Court File No.: CV-16-562080 00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

CARRIE EKLUND

Plaintiff

- and -

GOODLIFE FITNESS CENTRES INC.

Defendant

PROCEEDING UNDER THE *CLASS PROCEEDING INC, 1992*

FACTUM OF THE MOVING PLAINTIFF
(CERTIFICATION AND SETTLEMENT APPROVAL)
(returnable June 20, 2018)

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PART I - INTRODUCTION

1. This is a motion for certification on consent, approval of a proposed class action settlement reached by the parties, and approval of class counsel fees together with an honorarium for the representative plaintiff.

2. *Eklund v. GoodLife Fitness Centres Inc.* is an action for unpaid hours and unpaid overtime at GoodLife Fitness Centres Inc. ("GoodLife"), the largest chain of health clubs in Canada. The class members are non-managerial employees who work at GoodLife's clubs across Canada. Since the commencement of the action, GoodLife has made significant changes to its compensation system, which have addressed a number of the concerns that were at issue in the action. The proposed settlement provides for a payment to the class members of $7.5 million, divided between four categories of class members: personal trainers, fitness advisors,

club opening specialists, and other. Under the proposed settlement, eligible class members will receive a payment without the need for proof of individual damages. The proposed settlement provides meaningful recovery for the class members in a timely and efficient manner, and eliminates the risk and delay associated with further litigation. The settlement meets the criteria for approval and is fair, reasonable, and in the best interests of the class. The fees sought by class counsel are fair and reasonable given the achievements of the litigation and settlement. The honorarium for the representative plaintiff is reasonable having regard to her efforts with respect to the success of the action.

PART II - THE FACTS

3. This is an action for unpaid hours and unpaid overtime on behalf of non-managerial employees of GoodLife working at GoodLife's clubs across Canada, in the Provinces of Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick, Newfoundland, Nova Scotia, and Prince Edward Island, excluding employees who worked at Fit4Less or franchise clubs, and excluding unionized employees whose terms and conditions of employment were covered by a collective agreement. The Statement of Claim was issued on October 12, 2016, and was amended on January 26, 2017 to extend the class nationally. The claim relates to unpaid hours of work, both below and above the applicable provincial overtime thresholds. The action is framed in breach of contract (including the duty of good faith), unjust enrichment, and negligence.[1]

4. Following the commencement of the action in 2016, and as set out in the plaintiff's certification materials, GoodLife made significant changes to its compensation practices. These

[1] Affidavit of Christine Davies sworn June 1, 2018 ("Davies Affidavit"), Plaintiff's Motion Record, Tab 2, Exhibit A: Fresh as Amended Statement of Claim.

included scheduling paid prospecting hours for personal trainers and removing the clawback of their commission (effective January 2017); removing the disentitlement of personal trainers to receiving a bonus where they claimed overtime (effective January 2017); providing lieu time at the required time and a half instead of straight time for club opening specialists (together with some retroactive compensation) (retroactive to January 2017); and implementing a new record-keeping system (November 2016 to July 2017) for class members, as well as a new record-keeping system specifically for club opening team members (effective March 30, 2017).[2]

5. On December 7, 2017, the plaintiff learned that GoodLife had entered into a first collective agreement with Workers United Canada Council, a union that had been certified to represent personal trainers in Toronto, Ajax and Peterborough in 2016. The collective agreement recognized the entitlement of personal trainers to pay for certain categories of tasks which were previously unpaid (the administrative/scheduling and preparation/programming tasks). Pursuant to the agreement reached with the union, personal trainers would receive an additional 2.5 hours per pay period to compensate for such work. GoodLife also introduced a new policy for non-unionized personal trainers recognizing their entitlement to be paid for such work, effective January 2018. These categories of work represented a substantial part of the claims of the personal trainers in this class action for unpaid work.[3]

6. Following this development, it was apparent that GoodLife had addressed many of the concerns of the class members going forward and that much of the claim was now historical in

[2] Davies Affidavit, para 18.
[3] Davies Affidavit, para 18, Exhibit "C": Collective Agreement between GoodLife Fitness Centres Inc. and Workers United Canada.

nature. Class counsel reached out to counsel for the defendant on December 12, 2017 regarding the possibility of entering into settlement negotiations to resolve the action. [4]

7. The parties agreed to attend a mediation with the Hon. George Adams, which was scheduled for February 27 and 28, 2017. The parties reached an agreement to settle the certification motion and the action on March 1, 2018, following a two-day mediation with the Hon. George Adams and a further day of negotiations after the conclusion of the mediation.[5]

A. The Proposed Settlement

8. For settlement purposes, as set out in the settlement agreement, the class is defined as follows:[6]

> All current and former non-managerial employees of GoodLife employed at its clubs in the Provinces of Ontario, British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick, Newfoundland, Nova Scotia, and Prince Edward Island, for the period from October 12, 2014 to the date certification is granted ("Class Period") in this action, save and except for those employed at its Fit4Less or franchise clubs, and save and except for all personal trainers employed by GoodLife in the Cities of Toronto, Ontario; Ajax, Ontario; and Peterborough, Ontario for the period commencing on December 5, 2017 and ongoing. To the extent any employees had both managerial and non-managerial roles during the Class Period, they will be in the class only in respect of their non-managerial roles.

9. There are approximately 22,000 people in the class.[7]

10. For certification purposes, the settlement identifies the common issue as follows:

> Whether any Class Member worked hours of work, including overtime hours, during the Class Period, for which they were not paid or otherwise compensated in accordance with the requirements of the applicable.[8]

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[4] Davies Affidavit, para 19.
[5] Davies Affidavit, para 24.
[6] Davies Affidavit, para 26, Exhibit "D": Minutes of Settlement [redacted].
[7] Davies Affidavit, para 4.

11. The proposed settlement provides that GoodLife will, within 90 days of the approval of the settlement, pay $7.5 million to the class members, as follows:[9]

a) $5.5 million to personal trainers, to be distributed pro rata based on the total number of recorded personal training services hours for the period October 12, 2014 to December 31, 2017;

b) $150,000 to club opening specialists, to be distributed pro rata basis based on the total number of full weeks worked for the period October 12, 2014 to March 30, 2017;

c) $800,000 to fitness advisors, to be distributed pro rata based on the total number of recorded sales hours worked for the period October 12, 2014 to February 28, 2018;

d) $1,050,000 to other class members on a pro rata basis based on the total number of recorded hours worked for the period October 12, 2014 to February 28, 2018.

12. All class members are eligible to receive a payment under the proposed settlement without proof of damages. The details of the payments for of each category are slightly different depending on the relevant time periods for those groups taking into account changes to GoodLife's policies and practices after this action was commenced.[10]

13. The relatively high amount for the personal trainers reflects that there was greater evidence of unpaid work by personal trainers as compared to other class members, and takes into account GoodLife's recent recognition that certain tasks performed by personal trainers that were previously unpaid were properly characterized as work for which personal trainers were entitled to be paid. The relevant time period for the personal trainers runs from the date of the commencement of the class period to December 31, 2017, recognizing that as of January 1, 2018, GoodLife began compensating personal trainers for their administrative / scheduling

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[8] Davies Affidavit, para 29 and Exhibit "D": Minutes of Settlement [redacted], para 4b.
[9] Davies Affidavit, para 30 and Exhibit "D": Minutes of Settlement [redacted], para 5 and Schedule "A", para 1
[10] Affidavit of Carrie Eklund sworn May 31, 2018 ("Eklund Affidavit"), Plaintiff's Motion Record, Tab 1, para 15.

and preparation / programming time. The payment is tied to personal training service hours (the time spent actually training clients) recognizing that individuals who spent more time training clients also likely spent comparatively more time on the previously unpaid tasks of scheduling, administration, and preparation or programming for such clients. It is anticipated that individuals who worked for GoodLife for longer periods of time will recover more under the proposed settlement than those who only worked for a short period.[11]

14. The amount for the club opening specialists is smaller relative to groups (a) and (c), but reflects that the club opening team is small (around 15-20 members), and therefore the damages for each class member who held the position of club opening specialist will be more significant. The time period for the personal trainers runs from the date of the commencement of the class period to March 30, 2017, when GoodLife made significant changes to the practices concerning the recording and compensating of hours worked for this group of employees. As of March 30, 2017, GoodLife introduced a new record-keeping system for the club opening team allowing employees on the club opening team to record their actual hours of work (not simply scheduled hours of work) and also provided lieu time compensation at the required time and a half rate. The payment to club opening specialists is based on the number of weeks worked during the relevant period, rather than hours recorded, because the club opening specialists were paid on a salaried basis, unlike other members of the class. The amount per class member for this group will likely be in the range of $7,500-10,000 for individuals who worked the entire relevant period. The parties negotiated this amount knowing that one of the plaintiff's witnesses, Ms. Winta Hagos, had received approximately $12,300 in respect of her unpaid overtime complaint to the Ministry of Labour, which required proof of individual damages. The amount negotiated

[11] Davies Affidavit, para 32; Eklund Affidavit, para 13.

as part of this settlement represents a substantial recovery for class members without the need to prove individual damages.[12]

15. The settlement allocates $800,000 to fitness advisors, taking into account that, relative to 'other' class members, from the plaintiff's perspective, there was greater evidence that they engaged in unpaid work having regard to the pressures of their sales positions. The time period for the personal trainers runs from the date of the commencement of the class period to February 28, 2018, the date prior to the date of the settlement. The amount is based on the number of recorded sales hours worked, on the basis that individuals who worked greater number of recorded hours (e.g. long-serving class members) likely also worked comparatively greater numbers of unpaid hours.[13]

16. Finally, group (d) comprises the remaining members of the class ('other'). The majority of the class members will fall within group (d). The evidence of unpaid work, and systemic causes of any unpaid work, was more limited in group (d) than for the class members in groups (a) through (c). In addition, group (d) includes group fitness instructors, who were paid based on a flat rate and may not have had any claim to additional compensation. The amount allocated to group (d) therefore took into account the challenges in proving these class members' claims and the likelihood that many of these class members would have limited or no damages. The time period for the personal trainers runs from the date of the commencement of the class period to February 28, 2018, the date prior to the date of the settlement.[14]

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[12] Davies Affidavit, para 33.
[13] Davies Affidavit, para 34.
[14] Davies Affidavit, para 35.

17. The settlement provides that *de minimis* amounts of less than $50 will not be distributed. The funds that would have been payable to those class members will be redistributed to the other class members in each of the above categories. There was a concern that there were many class members whose entitlements would be very small, given the turnover rate among class members at GoodLife. The parties were concerned that cheques for very small amounts might not be cashed, and this provision will help ensure a good take-up rate of class members cashing the settlement cheques. It will also help maximize the amounts paid to class members who worked for GoodLife the longest and therefore had the most damages.[15]

18. The exact amount for each class member will depend on the number class members per category, after opt-outs and after class members with '*de minimis*' amounts are removed, and the number of relevant hours for those remaining individuals for the relevant time periods. The plaintiff's rough estimate is that a personal trainer who worked the entire relevant period would receive approximately $2500, while a fitness advisor who worked the entire relevant period would receive approximately $1600. The club opening specialists will receive the most, in light of their recognized long hours of overtime, higher wage rates, and taking into account the amount awarded to Ms. Hagos by the Ministry of Labour. It is more difficult to estimate the amount that may be owing to "other" class members given the greater variation in hours worked (generally, group fitness instructors worked only a few hours a week while other class members such as motivators or club administrators worked closer to full-time hours), but a rough estimate is that a class member who worked on a part-time basis for 20 hours a week for the entire relevant period would receive $150.[16] These estimates do not account for the amounts

[15] Davies Affidavit, para 36.
[16] Davies Affidavit, para 37.

owing to certain class members falling below the *de minimis* threshold, which would result in larger payouts for the class members above the *de minimis* threshold.

19. The payments will be made directly by GoodLife to the class members. Where a class member cannot be located despite the efforts of class counsel, and in the event of stale cheques, the settlement contemplates that those funds will be donated to the Canadian Cancer Society.[17]

20. It is a specific term of the proposed settlement that Ms. Hagos will not recover with respect to her employment as a club opening specialist, in light of the fact that she already received compensation through her Employment Standards complaint. She may recover under group (d) in respect of her service with GoodLife before joining the club opening team.[18]

21. The proposed settlement contains an opt-out threshold. The settlement contemplated that if the number of opt-outs exceeded the threshold, GoodLife would have the option to unilaterally terminate the settlement. The opt-out period was 30 days. The opt-out threshold was not exceeded. The total number of opt-outs was 98, representing less than one half of 1% of the class.[19]

22. Under the proposed settlement, class members who do not opt out will grant GoodLife a release from any claims in relation to the action and the issues raised or which could have been raised therein, whether known or unknown.[20]

23. The proposed settlement provides for class counsel fees in the amount of $1,000,000, inclusive of taxes and disbursements, as well as an honorarium for the representative plaintiff.

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[17] Davies Affidavit, para 38, Exhibit D: Minutes of Settlement [redacted], para 6c.
[18] Davies Affidavit, para 39.
[19] Davies Affidavit, para 40.
[20] Davies Affidavit, para 41, Exhibit D: Minutes of Settlement [redacted], para 8.

The fees were negotiated separately from the amount to be paid to class members. Very little time was spent in the mediation on the issue of fees, as the amount initially proposed by GoodLife was acceptable to the plaintiff. Rather, the focus of the plaintiff's efforts was to maximize the amount for the class members and to ensure that the amount for class members was distributed in a manner that was fair.[21]

24. The proposed settlement also contemplates an honorarium for the representative plaintiff in the amount of $10,000. This amount is being paid separately from the $7.5 million to the class, and from class counsel fees. It does not result in any reduction to the amounts class members will receive. The representative plaintiff devoted a considerable amount of time to the success of this action, including communicating with other class members (dozens of whom reached out to her directly), speaking to the media, meeting with and instructing counsel, reviewing documents, swearing an affidavit, and attending multiple long days of mediation. Her involvement as the face of the class action has come at a personal cost, and she did not receive a job opportunity after a potential employer asked her about the lawsuit against GoodLife, her former employer, during a job interview. Class counsel supports the payment of an honorarium to the representative plaintiff in recognition of her vital role and efforts in advancing the claims of the class. No class member has objected to the honorarium.[22]

B. Notice of Certification and Settlement Approval Hearing

25. The Notice of Certification and Settlement Approval Hearing was distributed by GoodLife through its internal system for current employees, and was mailed to former employees, as well as posted on class counsel's websites (goodlifeclassaction.com and

[21] Davies Affidavit, para 62; Eklund Affidavit, para 22.
[22] Davies Affidavit, para 68, Exhibit "D": Minutes of Settlement [redacted], para 5d; Eklund Affidavit, para 23.

goldblattpartners.com). Class counsel put out a national press release, and articles about the settlement appeared in major publications, including the Toronto Star and London Free Press. Class counsel also shared news of the settlement on Twitter and Facebook.

26. Following the delivery of the Notice of Certification and Settlement Approval Hearing, class counsel received over 500 calls and emails from class members about the action and proposed settlement. In addition, the representative plaintiff was directly contacted by many class members, and referred them to class counsel. The people the representative plaintiff has spoken with were all happy about the settlement.[23]

C. Submissions by Class Members

27. The plaintiff received nine submissions by class members supporting the settlement.[24] The plaintiff received one submission by a class member opposing the settlement.[25] The class member who wrote to oppose the settlement indicated a concern about collusion with the CIA.

PART III - ISSUES AND THE LAW

A. Certification

28. The certification requirements are the same in a settlement context as in a litigation context, however it is generally accepted that they need not be as rigorously applied in a settlement context.[26]

29. The within claim asserts reasonable causes of action for breach of contract, unjust enrichment, and negligence. There is an identifiable class of two or more persons who share an

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[23] Davies Affidavit, para 47; Eklund Affidavit, para. 20.
[24] Davies Affidavit, para. 61 and Exhibit "G": Copies of statements in support of settlement.
[25] Davies Affidavit, para. 61 and Exhibit "G": Copies of statements in opposition of settlement.
[26] *Osmun v. Cadbury Adams Canada Inc.*, 2009 CanLII 72092 (ON SC), para 21, and cases cited therein.

interest in the resolution of the case. There are common issues concerning the legality of the defendant's business practices which will substantially advance the class members' claims. The class proceeding is the preferable procedure for deciding the class members' claims. Lastly, Ms. Eklund has adequately represented the interests of the class and will do so until the case is completed. The class action is similar to other unpaid overtime class actions that have been certified on a contested basis, including but not limited to *Fresco v. CIBC*,[27] *Fulawka v. BNS*,[28] *Rosen v. BMO*,[29] and *Bozsik v. Livingston International Inc.*[30]

30. In this case, it is submitted that the test for certification under s. 5 of the *Class Proceedings Act, 1992* ("*CPA*") is plainly met.

B. Settlement Approval

31. Under section 29(2) of *CPA*, a settlement in a class proceeding is not binding unless approved by the court.[31]

32. The resolution of complex litigation, such as class proceedings, through compromise and settlement is encouraged by the courts and favoured by public policy.[32] A court's scrutiny of a settlement agreement must be tempered by a recognition that the resolution need not be perfect, but must fall within a "range of reasonableness:"[33]

> "All settlements are the product of compromise and a process of give and take and settlements rarely give all parties exactly what they want.

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[27] *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444 (CanLII).
[28] *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443 (CanLII).
[29] *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2144 (CanLII).
[30] *Bozsik v Livingston International Inc.*, 2016 ONSC 7168 (CanLII).
[31] *Class Proceedings Act, 1992*, S.O. 1992, c. C. 6 ("*CPA*") at s. 29(2).
[32] *Rowlands v. Durham Region Health*, [2012] O.J. No. 3191 (S.C.J.), para 7.
[33] *Dabbs v. Sun Life Assurance Company of Canada*, [1998] O.J. No. 2811 (Gen. Div.) ("*Dabbs*"), para 30; *Robertson v. Proquest Information and Learning LLC*, [2011] O.J. No. 2013 (S.C.J.) ("*Robertson*"), paras 38-39; *Rosen v BMO Nesbitt Burns Inc.*, 2016 ONSC 4752 (CanLII) ("*Rosen*"), para 12.

> Fairness is not a standard of perfection. Reasonableness allows for a range of possible resolutions."

33. There is a strong initial presumption favouring approval when a proposed settlement was negotiated at arm's length by experienced counsel:[34]

> "When the parties are represented, as they are in this case by reputable counsel with expertise required in class litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation."

34. Here, there can be no doubt that the settlement was negotiated at arm's length, by responsible, experienced counsel.[35]

35. To approve a settlement, the court must find that in all the circumstances the settlement is fair, reasonable, and in the best interests of the class members. In doing so, the court has regard to the claims and defences in the litigation and any objection raised to the settlement.[36]

36. Courts in Ontario have consistently set out a list of factors that provide a suitable benchmark against which a Court will assess whether a settlement agreement is fair.[37] These considerations include:

a) the likelihood of recovery or likelihood of success;
b) the amount and nature of discovery, evidence or investigation;
c) the settlement terms and conditions;
d) the recommendation and experience of counsel;
e) the future expenses and likely duration of litigation and risk;
f) the recommendation of neutral parties, if any;

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[34] *Wein v. Rogers Cable Communications*, [2011] O.J. No. 5572 (S.C.J.) ("*Wein*"), para 20; *Barwin v IKO*, 2017 ONSC 3520 (CanLII) ("*IKO*"), para 28

[35] Davies Affidavit, para 49.

[36] *Lavier v. My Travel*, 2011 ONSC 1222, paras 19-20; *Dabb*, para 9, affirmed 1998 CanLii 7165 (ONCA), leave to appeal refused 1998 SCCA No. 372; *Parsons v. Canadian Red Cross Society* [1999] O.J. No. 3572, paras 68-73.

[37] *Waldman v Thomson Reuters Canada Limited*, 2016 ONSC 2622 (CanLII) (Div. Ct.), para 22.

g) the number of objectors and nature of objections;
h) the presence of good faith, arms-length bargaining and the absence of collusion;
i) the degree and nature of communications by counsel and the representative parties with class members during the litigation; and
j) information conveyed to the court regarding the dynamics of and the positions taken by the parties during the negotiation.[38]

37. These factors guide, but do not determine, the assessment that the court must make. In any particular case, some factors will bear greater significance than others and weight ought to be accordingly ascribed.[39]

i. Likelihood of Success

38. This settlement reflects that the strongest aspect of the plaintiff's case related to the personal trainers, and in particular, the categories of unpaid work that were previously uncompensated and that GoodLife now recognizes as compensable. The plaintiff estimates that the amount provided by the settlement will roughly compensate personal trainers for these categories of unpaid work at the same rate that GoodLife is now paying going forward since the introduction of the collective agreement and the new policy for non-unionized employees. Through the settlement, the plaintiff was also able to secure significant amounts for other categories of class members, although it was GoodLife's position that they did not work unpaid hours and that its policies required payment for all hours worked. The proposed settlement provides a significant benefit to those class members, since the likelihood of success with respect to their claims was more uncertain and the challenges in proving damages even more significant.

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[38] *Kidd*, para 113.

[39] *Parsons*, para 73.

ii. Amount and nature of discovery, evidence or investigation

39. The proposed settlement was reached following the delivery of the certification motion records. The plaintiff was in possession of the defendant's relevant standard employment documents (policies, contracts, job descriptions), and was in possession of information from class members who gave affidavits, were interviewed by class counsel, or registered on class counsel's website. The plaintiff was also aware of the changes in the defendant's compensation practices since the commencement of the action, including the new policy of compensating administrative/scheduling and preparation/programming time at a rate of up to 2.5 hours per pay period.[40]

40. Courts have approved settlements of class actions reached before certification, where counsel reasonably evaluated the claims in the circumstances.[41] The plaintiff submits that in the circumstances of this case, there is sufficient information available to conclude that the proposed settlement is fair and reasonable.

iii. Settlement Terms and Conditions

41. The terms of the settlement, described in detail above, provide for $7.5 million to be paid to the class members for their unpaid hours and unpaid overtime. The amount each class member will receive will depend on their role (personal trainer, fitness advisor, club opening specialist, or other) and the number of hours or weeks worked during the relevant period. Significantly, class members are eligible to recover without proof of individual damages. The terms of the proposed settlement are designed to ensure the benefits of the settlement flow to

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[40] Davies Affidavit, para 18.

[41] *Elliot v. Joseph Brant Hospital*, 2013 ONSC 124 (CanLII), para 19; *Dow v 407 ETR Concession Company Limited*, 2016 ONSC 7086 (CanLII); *Drew v Walmart Canada Inc.*, 2016 ONSC 8067 (CanLII); *Drew v Walmart Canada Inc.*, 2017 ONSC 3308 (CanLII).

those class members with the greatest uncompensated losses and stronger legal claims. Class counsel submits that terms of the proposed settlement are reasonable and properly take into account the litigation risk. The terms are fair and reasonable.[42]

42. A settlement with similar features was approved in *Rosen v. BMO*, an overtime misclassification settlement. In *Rosen*, the defendant paid $12 million on a non-reversionary basis and $500,000 for administration. The amount was divided between two groups, $10 million for trainees and $2 million for non-trainees, and did not require individual proof of damages. Payments were made pro rata to all class members who registered. Legal fees and an honorarium for the representative plaintiff were approved and were paid out of the $12 million fund. In approving the settlement, Belobaba J. noted that the quick process that did not require proof of individual damages offered a significant benefit to class members:

> "Here, of course, class members will receive an "equal share" payout that does not depend on months worked and thus does not require a costly claims process, individual adjudications and related appeals. This alone provides a significant benefit to every class member. As I noted in *Fulawka*, "The overall benefit to class members of an immediate and substantial payout, without further delay or uncertainty, is significant and justifies judicial approval.""[43]

43. In approving the settlement, Belobaba J. also noted that the class action had achieved behaviour modification, including policy changes from the defendant with respect to overtime.[44] The plaintiff submits that there has similarly been behaviour modification by GoodLife since the commencement of the action, and that these developments should be considered in evaluating whether the resolution of the action is fair and reasonable.

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[42] *Barwin v IKO*, 2017 ONSC 3520 (CanLII) at para 36.
[43] *Rosen*, para 20.
[44] *Rosen*, para 28.

iv. Recommendation and experience of counsel

44. Class counsel has considerable experience with class actions, particularly employment-related class actions concerning hours of work and overtime. Class counsel has acted on a number of leading employment class actions, including *Fresco v. CIBC*, *Fulawka v. BNS*, *McCracken v. CN Rail*, *Bozsik v. Livingston International Inc.*, *Walter v. Western Hockey League et al.* and *Berg v. Canadian Hockey League et al.*[45]

45. The basis of class counsel's recommendation is set out in the Davies Affidavit. Class counsel's recommendation was based in part on the fact that GoodLife had made many changes to its compensation practices following the commencement of the action. As a result of these changes, many of the issues in the class action were now "historical", and a determination on the merits with respect to such issues would not necessarily affect working conditions or compensation going forward. The proposed settlement resolves class members' historical claims for unpaid work, and provides for certainty of outcome as well as a relatively quick payment to class members without the need to provide individual damages.

46. Class counsel's recommendation is also based on the strength of the claims of the class. As set out in the Davies affidavit, class counsel believed the claims of the class were strong, particularly the claim of the personal trainers with respect to unpaid types of work that are now recognized as compensable. However, class counsel also recognized that while some class actions have been certified for off-the-clock overtime claims, including based on overtime policies that contained pre-approval requirements, to date no court has determined the legality of such policies in an overtime class action, and therefore the ultimate likelihood of success on the merits remained subject to considerable uncertainty. In this regard, the *Fresco v. CIBC* class

[45] Davies Affidavit, para 49.

action, which raised similar issues, was commenced in 2007 and certified by the Ontario Court of Appeal in 2012, but has not yet been heard on the merits. Accordingly, class counsel recognized that this action was to some extent a 'novel' one and that there was accordingly some uncertainty regarding the chances of success.[46]

47. Class counsel also took into account the challenges that could have arisen with respect to proof of individual damages in this matter. While the plaintiff sought an aggregate award of damages in this case, because the claim related primarily to hours that were unrecorded, it remained a possibility that a court would find that individual inquiries regarding damages were required The plaintiff recognized that individual damages calculations would be complex, and that damages would be challenging to prove in light of the limited records of GoodLife and individual class members (if any). A major benefit of the proposed settlement, informing class counsel's recommendation, is that it simplifies the procedure for the determination of individual damages.[47]

48. Class counsel submits that its recommendation deserves substantial regard when assessing the proposed settlement.[48]

v. Future expenses and likely duration of litigation and risk

49. Courts have recognized that the practical value of an expedited recovery is an important factor for consideration. All cases, including this one, involve risks, and a settlement avoids the prospect of many years of litigation, including appeals.[49] By way of example, a similar unpaid overtime class action, *Fresco v. CIBC*, has yet to be heard on the merits over 10 years after the

[46] Davies Affidavit, paras 52-53.
[47] Davies Affidavit, para 58.
[48] *Joseph Brant Hospital,* para 38; *IKO,* para 41.
[49] *Elliot v. Joseph Brant Hospital,* 2013 ONSC 124 (CanLII), para 26.

action was commenced.[50] There is a real benefit to class members in resolving their claims and ensuring they receive some compensation promptly, rather than engaging in years of uncertain litigation.

vi. Recommendation of neutral parties, if any

50. The parties attended a two-day mediation before the Hon. George Adams, a highly experienced mediator, and reached the proposed settlement one day following the conclusion of that mediation.[51] The involvement of an experienced mediator is a factor courts have considered favourably with respect to settlement approvals.[52]

vii. Number of objectors and nature of objections

51. There has been one objection to the proposed settlement. However, the nature of the objection concerned an allegation of collusion between the parties and various other entities, including the CIA.[53] The plaintiff submits that there is no factual basis for the concern raised in the objection.

viii. Presence of good faith, arms-length bargaining and the absence of collusion

52. The affidavit of Christine Davies details the negotiations between the parties. There is no reason to suspect that there was any collusion between the parties. The negotiations were arms-length and adversarial.[54] The Settlement Agreement represents a fair compromise having regard to the plaintiff's likelihood of success balanced against the risk and delay associated with further litigation.

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[50] Davies Affidavit, para 49.
[51] Davies Affidavit, para 24.
[52] *Speevak v. Canadian Imperial Bank of Commerce*, 2010 ONSC 1128 (CanLII), para 43.
[53] Davies Affidavit, Exhibit "G".
[54] Davies Affidavit, paras 24-25.

ix. Degree and nature of communications by counsel and the representative parties with class members during the litigation

53. Class counsel maintained information about this class action on its website since the commencement of the action, which has included copies of the plaintiff's pleadings and the certification motion record. Class counsel also answered telephone calls about the action from time to time, and there were many inquiries following the announcement of the settlement.[55] In addition, members of the class directly contacted the representative plaintiff, who referred them to class counsel.[56]

x. Dynamics of and the positions taken by the parties during the negotiation

54. The negotiations were adversarial and the parties exchanged numerous proposals. From the plaintiff's perspective the negotiations were focussed on maximizing the amount for the class members and ensuring a fair distribution within the class. The representative plaintiff was engaged throughout the action and was actively involved in the mediation leading to the proposed settlement. The representative plaintiff supports the settlement, and believes it to be fair and reasonable.[57]

C. Fees of Class Counsel

55. The court must decide whether the fee arrangements are fair and reasonable. Counsel are entitled to fair compensation, which may include a premium for the risk undertaken and the

[55] Davies Affidavit, para 45.
[56] Eklund Affidavit, paras 20-21.
[57] Eklund Affidavit, para 11.

result achieved. The fees must not, however, bring about a settlement that is in the interests of counsel but not in the best interests of class members.[58]

56. In *Hamilton v. Toyota Motor Sales, USA, Inc.*,[59] Justice Perell identified the following factors as relevant to the determination of whether fees sought by counsel are fair and reasonable:

> "(a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement..."

57. In *Lavier,* the Court of Appeal commented that where a settlement agreement provides for the payment of fees, the court's jurisdiction to approve the fees does not come from ss. 32-33 of the *CPA*, but rather from its jurisdiction under s. 29 to review and approve the settlement. However, this does not change the standard by which the fee is assessed. The standard, initially established under *Gagne*, is that the fee must be fair and reasonable, as well as proportionate.[60]

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[58] *Lavier v. My Travel*, 2011 ONSC 1222 (S.C.J.), paras 31-33; *Smith v. National Money Mart*, [2010] O.J. No. 873 (SCJ), paras 19-24; *Parsons,* para 94;

[59] *Hamilton v. Toyota Motor Sales, USA, Inc.*, 2014 ONSC 785 (CanLII).

[60] *Lavier v. MyTravel Canada Holidays Inc.*, 2013 ONCA 92 (CanLII), paras 22-3.3

58. The payment of fees with a multiplier has been approved in a number of cases. The Court of Appeal has specifically noted that multipliers enhance the goals of the *CPA* in *Gagne v. Silcorp Ltd*:[61]

> "Another fundamental objective is to provide enhanced access to justice to those with claims that would not otherwise be brought because to do so as individual proceedings would be prohibitively uneconomic or inefficient. The provision of contingency fees where a multiplier is applied to the base fee is an important means to achieve this objective. The opportunity to achieve a multiple of the base fee if the class action succeeds gives the lawyer the necessary economic incentive to take the case in the first place and to do it well. However, if the Act is to fulfil its promise, that opportunity must not be a false hope."

59. In *Gagne,* the Court of Appeal noted that, where appropriate, a multiplier could range from "slightly greater than one to three or four in the most deserving case." The Court of Appeal urged consideration of the percentage of gross recovery that would be represented by the multiplied base fee; the placement of the multiplier within the range; and the retainer agreement.

60. In *Fulawka*, an overtime class action settlement, courts approved an initial settlement and later an amended settlement, together with fees that were subject to a multiplier. [62] The initial settlement provided for an overtime claims process without any limit on the total payouts. The legal fees were determined by arbitration ($3.8 million with a 2.75 multiplier) and were approved.[63] A further settlement in 2016 provided for additional amounts to be paid for claims that had been partly paid or rejected. The defendant paid an additional $20.6 million to the class members and $2.3 million for legal fees. The court approved the settlement,

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[61] *Gagne v. Silcorp Ltd.*, 1998 CanLII 1584 (ON CA).

[62] See *Fulawka v Bank of Nova Scotia*, 2014 ONSC 4743 (CanLII) ("*BNS 2014*"), 2016 ONSC 1576 (CanLII) ("*BNS 2016*").

[63] *BNS 2014*, paras 20-24.

specifically noting that it was achieved after a two-day mediation with the Hon. George Adams, described as "one of the country's most experience mediators".[64] The additional fees represented a multiplier of approximately 1.99, or 24% of what was achieved for the class over the two settlements. The fees were approved.[65]

61. Courts have also approved class counsel fees calculated on a contingency basis. Where fees have been calculated on the basis of a contingency, courts have held that a fee of 25 per cent is "a reasonably standard fee agreement in class proceedings litigation".[66] In *Rosen*, a settlement of an overtime misclassification matter, Belobaba J. approved fees of $2,736,138 plus taxes and disbursements, representing a 25% contingency fee.[67]

62. The retainer between class counsel and the plaintiff permitted fees to be calculated on the basis of either a multiplier approach or contingency approach. In the circumstances of a settlement before certification, the retainer provided that a multiple of not less than 2 would apply, or 25% if calculated on a contingency basis.[68]

63. The proposed settlement provides for fees to be paid to class counsel separately from the payment to the class, and accordingly class counsel seeks approval of its fees on the basis of the multiplier approach.

64. Class counsel's actual time and disbursements to date are $544,725.39. Class counsel estimates that a further amount of up to $75,000 may be necessary for the settlement

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[64] *BNS 2016*, para 17.
[65] *BNS 2016*, para 19.
[66] *IKO*, para 59 and cases cited therein.
[67] *Rosen*, paras 22-23.
[68] Davies Affidavit, para 64, Exhibit "H": Retainer Agreement.

implementation process, including communications with class members and efforts to locate any missing class members.

65. Class counsel seeks approval of an all-inclusive payment of $1 million, consisting of all fees and disbursements for all work leading up to the settlement approval and any further work involved in administering the proposed settlement. This represents a multiplier of approximately 1.6 - 1.8 on the actual docketed time of counsel.

D. Honorarium for Representative Plaintiff

66. The plaintiff also requests approval of an honorarium recognizing the efforts of the representative plaintiff. In *Dow v 407 ETR Concession Company Limited*, Justice Perell approved an honorarium of $10,000 on the following basis:[69]

> "Mr. Dow, Ms. Miron, and Mr. Teolis were actively involved in the litigation and in giving instructions to Class Counsel. They were willing to expose their personal financial circumstances to public scrutiny in order for the litigation to advance. It is unlikely that the issues in the action would have ever been litigated on an individual basis given the relatively small amounts in issue, the nature of the constitutional question and necessary declaratory relief, the legal complexities and the unique vulnerability of the Class Members as insolvent persons. Were it not for their efforts, no litigation would likely have been commenced and there would have been no recovery in favour of the Class."

67. Honoraria were similarly approved in other class actions involving unpaid hours and overtime. In *Rosen,* a settlement of an overtime misclassification matter, Belobaba J. approved an honorarium for the representative plaintiff in the amount of $10,000, commenting as follows:

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[69] *Dow v 407 ETR Concession Company Limited*, 2016 ONSC 7086 (CanLII), para 26; see also *Gerard v Detour Gold Corporation,* 2017 ONSC 3966 (CanLII); *Horgan v. Lakeridge Health Corporation*, 2014 ONSC 5209 (CanLII).

> "Mr. Rosen assisted in the preparation of the case and contributed to the success of the action. He retained and instructed counsel. He helped with the statement of claim. He was cross-examined on his certification affidavit and in doing so was obliged to disclose personal financial and employment information. Mr. Rosen maintained contact and solicited input from other class members. In a word, he participated in every step of the six-year litigation including settlement discussions, the mediation and the finalization of the settlement agreement"

68. In *Fulawka*, the court approved a $15,000 honorarium for the representative plaintiff.[70]

69. The plaintiff submits that an honorarium is appropriate in this matter because of the extent of Ms. Eklund's efforts in bringing forward and prosecuting this action on behalf of the class. Ms. Eklund devoted a considerable amount of time to the success of this action, including communicating with other class members (dozens of whom reached out to her directly), providing statements to the media, meeting with and instructing counsel, reviewing documents, swearing an affidavit, and attending multiple long days of mediation. Her involvement as the face of the class action came at a personal cost, as she did not receive a job opportunity after a potential employer asked her about the lawsuit against her former employer, GoodLife, during a job interview. The extent of her involvement is similar to the cases above where honoraria have been approved. Class counsel supports the payment of the honorarium and no class member has objected to it.

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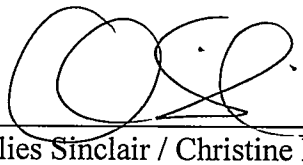
[70] *BNS 2014*, paras 20-24.

PART IV - ORDER REQUESTED

70. The plaintiff requests an Order approving the certification of the class approving settlement, and approving the fees of class counsel together with an honorarium for the representative plaintiff.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of June, 2018.



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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Osmun v. Cadbury Adams Canada Inc.*, 2009 CanLII 72092 (ON SC)
2. *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444 (CanLII)
3. *Fulawka v. Bank of Nova Scotia,* 2012 ONCA 443 (CanLII)
4. *Rosen v. BMO Nesbitt Burns Inc.*, 2013 ONSC 2144 (CanLII)
5. *Bozsik v Livingston International Inc.*, 2016 ONSC 7168 (CanLII)
6. *Rowlands v. Durham Region Health*, [2012] O.J. No. 3191 (S.C.J.)
7. *Dabbs v. Sun Life Assurance Company of Canada,* [1998] O.J. No. 2811 (Gen. Div.); affirmed 1998 CanLii 7165 (ONCA), leave to appeal refused 1998 SCCA No. 372
8. *Robertson v. Proquest Information and Learning LLC*, [2011] O.J. No. 2013 (S.C.J.)
9. *Rosen v. BMO Nesbitt Burns Inc.*, 2016 ONSC 4752 (CanLII)
10. *Wein v. Rogers Cable Communications*, [2011] O.J. No. 5572 (S.C.J.)
11. *Barwin v. IKO,* 2017 ONSC 3520 (CanLII)
12. *Lavier v. My Travel*, 2011 ONSC 1222
13. *Parsons v. Canadian Red Cross Society* [1999] O.J. No. 3572
14. *Waldman v. Thomson Reuters Canada Limited*, 2016 ONSC 2622 (CanLII) (Div. Ct.)
15. *Elliot v. Joseph Brant Hospital*, 2013 ONSC 124 (CanLII)
16. *Dow v. 407 ETR Concession Company Limited*, 2016 ONSC 7086 (CanLII)
17. *Drew v. Walmart Canada Inc.*, 2016 ONSC 8067 (CanLII)
18. *Drew v. Walmart Canada Inc.*, 2017 ONSC 3308 (CanLII)
19. *Speevak v. Canadian Imperial Bank of Commerce*, 2010 ONSC 1128 (CanLII)
20. *Smith v. National Money Mart*, [2010] O.J. No. 873 (SCJ)
21. *Hamilton v. Toyota Motor Sales, USA, Inc.*, 2014 ONSC 785 (CanLII)
22. *Lavier v. MyTravel Canada Holidays Inc.*, 2013 ONCA 92 (CanLII)

23. *Gagne v. Silcorp Ltd.*, 1998 CanLII 1584 (ON CA)

24. *Fulawka v. Bank of Nova Scotia*, 2014 ONSC 4743 (CanLII)

25. *Fulawka v. Bank of Nova Scotia*, 2016 ONSC 1576 (CanLII)

26. *Gerard v. Detour Gold Corporation,* 2017 ONSC 3966 (CanLII)

27. *Horgan v. Lakeridge Health Corporation*, 2014 ONSC 5209 (CanLII)

SCHEDULE "B"
RELEVANT STATUTES

Class Proceedings Act, 1992, S.O. 1992, c. 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).

Settlement without court approval not binding

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

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

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(returnable June 20, 2018)

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