sworn March 20, 2018 (the "McNeely Affidavit") at paras 16 and 59, **Tab E to the Walmsley Record**; Exhibit 9 to the McNeely Affidavit, **Tab E-9, pp. 1824-1827 to the Walmsley Record.**

| | |
|---|---|
| | • Was required to attend two "professional activity days".<br>• Negotiated up the value of one of his contracts, due to the economics of travelling to teach the course[38]. |

34. Some teachers contract with Blyth to teach only one course at a time, and others teach or taught many. Walmsley, for example, taught three courses per block for a number of different blocks; in the 2015/2016 school year, Walmsley taught 12 courses – 3 per "block"[39].

35. However, Walmsley's experience is not typical of all teachers at Blyth. See the chart below[40], which compares, in the course of one school year, how many independent contractor teachers there were teaching a particular number of courses. As seen in the chart below, across all schools in Ontario, in 2015/2016 there were 47 teachers who taught one group course, whereas there were only four teachers who taught more than 10 courses over the course of the year.

| **Across All Schools 2015/2016** | |
|---|---|
| Number of Contracts | Number of Teachers working pursuant to that many contracts |
| 1 | 47 |
| 2 | 35 |
| 3 | 17 |
| 4 | 9 |
| 5 | 13 |
| 6 | 9 |
| 7 | 9 |

[38] Affidavit of Robert Kovanchak sworn March 10, 2018 (the "Kovanchak Affidavit") at paras 10, 12, 15, 24, **Tab "G" to the Walmsley Record.**
[39] The Walmsley Affidavit at paras 15-30, **Tab D to the Walmsley Record.**
[40] Excerpted from Chart produced in answers to undertakings from cross examination of Pat Shaw, **Tab 4-B, p. 79-80 to the Joint Record**

| | |
|---|---|
| 8 | 11 |
| 9 | 5 |
| 10 | 7 |
| 11 | 3 |
| 12 | 1 |
| 13 | 1 |

| **Across All Schools 2016/2017** | |
|---|---|
| Number of Contracts | Number of Teachers working pursuant to that many contracts |
| 1 | 45 |
| 2 | 35 |
| 3 | 16 |
| 4 | 11 |
| 5 | 12 |
| 6 | 10 |
| 7 | 8 |
| 8 | 9 |
| 9 | 5 |
| 10 | 6 |
| 11 | 5 |
| 12 | 4 |
| 13 | |

| **Across All Schools 2017/2018** | |
|---|---|
| Number of Contracts | Number of Teachers working pursuant to that many contracts |
| 1 | 40 |
| 2 | 33 |
| 3 | 18 |
| 4 | 12 |
| 5 | 9 |
| 6 | 6 |
| 7 | 5 |
| 8 | 7 |
| 9 | 6 |
| 10 | 1 |
| 11 | 4 |
| 12 | 3 |

36. The above charts demonstrate that there were and are many teachers who did not share Walmsley's experience of teaching three courses per "block". Many teachers teaching at Blyth were only teaching one contract (10 weeks) for one group day course at one of the campuses in a 10 month school year. Very few of the teachers taught to the extent that Walmsley did. It is true that Walmsley's relationship with Blyth Academy was involved. It is equally true that she is not a typical example of a Blyth teacher – not that it could even be said that there is such thing as a "typical" Blyth teacher.

**F. No systemic control or classification**

37. The plaintiff attempts to prove that Blyth has a "highly organized structure" that systematically categorizes teachers arbitrarily between independent contractors and employees to serve a goal of affordability and profitability. The plaintiff relies on information presented to investors considering an expansion of a Blyth school outside of Ontario to argue that the distinction between contractors and employees serves a business model to keep costs down.[41]

38. It is true that this presentation to investors did not differentiate between employee teachers and independent contractor teachers. Why would it? Such a distinction, though legitimate, does not need to be highlighted in a high-level presentation to foreign investors. In any event, criticism of a private business for trying

[41] See generally the Affidavit of Audrey Gheldof, sworn April 19, 2018 (the "Gheldof Affidavit"); **Tab A to the Plaintiff's Supplementary Motion Record.** See also Factum of the Plaintiff, at para 39.

to manage its expenses and generate profit is misplaced[42]. These are the goals of virtually every private business.

39. Furthermore, such an argument is beside the true point, namely, whether the determination of the status of the teachers can be made in common for the class. The answer to this question will not rely on the "business goals" of Blyth Academy, but the individual classification of each teacher.

40. The plaintiff also relies on weak and unfounded attacks on the defendants' evidence to suggest that there is no real difference between contractors and employees. For instance, Mr. Shaw's statement that contractors are not required to attend staff meetings or engage in administrative duties, is "contradicted" by evidence of 8 emails where Mr. McNeely was directed to teach in certain class rooms[43]. This is a false contradiction. Emails settling where a course would be taught do not contradict the statement in Mr. Shaw's affidavit.

41. The plaintiff's evidence intended to show systemic policies and procedures is riddled with sweeping generalizations that are *in fact* contradicted by direct evidence from teachers who used to provide services to Blyth Academy as contractors. For instance, Mr. Kovanchak states in his affidavit "I observed no discernable difference between what I was doing and what the other teachers on campus… were doing"[44]. Ms. Walmsley states that the duties and controls imposed were "consistent across all class

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[42] Factum of the Plaintiff at para 43.
[43] Factum of the Plaintiff at para 36.
[44] The Kovanchak Affidavit at para 30, **Tab G to the Walmsley Record.**

members" and baldly states that her duties were functionally similar to an employee named Dr. Reibetanz, who – it should be noted – failed to provide evidence himself[45].

42. However, these statements are directly contradicted by evidence given by both the plaintiff and the defendant in the record. Ms. Hacker, in her affidavit, plainly states that the employee teachers:

> *"...all work full-time. They are expected to be on campus all day. They are required to teach subjects as assigned to them. They are required to attend staff meetings and professional development sessions offered.*
>
> *11. By contrast, independent contractors usually do not teach a full course load. They attend on campus to teach their class(es), but there is no expectation they be on campus at any other time. They control the subjects they are willing to teach, and can decline any contract offered to them. They are not required to attend staff meetings or professional development sessions."*[46]

43. Similarly, Mr. Bishop, who provided services to Blyth as an independent contractor, deposes that as a contractor he "was not required to take part in school-organized professional development sessions"[47].

44. These are not statements of "feelings" as the plaintiff states in her factum. They are statements of fact that are un-contradicted in the evidence.

45. Although the plaintiff suggests that the level of control of teachers by Blyth is constant across all of the class members, this is simply not the case. At best, Walmsley could only testify as to her assumptions; she states that it is her "understanding from speaking with other teachers at Blyth Academy, including teachers at other campuses,

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[45] The Walmsley Affidavit at para 34, **Tab D to the Walmsley Record.**
[46] The Hacker Affidavit at paras 10-11, **Tab 4 to the Blyth Record.**
[47] The Hacker Affidavit at paras 10-11, **Tab 4 to the Blyth Record.**

[her] duties are consistent with the duties of all Class Members" and "the operations of Blyth Academy and the controls imposed by Blyth Academy on the class members are consistent across all class members"[48]. Her testimony on cross-examination clearly demonstrates that her assumption in this regard does not necessarily apply to all proposed class members[49].

46. Rather than belabour the point, it suffices to say that the implied assertions by the plaintiff that, due to systemic control and procedures, there are no differences between contractors and employees, are not accurate.

## G. Control highlighted by plaintiff is primarily due to Ministerial Control

47. The plaintiff has highlighted the alleged bureaucratic control imposed by Blyth Academy on teachers whether they be contractors or employees. Blyth Academy does not deny that there are certain expectations of the teachers, incorporated into the contracts as deliverables, to ensure compliance with the Ministry of Education's guidelines[50]. Such "control" should be seen as what it is: a requirement of operating a private school.

48. While it may appear to teachers that many "controls" are imposed by Blyth Academy, in reality they are imposed by the Ministry of Education. In Ontario, private schools with authority to grant OSSD credits are periodically inspected by the Ministry[51]. Ministry inspections are intended to ensure that the instruction, assessment, and evaluation in the offered Secondary School courses are in compliance with the

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[48] The Walmsley Affidavit at para 13, **Tab D to the Walmsley Record.**
[49] The Walmsley Transcript at pp. 47, **Tab 5 to the Joint Record.**
[50] The Hatcher Affidavit at para 14, **Tab 2 to the Blyth Record.**
[51] The Hatcher Affidavit at para 10, **Tab 2 to the Blyth Record.**

myriad requirements of the Ministry. Compliance with these requirements is assessed through the review of pre-inspection materials and on-site discussions with principals and teachers. The inspectors also review samples of student work, examination of school policies and procedures, and school records. As a result, Blyth's Vice President of Academics requests that teachers maintain certain records – such as courses of instruction, lesson plans, and attendance records[52].

49. The controls that the Ministry - whose business it is to regulate the delivery of a standard level of education in Ontario – requires of Blyth Academy are entirely unconcerned with the actual labour relationship between the school and the teacher. There is no evidence that the Ministry concerns itself in any way with how Blyth Academy classifies its teachers.

50. It is misleading to suggest that, simply because Blyth Academy requires teachers to maintain various records required by the Ministry of Education, such requirements can then be used to determine the actual labour relationship between any given teacher and Blyth.

## H. Evidentiary issues

51. Before leaving this discussion of the Facts, the defendants must respond to the allegations in the plaintiff's factum regarding "generalities, opinion, initial and hearsay."[53] The plaintiff's characterization of the defendants' evidence is simply incorrect. The defendants have led evidence of facts that characterize the relationship between Blyth Academy and those teaching for Blyth. These relationships are two-

[52] The Hatcher Affidavit at para 14, **Tab 2 to the Blyth Record**.
[53] Plaintiff's Factum, para. 28 to 42.

sided, and evidence coming from Blyth's side of this relationship is admissible and cannot be described as hearsay. Evidence from a representative of Blyth Academy about how a particular teacher contracts with Blyth, anonymous or not, is simply not hearsay. It is direct evidence from Blyth's affiants about what they have observed.

52. Second, to the extent that the plaintiff takes issue with the defendants' affiants not providing the names of the teachers that are discussed in the affidavits (for privacy reasons), it was open to the plaintiff to request names of those individuals on cross-examination of the affiants, if the identities of such individuals were truly necessary for the plaintiff to be able to test this evidence. The plaintiff did not do so, presumably because the specific names of the individual teachers are not relevant or necessary to this motion.

53. Indeed, Walmsley herself exercised similar care in not identifying the names of specific and potential class members. On cross-examination, Walmsley was asked about who it was she spoke to and who she got her information from in respect of her assertion that her duties and Blyth Academy's controls were consistent across all class members. Her counsel stated "So we are very clear, no names will be given, and we will be objecting to names of persons at Blyth currently in case that... in case you ask for one"[54].

54. Clearly, both parties accept that the names of specific individuals are not required for the purposes of the certification motion.

55. Walmsley's relationship with Blyth Academy ended in 2017, and shortly thereafter she began this action. To the extent Walmsley has provided her insight as to

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[54] The Walmsley Transcript at pp. 17, **Tab 5 to the Joint Record.**

the circumstances of other independent contractors at other campuses, having only worked at the Yorkville Campus, her information about the experiences of teachers who provided services to other campuses is at best speculation and at worst hearsay. On her own admission, she cannot recall with any certainty speaking with anyone from the London, Waterloo, Thornhill, CIHA, Barrie (now defunct), or Ottawa[55].

56. Similarly, Ms. Badger's evidence can only speak to her brief experience with Blyth Academy Downsview Park, a separate corporation that did not at the time engage teachers in a manner at all similar to other campuses. Further, Mr. McNeely's evidence is unique to his own experience at the Lawrence Park campus, with the exception of a brief foray working at the Thornhill location. Mr. Kovanchak's evidence with respect to the Mississauga campus is similarly constrained.

## PART III - ISSUES

57. The issues on this motion are as follows:

(a) Should this action be certified pursuant to s. 5 of the *Class Proceedings Act*, given that, in particular,

(i) The facts demonstrate that it is not possible to make a common determination as to whether class members are "employees" pursuant to the *Employment Standards Act*; and

(ii) This proposed class action is not the preferable procedure to resolve the claims of the class members.

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[55] Walmsley Cross-examination transcript at pages 42-46.

(b) In the alternative, if the action is certified, what should the common issues and class definition be?

(i) The definition of the class should be limited in the past to the applicable limitation period proscription date, and in the future to the date of certification;

(ii) The causes of action not based in breaches of the *ESA* should not be certified because they are redundant and superfluous;

(iii) The Claim for punitive damages should not be certified for lack of evidence; and

(iv) The Claim for employee overtime should not be certified as there is no basis in fact for it.

## PART IV - LAW AND ARGUMENT

58. Walmsley seeks to certify this action as a class action, broadly defining the class as:

> *"any person, excluding those who worked exclusively as Principals or Vice Principals, who, since 2002, worked or continues to work for Blyth Academy in Ontario and who taught or teaches at least one course, including those whose work consisted or consists exclusively of teaching private or semi-private courses."*[56]

59. In other words, her claim is that not only she, but every teacher who taught any course for any Blyth Academy school/program in Ontario at any time since 2002 stood

[56] Amended Statement of Claim at para 7, **Tab B to the Walmsley Record.**

in a sufficiently similar relationship to Blyth Academy, such that a determination about misclassification and entitlements can be made in common for each and every one of these individuals.

## A. Section 5(1)(a) of the CPA

60. The defendants do not dispute that the plaintiff has pled technically proper causes of action in breach of statute, breach of contract, breach of duty of good faith, honesty, and fair dealing, negligence, and unjust enrichment.

61. However, not all of these actions should be certified. The causes of action in negligence, breach of contract, breach of duty of good faith, and unjust enrichment are all entirely superfluous, and will do nothing more than add unnecessary complexity to the discovery process. Such was the reasoning of Justice Perell in *Berg v. Canadian Hockey League*:

> *In this proposed class action, if the Plaintiffs prove that as a common employer the Defendants breached the various employment standard statues, then they will succeed on their breach of statute claim and on their unjust enrichment claim and there would be no need to prove breach of contract, negligence breach of duty of honesty, good faith and fair dealing, conspiracy and waiver of tort.*
>
> *Conversely, if the Plaintiffs fail to prove that the Defendants breached the various employment standards statutes, they will not be able to snatch victory from the jaws of defeat by proving breach of contract, negligence, breach of duty of honesty, good faith, and fair dealing, conspiracy, or waiver of tort, because all of these claims will necessarily fail with the failure of the breach of statute claim.*[57]

62. Much like in *Berg*, in this case if the matter is certified, the significant question is whether class members should have been classified as employees rather than as

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[57] *Berg v. Canadian Hockey League,* 2017 ONSC 2608 at paras 198-199 [*Berg*], **Tab 1 to the Defendants' Book of Authorities (the "Defendants' BOA").**

independent contractors. If the answer is yes, the class members do not need to succeed in all of the other causes of action to obtain their entitlements. If the answer is no, all other causes of action necessarily fail. As such, the causes of action in contract, duty of honesty, good faith, and fair dealing, negligence, and unjust enrichment should not be certified.

**B. Section 5(1)(b) of the CPA**

63. Similarly, the defendants do not dispute that the plaintiff has generally proposed a class definition that is defined and objective, such that the members of the class can be ascertained.

64. That said, the inclusion of all teachers going back to 2002 – for the last 16 years – blatantly ignores that class members who have claims stemming from contracts that ran prior to October 2015 are clearly statute-barred. The Statement of Claim was issued in October, 2017. The plaintiff has led no evidence that suggests that the claim was not discoverable by class members until 2015, nor has the plaintiff even pleaded discoverability.

65. Further, the class must necessarily have a temporal boundary that creates an end-point for its definition. Courts have recognized this consideration, and such was the decision of Justice Perell in *Berg*, limiting the temporal terminus for the class definition as the date of certification[58].

66. The defendants therefore submit that the class definition should be limited to those teachers who worked for Blyth between October 2015 and December 2018.

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[58] *Berg* at para 162, **Tab 1 to the Defendants' BOA.**

## C. Section 5(1)(c) of the CPA

67. The requirement that it be possible to resolve the common issues for the entire class is likely the most important factor in considering whether an action should be certified as a class action[59].

68. The law of commonality has been "generally interpreted in the case law as involving two-steps – some evidence that the proposed common issue actually exists and some evidence that the proposed issue can be answered in common on a class-wide basis"[60].

69. The second step of this analysis requires the plaintiff to show that, apart from actually existing, the proposed common issue can actually be determined in common for the class. As stated in *Omarali*:

> *"The plaintiff may well have some evidence that the PCI exists at least for one or more class members. But now, under the second step of the analysis, he must present some evidence that the [proposed common issue] is common to the entire class."*

70. Put another way: "One of the most important issues in the common issues analysis is that a common issue cannot depend upon individual findings of fact that have to be made with respect to each individual claimant. In other words, if the common questions that arise herein… depend on individual findings of fact about each individual… then these questions cannot be certified as common issues"[61].

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[59] *Fehr v. Sun Life Assurance Company,* 2015 ONSC 6931, at para 17, **Tab 2 to the Defendants' BOA.**
[60] *Omarali v. Just Energy,* 2016 ONSC 4094 at para 36 [*Omarali*], **Tab 3 to the Defendants' BOA.**
[61] *Rosen v. BMO Nesbitt Burns*, 2013 ONSC 2144, at para 44 [*Rosen*], **Tab 4 to the Defendants' BOA.**

71. It is the plaintiff's onus is to show some basis in fact; this onus does not involve such a superficial level of analysis such that it amounts to "symbolic scrutiny"[62].

72. The main question on this certification motion is whether it is possible to determine whether every teacher in the class should have been classified as an employee, pursuant to the *Employment Standards Act*. The answer to that question is "no".

**No basis in fact that labour relationship for every teacher can be determined in common**

73. There is no one conclusive test that can be universally applied to determine whether a person is an employee or an independent contractor. There are a number of factors that will assist a court in determining the true nature of the relationship between a worker and an institution. The heart of the inquiry is not however any one factor, but the total relationship between the parties with the central question being "whether the person who has been engaged to perform the services is performing them as a person in business on his own account"[63]. That said, courts have relied on the factors enunciated by the Supreme Court of Canada in *Sagaz Industries*:

(a) The level of control over a worker (not only as to the product sold, but also as to when, where and how it is sold);

(b) Whether the worker was limited exclusively to the service of the principal;

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[62] *Pro-Sys Consultants v. Microsoft Corporation,* 2013 SCC 57 at para 103, **Tab 5 to the Defendants' BOA.**

[63] *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983, paras. 46-47 [*Sagaz*], **Tab 6 to the Defendants' BOA.**

(c) Whether the worker provides his or her own equipment;

(d) Whether the worker hires (or could hire) his or her own helpers;

(e) The degree of responsibility for investment and management held by the worker;

(f) Was the individual carrying on business for himself or herself or was the individual carrying on the business of the organization from which he or she was receiving compensation?

(g) The degree of financial risk taken by the worker; and

(h) The worker's opportunity for profit in the performance of his or her tasks[64].

74. Thus, the focus of the commonality analysis in employee/independent contractor misclassification cases is on the objective circumstances of *the teacher*, not on the similarities between job duties of the teachers or the operations of Blyth Academy. This individual-based inquiry is precisely why this class-action is not certifiable.

75. While the plaintiff has focussed her evidence on the level of control over the teachers, this is but one factor in the analysis, and is not solely determinative of the question.[65]

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[64] *Sagaz*, paras. 46-48, **Tab 6 to the Defendants' BOA**; *Braiden v. La-Z-Boy Canada Ltd.*, [2008] O.J. No. 2314, para. 33, **Tab 7 to the Defendants' BOA**.
Although the plaintiff has cited American and British case law in her factum, *Sagaz* remains the binding authority in Ontario courts.

[65] *Braiden,* supra at para 33; *Belton v. Liberty Insurance Co. of Canada*, [2004] O.J. NO. 3358 at para 11, **Tab 8 to the Defendants' BOA.**

76. Further, while the mutual intentions of the parties regarding their relationship and execution of the contract for services are not determinative on their own, they nonetheless cannot be ignored[66]. Accordingly, the intention of each teacher as to what he or she intended regarding the labour relationship and at the time of entering into his or her respective contract for services is relevant and necessary to the inquiry.

77. In order to answer whether there is some basis in fact to certify the misclassification issue as a common question, one must necessarily ask the question of whether there is some basis in fact to make a common determination on the factors relevant to the common law classification test.

**The level of control**

78. It is not in dispute that the "what" that was offered by the plaintiff and the defendants was the same product – secondary school credits. However, it is also clear that the "when", "where", and "how" were in many cases, though not all, left up to the proposed class members.

79. Certain aspects of teaching groups of students, which may appear at first glance as "control", are in actuality the simple realities of the delivery of the product. Teachers who may appear to not have control over the "when" and the "where" of instructional delivery of a course often in fact do have that control vis-à-vis Blyth Academy, but are

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[66] See *Royal Winnipeg Ballet v. M.N.R.*, [2007] 1 FCR 35, 2006 FCA 87 at para 25, **Tab 9 to the Defendants' BOA**; *Ligocki v. Allianz Insurance Company of Canada,* 2010 ONSC 1166 (CanLII) at para 34, **Tab 10 to the Defendants' BOA**; *Wellington (County) v. Butler,* 2001 CanLII 38739 (ON SCDC) at para 43, **Tab 11 to the Defendants' BOA.**

restricted in this flexibility vis-à-vis the student, who may also be taking courses at public school boards, have outside obligations, or the like[67].

80. In that same vein, Justice Pizzitelli of the Tax Court of Canada, in deciding that a teacher for Blyth Academy was in fact an independent contractor, held:

> *The fact that she was required to teach the course at the Appellant's campus and in the Appellant's classroom, or to take a field trip to the very nearby Royal Ontario Museum with which the Appellant has had an educational partnership does not place her under the supervision of the appellant for control purposes. The nature of the Appellant's business is that a dozen or so students must congregate at a fixed place to receive instruction. And so it makes sense that it be at a school and in a class room, just as it makes sense and is more of simple necessity that an electrician or other independent tradesmen perform his work at the construction site.*[68]

81. Nevertheless we *do* see numerous examples in the record of teachers that had considerable freedom in determining not only the "what" but also the "when", "where", and "how". For instance, C.B. at Lawrence Park had full freedom to negotiate the time and location and duration of the classes she taught, and did so by contacting the students directly[69]. B.W.'s contractual relationship with Blyth Academy permits him to engage with another client base, and develop his business through teaching Blyth Academy's students at his art school. C.G. taught computer science to groups of students at Waterloo over his lunch-hour from his primary employment and to the extent that lunch-

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[67] See eg. The Hacker Affidavit, at para 19, **Tab 4 to the Blyth Record.**
[68] *2016169 Ontario Inc. o/a Blyth Academy v. Minister of National Revenue*, Unreported, Toronto, November 21, 2013 Docket 2013-822 (CPP), 2013-823 (EI) at para 22, **Tab 12 to the Defendants' BOA.**
[69] The Shaw Affidavit at paras 27-28, **Tab 1 to the Blyth Record.**

time teaching did not add up to 110 hours per course, he chose to deliver the rest of the course online[70].

82. It is certainly clear that there is minimal control over the teachers of Blyth Academy Online. They are able to teach from "anywhere they have an internet connection" and "have complete control of when and where they work"[71]. Indeed, some of the BOA teachers are based out of other provinces, or even internationally[72].

83. Although Mr. McNeely provided evidence in his affidavit that Blyth Academy determined when and where he would teach his students[73], a review of the emails attached to his affidavit demonstrates the incorrectness of this statement. For example, in an email to a student, Mr. McNeely states "We have 16.5 hours left in a course, and alas, I cannot teach tomorrow. I forgot I have an all-day conference I must attend. Please work on the paper and get it done so we can focus on exam review tomorrow." In response, an email from someone who appears to be the student's mother advises that another class must be cancelled, and arrangements are made between Mr. McNeely and the student's mother to reschedule these missed classes to a Saturday[74].

84. Similarly, Ms. Young also relates how a contractor teacher at the Whitby location customized the "where and the when" by arranging with a student to provide instruction at irregular times, without direction from the campus principal[75].

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[70] The Young Affidavit at para 17(a), **Tab 5 to the Blyth Record.**
[71] The Bishop Affidavit at para 7, **Tab 3 to the Blyth Record.**
[72] The Bishop Affidavit at para 8, **Tab 3 to the Blyth Record.**
[73] The McNeely Affidavit at para 49, **Tab E to the Walmsley Record.**
[74] Exhibit 9 to the McNeely Affidavit, **Tab E-9 to the Walmsley Record**; It is also of note that this email was sent from what appears to be a personal email address.
[75] The Young Affidavit at para 17(b), **Tab 5 to the Blyth Record.**

85. There is also significant variance amongst class members when assessing the evidence tendered regarding the obligation to attend staff meetings, conduct extra-curricular activities, attend professional development sessions, or other such activities. For example, contrast Walmsley's evidence (worked outside of classroom hours) with that of Ms. Hacker (Whitby independent contractor teachers are not required to attend staff meetings or professional development sessions[76]) and with that of Mr. Bishop (as an independent contractor teacher in London, he was not required to attend any professional development sessions[77]).

86. What is clear from the contrasting evidence above is that the level of control was *not* uniformly common amongst all class members. Certain members of the proposed class believe that they experienced high degrees of bureaucratic control, while others have described a high degree of freedom in executing their teaching jobs.

**Whether the worker was limited exclusively to the service of the principal and whether they were in business on their own account**

87. Exclusivity of service as a factor in determining whether a worker is a contractor or an employee[78]. It clear from the contracts for service that the Blyth teachers were not restrained from working for any other employer, and many in fact did. There are members of the proposed class who might well be held by a court to have been in business on their own account and who considered Blyth Academy a client.

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[76] The Hacker Affidavit at para 11, **Tab 4 to the Blyth Record.**
[77] The Bishop Affidavit at para 27, **Tab 3 to the Blyth Record.**
[78] *Braiden* at para 33, **Tab 7 to the Defendants' BOA.**

88. For example, N.G. was also an entrepreneurial woodworker, personal trainer, and musician[79]. B.W., who taught art at the Lawrence Park campus, did so as a part of his own fine arts instructional business, in that way adding to his company's book of business[80], such that it might be said that he was in business on his own account, providing services to his client, Blyth Academy.

89. C.G., who taught computer programming for the Blyth Waterloo campus, teaches during his lunch period, necessary because of the very fact that he teaches his course while he is at work engaged in full-time employment as a software engineer[81]. C.G. also might very well be considered by a Court to be in business on his own account.

90. Further still, J.A., a teacher with Blyth Academy Online, teaches through Blyth Academy as a supplement to his own tutoring business, and M.H., another teacher with Blyth Academy Online, is a published author who also teaches creative writing at Fanshawe College[82].

91. There are also examples of those who provided services through a personal corporation: P.K., a teacher for Blyth Academy Online of advanced functions, invoiced Blyth Academy through his numbered company 1387909 Ontario Inc.[83]

92. These teachers referenced above clearly do not have an exclusive relationship with Blyth Academy.

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[79] The Hacker Affidavit at para 14, **Tab 4 to the Blyth Record.**
[80] The Shaw Affidavit at paras 24-25, **Tab 1 to the Blyth Record.**
[81] The Young Affidavit at para 17(a), **Tab 5 to the Blyth Record**
[82] The Bishop Affidavit at para 16, **Tab 3 to the Blyth Record**
[83] Exhibit "C" to the Bishop Affidavit, **Tab 3-C to the Blyth Record.**

**Equipment used in performing duties**

93. It is not in dispute that Blyth Academy's "bricks and mortar" schools gave teachers the opportunity to use their photocopiers, printers, projector screens, and kitchenettes in teaching courses. The nature of the work – teaching to groups of students – in many cases dictated that the work be performed at a specific campus.

94. But it is also not in dispute that teachers (e.g. McNeely, Walmsley, Bishop, and Hacker) also used their own equipment in preparing for their courses. This use of personal equipment is especially the case for teachers of Blyth Academy Online courses, who have the ability to work from any location, and sometimes work from out of the country[84].

95. Mr. McNeely advises that he used his own laptop, and later, an IPad, to complete his duties[85]. Mr. McNeely was also advised by Luke Coles, principal of Blyth Academy Lawrence Park that "a laptop is a basic tool of the trade that all teachers should arrive with"[86].

96. Mr. Bishop testifies that when he taught as an independent contractor for Blyth Academy in London, he would "typically communicate [with students] by text message, and for that I used my personal cell-phone"[87].

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[84] The Bishop Affidavit at para 7, **Tab 3 to the Blyth Record.**
[85] The McNeely Affidavit at para 59, **Tab E to the Walmsley Record.**
[86] Exhibit 13 to the McNeely Affidavit, **Tab E-13, pp. 1953 to the Walmsley Record.**
[87] The Bishop Affidavit at para 25, **Tab 3 to the Blyth Record.**

97. Indeed, Walmsley herself deducted "office expenses" and telephone and utilities on her tax returns as expenses associated with her work as an independent contractor for Blyth Academy[88].

**Subjective intention of the parties**

98. The Divisional Court has held that the subjective understanding of the parties is a relevant factor for consideration in determining the nature of the labour relationship and should not be ignored[89].

99. However, it is apparent that it will be virtually impossible to make any common determination of the *subjective intentions* of the class members: what did they understand or intend their labour relationship to mean? The nature of such an inquiry is necessarily individualistic, and cannot be determined in common.

**Label of "teacher" and similarity in job function not determinative**

100. Although all of the proposed class members share the common label of "teacher", much like in *McCracken*, this label gives a false impression of commonality.[90] To be clear, the issue in this case is not whether a particular worker was exempt from certain entitlements by virtue of being a managerial employee. That issue legally turns on job function and responsibility, and *McCracken* turned on the fact that there was not enough evidence to show similarity in job function across the proposed class. This case will turn on whether there is evidence of commonality among the labour relationship, not job functionality.

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[88] The Walmsley Transcript at pp. 37, **Tab 5 to the Joint Record**.
[89] *Ligocki*, supra, **Tab 10 to the Defendants' BOA**, *Wellington (County)* supra, **Tab 14 to the Defendants' BOA.**
[90] *McCracken v. CN Rail,* 2012 ONCA 445 [*McCracken*] **Tab 13 to the Defendants' BOA**

101. In the within case, the defendants do not dispute that there is similarity in job function – but that is not the focus of the inquiry. The inquiry is whether, having regard to the specific circumstances of the individual teacher vis-à-vis Blyth Academy, the labour relationship is properly classified as a contractor or an employee. Naturally there will be similarity in job function between teachers of high school courses, but this commonality stems out of the nature of the work performed, not the nature of the relationship between Blyth Academy and the individual proposed class members.

102. In *Omarali* the Court, distinguishing from the "overtime" misclassification cases, also made clear that the inquiry into whether a worker is an independent contractor or an employee is materially different than the inquiry into whether an employee is a managerial employee or not. In those cases, such as *Brown, McCracken*, and *Rosen*, the focus of the commonalities analysis was on whether there is evidence to suggest that "the job functions of the class-members are "sufficiently similar" that the misclassification claim could be resolved without considering the individual circumstances of the class members"[91].

103. Thus, the focus of much of the evidence in the plaintiff's certification motion record on the commonality of the job functions is misplaced. The fact that Walmsley believes her "duties were consistent with the duties of all Class Members"[92] is irrelevant to the analysis. Naturally, the duties of a person teaching a secondary school course will be similar to another person who is also teaching a secondary school course.

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[91] *Omarali,* para 48, Tab 14, **Tab 3 to the Defendants' BOA.**
[92] The Walmsley Affidavit at para 13, **Tab D to the Walmsley Record.**

**Evidence of systemic practices and policies is not persuasive**

104. The plaintiff relies heavily on evidence of supposed "systemic" practices and policies to establish some basis in fact that the issues can be resolved in common for all proposed class members, drawing from cases such as *Baroch, Rosen, Omarali,* and *Sondhi*. To the extent that the courts look at the systemic nature of a company's behaviour to support an order for certification, such systemic evidence is relevant only when entitlement is not in issue.

105. For instance, in *Baroch v. Canada Cartage*[93], the class definition was crafted to include "only those former or current employees who *were* entitled to receive overtime compensation under the federal legislation (i.e. if they exceeded the applicable hours of work threshold)". As the Court noted in that case: "When is an overtime misclassification case not a misclassification case? When it is framed as a complaint about the systemic policies or practices of the employer".

106. Justice Belobaba's decision in *Omarali*, though appearing to rely on evidence of systemic practices and policies to support the certification order, is distinguishable from the case at bar, and does not assist the plaintiff. Specifically, in certifying *Omarali,* Justice Belobaba stated that "the defendants really had little in the way of "it depends" evidence and the plaintiff, on the other hand, had significant evidence of systemic commonality".

107. In contrast with the case at bar, the defendant in *Omarali* relied heavily on the provisions in the independent contractor agreement that classified its workers as

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[93] *Baroch v. Canada Cartage*, 2015 ONSC 40 at para 10, **Tab 14 to the Defendants' BOA.**

independent contractors[94]. As a result, the primary evidence on which the case was certified was based on systemic practice and policies of the defendant in that case.

108. Blyth Academy does not take this position. It recognizes that the wording of the contracts with individual teachers is not a determinative factor, although it is nonetheless a relevant factor. Rather, the objective classification of the teachers is the determinative factor for entitlement to *ESA* benefits.

109. Even assuming for the sake of argument that Blyth Academy was engaged in a systemic practice of classifying teachers as independent contractors – which is not actually the evidence before this Court – Blyth's subjective classification of each teacher would not be determinative of their status as either an employee or an independent contractor. Such an analysis would suggest that the label used in the contracts for services would be determinative of their status, which is not the law.

**"It Depends"**

110. Given the above case law and evidence, it is clear that individual enquiries will be required of each and every teacher to determine whether they are indeed a member of the class. This is expressly the type of individual fact-finding that the Court of Appeal said in *McCracken* precludes certification of a proposed class action:

> *For these legal principles to be satisfied in the context of a proposed common issue of misclassification, the plaintiffs' evidence must establish some basis in fact to find that the job functions and duties of class members are sufficiently similar that the misclassification element of the claim against CN could be resolved without considering the individual circumstances of class members. In the absence*

[94] *Omarali* at para 16, **Tab 3 to the Defendants' BOA.**

> *of such evidence, there is no basis in fact to find that resolving the proposed common issue would avoid duplication of fact-finding or legal analysis, or that success for one class member will mean success for all, or that individual findings of fact would not be required with respect to each individual claimant.*
>
> ....
>
> *The plaintiffs' litigation strategy seizes on the superficial commonality that all class members work for CN and all share the common label of being a [front-line supervisor]. However, this common label conveys a false impression of commonality given the evidence on the motion of the different job responsibilities and functions of class members, who hold many different job titles and who work in a variety of workplaces with different reporting structures and different sizes of workforce. There is no basis in fact to support a finding that the essential misclassification determination could be made without resorting to the evidence of individual class members. Simply put, the plaintiff has not shown that any significant element of his claim is capable of common proof.*[95] [emphasis added]

111. A similar conclusion was reached in *Brown v. Canadian Imperial Bank of Commerce*, where the plaintiff alleged that investment advisors employed by the defendant financial institution had been misclassified as managerial employees with the effect of wrongfully denying them overtime pay. As in *McCracken*, the motion judge found that the evidence dispelled the suggestion that the question of the proper classification of the class members could be decided on a class-wide basis:

> *The evidence proves that there are variations in individual circumstances that would put some Investment Advisors well on the "managerial" side of the scale in view of their individual autonomy, independence and discretion. While further investigation would be necessary to reach a*

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[95] *McCracken*, supra at paras. 104 and 128, **Tab 13 to the Defendants' BOA**; see also *Rosen*, supra, **Tab 4 to the Defendants' BOA.** A common issue "cannot depend upon individual findings of fact that have to be made with each individual claimant".

> *definitive conclusion, it seems to me that there is good argument that CIBC's witnesses Mr. Baker and Ms. Timms would fall on the managerial side of the scale. There are aspects of Mr. Sutherland's circumstances that would put him on the same side of the scale. CIBC does not dispute that it is possible that there are some Investment Advisors who may be entitled to overtime. It simply says that the determination cannot be made on a collective basis. The answer to the question: "Are Investment Advisors managers?" simply cannot be answered in common. The answer must be: "It depends." While in my view, there may be a strong argument that the autonomy, responsibilities and method of remuneration of Investment Advisors points in the direction of their positions being managerial, it is possible, as CIBC in fact acknowledges, that some individuals might be considered as eligible for overtime. But the answer to the question would require in each case an individual granular analysis.*[96] [emphasis added]

112. In the present case, the answer to the proposed common issue – "Are the class members "employees" of the defendants pursuant to the *Employment Standards Act*" – cannot be answered in common. The answer will also be: "It depends". The determination of whether a worker is an employee or an independent contractor is a highly fact-specific inquiry. Each case must be considered individually through a granular analysis[97].

113. That answer – "it depends"— is fatal to the plaintiff's motion to certify this class action.

114. The answer to the question "is Karen Walmsley an independent contractor or an employee" is irrelevant on certification. The *Class Proceedings Act* does not require a preliminary finding on the merits[98]. As stated in *Brown v. CIBC,* "the judge on the

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[96] *Brown v. Canadian Imperial Bank of Commerce*, 2012 ONSC 1284 (ON SCDC) [*Brown*] at paras 113, 175, **Tab 15 to the Defendants' BOA.**
[97] *Ligocki, supra,* **Tab 10 to the Defendants' BOA.**
[98] *Hollick v. Toronto*, 2001 SCC 608, at para 27, **Tab 16 to the Defendants' BOA.**

certification motion was not concerned with the ultimate merits of the claim that is whether employees were improperly deprived of overtime pay. Rather, he was concerned with the "merits" of the argument that eligibility for overtime pay could be determined as "a common issue"[99].

115. As the court said in *Freeman Bartholomew v. Coco Paving Inc. and Lafarge Canada Inc.*:

> *Here, however, there are so many individual issues ... which would likely require individual trials for virtually each class member, in such a situation certification should never be granted. Comments to this effect can be found in Mouhteros v. DeVry Canada Inc., 1998 CanLII 14686 (ON SC), 1998 41 OR (3d) 63, where Winkler J. (as he then was) stated:*
>
> *The presence of individual issues will not be fatal to certification. Indeed, virtually every class action contains individual issues to some extent. In the instant case, however, what common issues there may be are completely subsumed by the plethora of individual issues, which would necessitate individual trials for virtually each class member. Each student's experience is idiosyncratic, and liability would be subject to numerous variables for each class member. Such a class action would be completely unmanageable.*[100]

116. The totality of the evidence displays significant variance among many teachers in every factor relevant to determining whether a worker is a contractor or an employee. Ultimately, a common determination of the status of all independent contractor teachers cannot be made. On this basis alone, the proposed class action should not be certified.

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[99] Brown v. Candian Imperial Bank of Commerce, [2014] OJ No. 4712 (ONCA) at para 58, **Tab 17 to the Defendants' BOA**

[100] *Freeman Bartholomew v. Coco Paving Inc. and Lafarge Canada Inc.*, 2017 ONSC 6014 at paras 44-45, **Tab 18 to the Defendants' BOA**, see also *Mouhteros v. DeVry Canada,* 1998 O.J. No. 2786 at para 31, **Tab 19 to the Defendants' BOA**

**No basis in fact that an issue exists for an employee overtime claim**

117. One of the proposed common issues is whether the Defendants failed to pay class members certain entitlements (e.g. overtime) under the ESA. Blyth already employs a number of teachers; there were 71 employee teachers last year. The submissions that follow relate to the employee (as opposed to the independent contractor) teachers of the proposed class.

118. The first step of the common issues analysis requires the plaintiff to show that there is some basis in fact that the issue *actually exists* – that there is some evidentiary basis to support a claim[101].

119. It is conceded that with respect to the independent contractor teachers, there is evidence sufficient to demonstrate that an issue exists, at the very least for the proposed representative plaintiff, Walmsley and for Sarah Badger. They have both tendered evidence that they worked hours that would qualify as overtime, had they been employees.

120. However, there is in fact no evidence on the record to show some basis in fact that there is a claim for overtime by members of the class who are currently or were employees. The plaintiff's *employee* affiant, Mr. Kovanchak, has not provided any evidence that he has worked overtime or has any claim for overtime entitlement.

121. There is therefore no basis in fact that an issue exists with respect to the employee teachers for entitlement to overtime.

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[101] *Omarali* at para 37, **Tab 3 to the Defendants' BOA.**

**No basis in fact for an award of punitive damages**

122. As the Court found in *Omarali v. Just Energy*, punitive damages are awarded when the defendant's wrongful acts are "harsh, vindictive, reprehensible and malicious, indeed so malicious and outrageous that they are deserving of punishment on their own"[102]. The Court noted that the independent contractor issue had in fact been adjudicated before various administrative tribunals, and that "with each decision the defendants were reassured that their sales agents were indeed ICs not employees".

123. The case is identical here, if not more compelling. In multiple hearings over the past years before CRA tribunals as well as in the Tax Court of Canada, the defendants were repeatedly reassured by the CRA / Tax Court – who analyzed the *Sagaz* factors – that teachers who were working for Blyth Academy were not, in fact, employees, but were in fact independent contractors[103].

124. Further still, Blyth Academy does not unilaterally attempt to classify all of its teachers as independent contractors. Beginning in 2012, Blyth Academy began to engage teachers full-time as employees when appropriate to do so. For example, the plaintiff's affiant Mr. Kovanchak initially worked as a contractor before then accepting a salaried offer of employment[104]. By early June of 2018, Blyth Academy employed 71 teachers – all of whom, we might add, are included in the class definition.

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[102] *Omarali* at para 101, **Tab 3 to the Defendants' BOA.**
[103] *2016160 Ontario Inc.,* **Tab 15 to the Defendants' BOA**, See Also Letter from CRA, Exhibit "I" to the Affidavit of Patrick Shaw, **Tab 1-I to the Blyth Record**. The Defendants accept that although the same Sagaz factors are used to assess a labour relationship, the underlying statute considered by the CRA / Tax Court is not the *ESA*.
[104] The Kovanchak Affidavit at para 24, **Tab G to the Walmsley Record**.

125. In sum, there is absolutely no evidence of "harsh, vindictive, reprehensible, or malicious conduct" on behalf of the defendants and a common question for punitive damages should not be certified.

## D. Section 5(1)(d) of the CPA

126. The defendants submit that a class action is not the preferable procedure to resolve this dispute. As stated in *Hollick*, "...the preferability inquiry should be conducted through the lens of the three principal advantages of class actions – judicial economy, access to justice, and behaviour modification[105]".

127. The Supreme Court also recognized in *Hollick* that although the *Act* only requires that a class proceeding be the preferable procedure for the resolution of the common issues", it would be incorrect to place undue influence on the fact that the *Act* uses the phrase "resolution of the common issues" rather than resolution of the class members' claims... The question of preferability, then must take into account the importance of the common issues in relation to the claim as a whole"[106]. It is clear therefore that we must look at the preferability criteria in light of all claims made by class members.

### Class action is not the preferable procedure for the misclassification issue

128. In the circumstances, if the Court is to conclude that the common issues as proposed can be answered in common to the class, the primary outstanding issue would remain individual – that of the quantum of entitlement. As a result, a class proceeding would not serve the objective of judicial economy – the proposed class members would still, after the expense of discovery, mandatory mediation, and a common issues trial,

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[105] *Hollick,* supra at para 27, **Tab 16 to the Defendants' BOA.**
[106] *Hollick,* supra at para 30, **Tab 16 to the Defendants' BOA.**

have to proceed with individual actions to determine the quantum of their entitlement, which must necessarily be determined on the basis of evidence from individual claimants as to how many hours were worked.

129. The individual class members gain nothing by having this determination proceed by way of class action. Rather they will have to wait until the end of a common issues trial in order to proceed with collecting a quantum of damages that must still be determined by an adjudicator.

130. Indeed, why wait until the end of a common issues trial when there is already a statutory mechanism in place to address such complaints? A person who alleges that the *Employment Standards Act* has been or is being contravened may file a complaint with the Ministry[107]. An employment standards officer assigned to investigate a complaint may attempt to effect settlement[108]. The employment standards officer may require a meeting with the employer and the production of documents[109]. The officer may make an order that the employer pay wages to the employee[110]. Should either party not be content with the outcome of the complaint, they have a further recourse to the Ontario Labour Relations Board ("OLRB").

131. The OLRB reviews orders made by employment standards officers, including with respect to any orders to pay wages, at which time the OLRB shall give the parties the full opportunity to present their evidence and make their submissions[111].

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[107] *Employment Standards Act*, 2000, S.O. 2000 c. 41 [*ESA*], s. 96(1).
[108] *ESA* s. 101.1
[109] *ESA* s. 102
[110] *ESA* s. 103
[111] *ESA* s. 116

132. Accordingly, there is already a statutory scheme governing the same types of complaints made by the plaintiff in the within action, and that scheme, rather than the proposed class action, is the preferable procedure. A few examples of this procedure working well are found in the following cases:

(a) *Palmer v. Bold Dance*, a dance teacher resolved a misclassification dispute, where the damages were $817.44[112];

(b) *Qode Media Inc.,*[113], an award of approximately $1,748.15 in vacation pay;

(c) *Advanced Learning Day Care Centre Inc. (Re)*[114], an award of $578.80 awarded to a teacher in vacation pay and termination pay.

133. It is clear that such matters can be disposed of quickly, inexpensively, and without the need for costly legal battles.

**A class proceeding is not the preferable procedure to resolve any employee overtime claims**

134. Similarly, any claims that exist on behalf of employees for overtime compensation should not be certified because doing so would not achieve anything on behalf of the class members.

135. The defendants agree that the employee teachers are employees, and it is not in dispute that employees have certain entitlements under the *ESA*. To certify a question as

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[112] *Palmer v. Bold Dance*, 2014 CarswellOnt 7358 at para 16, **Tab 60-D to the Plaintiff's BOA**
[113] *Qode Media Inc.*, [2015] O.E.S.A.D. No. 221 at para 74, **Tab 20 to the Defendants' BOA.**
[114] *Advanced Learning Day Care Centre Inc. (Re)* [2015] O.E.S.A.D. No. 221 at pp. 1, **Tab 21 to the Defendants' BOA.**

"are employees entitled to their entitlements under the *Employment Standards Act?*" is pointless. A common issues trial on such an issue would not move the matter forward at all, as it would still be necessary to conduct an individual review of the number of hours each individual employee has worked.

136. As a result, the individual issue of damages completely dominates the "common issue" of entitlement and this class action should therefore not be certified in respect of any claim for damages on behalf of employee teachers.

## PART V - ORDER REQUESTED

137. The defendants respectfully request that this motion for the certification of this proposed class action be dismissed, with costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED**
**this 12th day of November, 2018.**

**Elizabeth Bowker**
**Emily McKernan**
**Thanasi Lampropoulos**
**STIEBER BERLACH LLP**

Lawyers for the Defendant

# TAB A

**SCHEDULE "A"**
**LIST OF AUTHORITIES**

1. *Berg v. Canadian Hockey League,* 2017 ONSC 2608 (ON SC)
2. *Fehr v. Sun Life Assurance Company,* 2015 ONSC 6931
3. *Omarali v. Just Energy,* 2016 ONSC 4094
4. *Rosen v. BMO Nesbitt Burns*, 2013 ONSC 2144
5. *Pro-Sys Consultants v. Microsoft Corporation,* 2013 SCC 57
6. *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983
7. *Braiden v. La-Z-Boy Canada Ltd.*, [2008] O.J. No. 2314 (ONCA)
8. *Belton v. Liberty Insurance Co. of Canada*, [2004] O.J. NO. 3358 (ONCA)
9. *Royal Winnipeg Ballet v. M.N.R.,* 2006 FCA 87
10. *Ligocki v. Allianz Insurance Co. of Canada*, [2010] 100 O.R. (3d) 624 (ON SCDC)
11. *Wellington (County) v. Butler,* 2001 CanLII 38739 (ON SCDC)
12. *2016169 Ontario Inc. o/a Blyth Academy v. Minister of National Revenue*, Unreported, Toronto, November 21, 2013 Docket 2013-822 (CPP), 2013-823 (EI) (TCC)
13. *McCracken v. CN Rail*, 2012 ONCA 445
14. *Baroch v. Canada Cartage*, 2015 ONSC 40
15. *Brown v. Canadian Imperial Bank of Commerce*, 2012 ONSC 1284 (ON SCDC)
16. *Hollick v. Toronto*, 2001 SCC 68
17. *Brown v. Canadian Imperial Bank of Commerce,* 2014 OJ No. 4712 (ON CA)
18. *Freeman Bartholomew v. Coco Paving Inc. and Lafarge Canada Inc*, 2017 ONSC 6014
19. *Mouhteros v. DeVry Canada,* [1998] O.J. No. 2786 (ON SC)
20. *Palmer v. Bold Dance*, 2014 CarswellOnt 7358 (ONLRB)
21. *Qode Media Inc.,* [2015] O.E.S.A.D. No. 221

22. *Advanced Learning Day Care Centre Inc. (Re)* [2015] O.E.S.A.D. No. 221

# TAB B

## SCHEDULE "B"
## RELEVANT STATUTES

### *Class Proceedings Act, 1992, S.O. 1992, c. 6*

**Certification**

**5** (1) The court shall certify a class proceeding on a motion under section 2, 3 or 4 if,

(a) the pleadings or the notice of application discloses a cause of action;

(b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;

(c) the claims or defences of the class members raise common issues;

(d) a class proceeding would be the preferable procedure for the resolution of the common issues; and

(e) there is a representative plaintiff or defendant 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 for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1).

**Idem, subclass protection**

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

(a) would fairly and adequately represent the interests of the subclass;

(b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and

(c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members. 1992, c. 6, s. 5 (2).

**Evidence as to size of class**

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class. 1992, c. 6, s. 5 (3).

**Adjournments**

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence. 1992, c. 6, s. 5 (4).

**Certification not a ruling on merits**

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding. 1992, c. 6, s. 5 (5).

**Certain matters not bar to certification**

**6** The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:

1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
2. The relief claimed relates to separate contracts involving different class members.
3. Different remedies are sought for different class members.
4. The number of class members or the identity of each class member is not known.
5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all class members. 1992, c. 6, s. 6.

**Refusal to certify: proceeding may continue in altered form**

**7** Where the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for the purpose, the court may,

(a) order the addition, deletion or substitution of parties;

(b) order the amendment of the pleadings or notice of application; and

(c) make any further order that it considers appropriate. 1992, c. 6, s. 7.

**Contents of certification order**

**8** (1) An order certifying a proceeding as a class proceeding shall,

(a) describe the class;

(b) state the names of the representative parties;

(c) state the nature of the claims or defences asserted on behalf of the class;

(d) state the relief sought by or from the class;

(e) set out the common issues for the class; and

(f) specify the manner in which class members may opt out of the class proceeding and a date after which class members may not opt out. 1992, c. 6, s. 8 (1).

**Subclass protection**

(2) Where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, subsection (1) applies with necessary modifications in respect of the subclass. 1992, c. 6, s. 8 (2).

## *Limitations Act, 2002, S.O. 2002, c. 24, Sched. B*

**Basic limitation period**

**4** Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the second anniversary of the day on which the claim was discovered. 2002, c. 24, Sched. B, s. 4.

**Discovery**

**5** (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1).

**Presumption**

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved. 2002, c. 24, Sched. B, s. 5 (2).

*Employment Standards Act, 2000, S.O. 2000, c. 41*

## PART VII
## HOURS OF WORK AND EATING PERIODS

**Limit on hours of work**

**17** (1) Subject to subsections (2) and (3), no employer shall require or permit an employee to work more than,

(a) eight hours in a day or, if the employer establishes a regular work day of more than eight hours for the employee, the number of hours in his or her regular work day; and

(b) 48 hours in a work week. 2004, c. 21, s. 4.

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## PART VIII
## OVERTIME PAY

**Overtime threshold**

**22** (1) Subject to subsection (1.1), an employer shall pay an employee overtime pay of at least one and one-half times his or her regular rate for each hour of work in excess of 44 hours in each work week or, if another threshold is prescribed, that prescribed threshold. 2000, c. 41, s. 22 (1); 2011, c. 1, Sched. 7, s. 1; 2017, c. 22, Sched. 1, s. 13 (1).

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## PART X
## PUBLIC HOLIDAYS

**Public holiday pay**

**24** (1) An employee's public holiday pay for a given public holiday shall be equal to,

(a) the total amount of regular wages earned in the pay period immediately preceding the public holiday, divided by the number of days the employee worked in that period; or

(b) if some other manner of calculation is prescribed, the amount determined using that manner of calculation. 2017, c. 22, Sched. 1, s. 16.

* * * * * * *

## PART XI
## VACATION WITH PAY

**Right to vacation**

**33** (1) An employer shall give an employee a vacation of,

(a) at least two weeks after each vacation entitlement year that the employee completes, if the employee's period of employment is less than five years; or

(b) at least three weeks after each vacation entitlement year that the employee completes, if the employee's period of employment is five years or more. 2017, c. 22, Sched. 1, s. 21.

* * * * * * *

**Enforcement by Employment Standards Officer**

**Settlement by employment standards officer**

**101.1** (1) An employment standards officer assigned to investigate a complaint may attempt to effect a settlement. 2010, c. 16, Sched. 9, s. 1 (9).

**Effect of settlement**

(2) If the employer and employee agree to a settlement under this section and do what they agreed to do under it,

(a) the settlement is binding on them;

(b) the complaint is deemed to have been withdrawn;

(c) the investigation is terminated; and

(d) any proceeding respecting the contravention alleged in the complaint, other than a prosecution, is terminated. 2010, c. 16, Sched. 9, s. 1 (9).

**Application of s. 112 (4), (5), (7) and (9)**

(3) Subsections 112 (4), (5), (7) and (9) apply, with necessary modifications, in respect of a settlement under this section. 2010, c. 16, Sched. 9, s. 1 (9).

**Application to void settlement**

(4) If, upon application to the Board, the employee or employer demonstrates that he, she or it entered into a settlement under this section as a result of fraud or coercion,

(a) the settlement is void;

(b) the complaint is deemed never to have been withdrawn;

(c) the investigation of the complaint is resumed; and

(d) any proceeding respecting the contravention alleged in the complaint that was terminated is resumed. 2010, c. 16, Sched. 9, s. 1 (9).

**Section Amendments with date in force (d/m/y)**

**101.2** Repealed: 2000, c. 41, s. 101.2 (7).

**Section Amendments with date in force (d/m/y)**

**Meeting may be required**

**102** (1) An employment standards officer may, after giving at least 15 days written notice, require any of the persons referred to in subsection (2) to attend a meeting with the officer in the following circumstances:

1. The officer is investigating a complaint against an employer.

2. The officer, while inspecting a place under section 91 or 92, comes to have reasonable grounds to believe that an employer has contravened this Act or the regulations with respect to an employee.

3. The officer acquires information that suggests to him or her the possibility that an employer may have contravened this Act or the regulations with respect to an employee.

4. The officer wishes to determine whether the employer of an employee who resides in the employer's residence is complying with this Act. 2000, c. 41, s. 102 (1); 2009, c. 32, s. 51 (3).

**Attendees**

(2) Any of the following persons may be required to attend the meeting:

1. The employee.

2. The employer.

3. If the employer is a corporation, a director or employee of the corporation. 2000, c. 41, s. 102 (2).

**Notice**

(3) The notice referred to in subsection (1) shall specify the time and place at which the person is to attend and shall be served on the person in accordance with section 95. 2009, c. 9, s. 5 (1).

**Documents**

(4) The employment standards officer may require the person to bring to the meeting or make available for the meeting any records or other documents specified in the notice. 2009, c. 9,

s. 5 (1).

**Same**

(5) The employment standards officer may give directions on how to make records or other documents available for the meeting. 2009, c. 9, s. 5 (1).

**Compliance**

(6) A person who receives a notice under this section shall comply with it. 2000, c. 41, s. 102 (6).

**Use of technology**

(7) The employment standards officer may direct that a meeting under this section be held using technology, including but not limited to teleconference and videoconference technology, that allows the persons participating in the meeting to participate concurrently. 2009, c. 9, s. 5 (2).

**Same**

(8) Where an employment standards officer gives directions under subsection (7) respecting a meeting, he or she shall include in the notice referred to in subsection (1) such information additional to that required by subsection (3) as the officer considers appropriate. 2009, c. 9, s. 5 (2).

**Same**

(9) Participation in a meeting by means described in subsection (7) is attendance at the meeting for the purposes of this section. 2009, c. 9, s. 5 (2).

**Determination if person fails to attend, etc.**

(10) If a person served with a notice under this section fails to attend the meeting or fails to bring or make available any records or other documents as required by the notice, the officer may determine whether an employer has contravened or is contravening this Act on the basis of the following factors:

1. If the employer failed to comply with the notice,

i. any evidence or submissions provided by or on behalf of the employer before the meeting, and
ii. any evidence or submissions provided by or on behalf of the employee before or during the meeting.

2. If the employee failed to comply with the notice,

i. any evidence or submissions provided by or on behalf of the employee before the meeting, and
ii. any evidence or submissions provided by or on behalf of the employer before or during the meeting.

3. Any other factors that the officer considers relevant. 2010, c. 16, Sched. 9, s. 1 (10).

**Employer includes representative**

(11) For the purposes of subsection (10), if the employer is a corporation, a reference to an employer includes a director or employee who was served with a notice requiring him or her to attend the meeting or to bring or make available any records or other documents. 2010, c. 16, Sched. 9, s. 1 (10).

**Time for response**

**102.1** (1) An employment standards officer may, in any of the following circumstances and after giving notice, require an employee or an employer to provide evidence or submissions to the officer within the time that he or she specifies in the notice:

1. The officer is investigating a complaint against an employer.

2. The officer, while inspecting a place under section 91 or 92, comes to have reasonable grounds to believe that an employer has contravened this Act or the regulations with respect to an employee.

3. The officer acquires information that suggests to him or her the possibility that an employer may have contravened this Act or the regulations with respect to an employee.

4. The officer wishes to determine whether the employer of an employee who resides in the employer's residence is complying with this Act. 2010, c. 16, Sched. 9, s. 1 (11).

**Service of notice**

(2) The notice shall be served on the employer or employee in accordance with section 95. 2010, c. 16, Sched. 9, s. 1 (11).

**Determination if person fails to respond**

(3) If a person served with a notice under this section fails to provide evidence or submissions as required by the notice, the officer may determine whether the employer has contravened or is contravening this Act on the basis of the following factors:

1. Any evidence or submissions provided by or on behalf of the employer or the employee before the notice was served.

2. Any evidence or submissions provided by or on behalf of the employer or the employee in response to and within the time specified in the notice.

3. Any other factors that the officer considers relevant. 2010, c. 16, Sched. 9, s. 1 (11).

**Section Amendments with date in force (d/m/y)**

**Order to pay wages**

**103** (1) If an employment standards officer finds that an employer owes wages to an employee, the officer may,

(a) arrange with the employer that the employer pay the wages directly to the employee;

(a.1) order the employer to pay wages to the employee; or

(b) order the employer to pay the amount of wages to the Director in trust. 2000, c. 41, s. 103 (1); 2017, c. 22, Sched. 1, s. 54.

* * * * * * *

**Review**

**116** (1) A person against whom an order has been issued under section 74.14, 74.16, 74.17, 103, 104, 106, 107 or 108 is entitled to a review of the order by the Board if, within the period set out in subsection (4), the person,

(a) applies to the Board in writing for a review;

(b) in the case of an order under section 74.14 or 103, pays the amount owing under the order to the Director in trust or provides the Director with an irrevocable letter of credit acceptable to the Director in that amount; and

(c) in the case of an order under section 74.16, 74.17 or 104, pays the lesser of the amount owing under the order and $10,000 to the Director in trust or provides the Director with an irrevocable letter of credit acceptable to the Director in that amount. 2009, c. 9, s. 18.

**Employee seeks review of order**

(2) If an order has been issued under section 74.14, 74.16, 74.17, 103 or 104 with respect to an employee, the employee is entitled to a review of the order by the Board if, within the period set out in subsection (4), the employee applies to the Board in writing for a review. 2009, c. 9, s. 18.

**Employee seeks review of refusal**

(3) If an employee has filed a complaint alleging a contravention of this Act or the regulations and an order could be issued under section 74.14, 74.16, 74.17, 103, 104 or 108 with respect to such a contravention, the employee is entitled to a review of an employment standards officer's refusal to issue such an order if, within the period set out in subsection (4), the employee applies to the Board in writing for such a review. 2009, c. 9, s. 18.

**Period for applying for review**

(4) An application for a review under subsection (1), (2) or (3) shall be made within 30 days after the day on which the order, letter advising of the order or letter advising of the refusal to issue an order, as the case may be, is served. 2009, c. 9, s. 18.

**Extension of time**

(5) The Board may extend the time for applying for a review under this section if it considers it appropriate in the circumstances to do so and, in the case of an application under subsection (1),

(a) the Board has enquired of the Director whether the Director has paid to the employee the wages, fees or compensation that were the subject of the order and is satisfied that the Director has not done so; and

(b) the Board has enquired of the Director whether a collector's fees or disbursements have been added to the amount of the order under subsection 128 (2) and, if so, the Board is satisfied that fees and disbursements were paid by the person against whom the order was issued. 2009, c. 9, s. 18.

**Hearing**

(6) Subject to subsection 118 (2), the Board shall hold a hearing for the purposes of the review. 2009, c. 9, s. 18.

**Parties**

(7) The following are parties to the review:

1. The applicant for the review of an order.
2. If the person against whom an order was issued applies for the review, the employee with respect to whom the order was issued.
3. If the employee applies for the review of an order, the person against whom the order was issued.
4. If the employee applies for a review of a refusal to issue an order under section 74.14, 74.16, 74.17, 103, 104 or 108, the person against whom such an order could be issued.
5. If a director of a corporation applies for the review, the applicant and each director, other than the applicant, on whom the order was served.
6. The Director.
7. Any other persons specified by the Board. 2009, c. 9, s. 18.

Parties given full opportunity

(8) The Board shall give the parties full opportunity to present their evidence and make their submissions. 2009, c. 9, s. 18.

Practice and procedure for review

(9) The Board shall determine its own practice and procedure with respect to a review under this section. 2009, c. 9, s. 18.

| | | | |
|---|---|---|---|
| KAREN WALMSLEY<br>Plaintiff | and | BLYTH ACADEMY<br>Defendant | Court File No.: CV-17-584523CP |

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

# FACTUM OF THE RESPONDING DEFENDANTS
## (Re: Motion for certification as class action returnable December 5-6, 2018)

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