

BETWEEN:

KATARZYNA ALICJA MATONI and  
KAREN E. THOMPSON

Plaintiffs

- and -

C.B.S. INTERACTIVE MULTIMEDIA INC., c.o.b. as CANADIAN BUSINESS  
COLLEGE; CANADIAN BUSINESS SCHOOL INC., c.o.b. as CANADIAN  
BUSINESS COLLEGE; MAZHER JAFFERY and ROSELYN CALAPINI

Defendants

## REASONS FOR DECISION

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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

KATARZYNA ALICJA MATONI and  
KAREN E. THOMPSON

Plaintiffs

J. Adam Dewar and R. Trent Morris, for  
the Plaintiffs

- and -

C.B.S. INTERACTIVE MULTIMEDIA  
INC., c.o.b. as CANADIAN BUSINESS  
COLLEGE; CANADIAN BUSINESS  
SCHOOL INC., c.o.b. as CANADIAN  
BUSINESS COLLEGE; MAZHER  
JAFFERY and ROSELYN CALAPINI

Defendants

Douglas M. Cunningham, for the  
Defendants

Proceeding under the *Class Proceedings Act, 1992*

HEARD: October 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup>, 2007  
Supplemental written

submissions provided by counsel to the  
plaintiffs on October 16, 2007, October 18,  
2007, October 24, 2007 and December 17,  
2007 and by counsel to the defendants on  
October 23, 2007, October 29, 2007 and  
December 17, 2007. Supplemental oral  
submissions on December 18, 2007.

Hoy J.

REASONS FOR DECISION

I INTRODUCTION

[1] In this motion, Katarzyna Matoni and Karen Thompson seek to have the action they commenced against C.B.S. Interactive Multimedia Inc. and Canadian Business School Inc., both of which carry on business under the name "Canadian Business College",

and which I refer to individually and collectively as "CBC", their founder and Chief Executive Officer, Mazher Jaffery, and his wife and CBC's administrator, Roselyn Calapini, certified as a class proceeding pursuant to section 5(1) of the *Class Proceeding Act, 1992*, S.O. 1992, c.6, as amended (the "CPA").

[2] CBC is a private, for-profit, career college. It offers an 18-month, non-accredited program to train prospective dental hygienists.

[3] Ms. Matoni and Ms. Thompson advance claims for negligent misrepresentation (express, implied and by omission), breach of section 52 the *Competition Act*, R.S., 1985, c. C-34, sections 14 and 15 of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A and sections 2, 3 and 4 of the *Business Practices Act*, R.S.O. 1990, c. B.18 and, in the case of CBC only, breach of contract and breach of collateral warranty. Their claims are founded on allegations that CBC, Mr. Jaffrey and Ms. Calapini misrepresented, and failed to make them aware of, two risks of enrolling in a program for dental hygienists that was not accredited by the applicable professional body. The first is that graduates of a non-accredited program are not automatically eligible to write the national exam which all persons who wish to practice as dental hygienists must first pass. The second is that, as a result, if permitted to write the exam, graduates of non-accredited programs typically experience delays between graduation and being able to practice as a dental hygienist.

[4] They seek to have this action certified on behalf of a class comprised of all persons who enrolled in the dental hygiene program at CBC since its inception in June 2005.

## II BACKGROUND

[5] CBC first offered a program for dental hygienists in June of 2005. Subsequent sessions started in September of 2005, January and September of 2006, and January, June and September of 2007. Counsel orally advised that a further session is being offered in January of 2008.

[6] Accreditation of dental hygiene programs by the applicable professional body, the Commission on Dental Accreditation of Canada (the "CDAC"), a part of the Canadian Dental Association, is a two-step process. First, an applicant must seek approval of its curriculum. If approved, the applicant is designated "Accreditation Eligible" or "Approved for Program Survey". (The nomenclature changed during the course of the class period.) Then, an applicant must successfully pass a site visit. Decisions regarding approvals are made by the CDAC annually, in November.

[7] Only persons who are registered with the College of Dental Hygienists (the "College") can practice as dental hygienists. In order to be registered with the College, a prospective dental hygienist must pass a national exam (the "Exam") that is administered by the National Dental Hygiene Certification Board (the "Board"). Exams are generally held three times a year.

[8] Graduates of non-accredited programs can face delays between graduation and registration which are not necessarily experienced by graduates of accredited programs.

The College estimates that the delay between graduation from some non-accredited programs and registration as a Dental Hygienist is 9 to 10 months.

[9] A student in a program accredited by the CDAC is automatically eligible to write the Exam, and may do so up to four months prior to graduation. A student in a non-accredited program, such as CBC's, must first make a separate, individual application to the Board for a determination of whether she is eligible to write the Exam. The Board assesses the applicant's course of study in determining eligibility.

[10] Until July 2007, a student of a non-accredited program had to wait until after graduation to take this additional step of applying for a determination of eligibility to write the Exam. Effective July 3, 2007, a student in a non-accredited program with Accreditation Eligible or Approved for Program Survey status may apply for eligibility to write the Exam up to four months before graduation. This decreased the delay in registration experienced by graduates of some non-accredited programs.

[11] If a graduate of a non-accredited program is found eligible to write the Exam, and writes, and passes, the Exam, she must then pass a provincial clinical competency assessment administered by the College. Graduates of an accredited program are not required to undergo this additional step in order to be registered as a dental hygienist.

[12] Ms. Matoni and Ms. Thompson enrolled in the session of CBC's dental hygiene program that commenced in September of 2005.

[13] Ms. Calapini's evidence is that it was her practice to tell applicants they would have to apply to write the Exam.

[14] Ms. Matoni alleges that when she enrolled, she was told that while the program was not accredited, it would be shortly. She alleges she was not told, and was not aware, that graduates of non-accredited programs are not automatically eligible to write the Exam.

[15] Ms. Thompson testified that she was told both not to worry – the program would be accredited and she would be able to write the Exam – and that she would have an automatic right to write the Exam if the program was accredited.

[16] Ms. Matoni and Ms. Thompson each signed the same document, entitled "Registration Form and Contract". Ms. Matoni's document is dated April 13, 2005; Ms. Thompson's is dated July 12, 2005. The "Registration Form and Contract" did not indicate that the program was not accredited or that there were any implications of enrolling in a non-accredited program on the registrant's ability to write the Exam.

[17] Both Ms. Matoni and Ms. Thompson were aware that graduates of a non-accredited program had to pass a provincial clinical competency assessment, and the evidence is that it was CBC's practice to make students aware of the need to pass this clinical competency assessment following graduation.

[18] CBC's application for accreditation was turned down at the first stage of the accreditation process because its application did not include all required information. At a

meeting in January of 2006, Mr. Jaffrey made an announcement to this effect to the students. Concerned, Ms. Matoni and Ms. Thompson made inquiries and learned, or confirmed, that graduates of non-accredited programs are not automatically eligible to write the Exam.

[19] As a result, Ms. Thompson withdrew from the program on January 25, 2006 and Ms. Matoni withdrew on January 27, 2006. Both demanded a refund of their tuition. CBC refused to refund the tuition paid.

[20] Ms. Thompson was unemployed for approximately four months after withdrawing from the program. The job she ultimately secured pays \$10,000 less per year than the job that she quit to take the program.

[21] Ms. Matoni has since enrolled in an accredited Dental Hygiene program. She had sold her house to pay for CBC's program; she had to borrow money to enroll in the accredited program.

[22] A total of 111 students registered in CBC's June and September 2005 and January 2006 sessions. Twenty-two of them voluntarily withdrew from the program since the January 2006 announcement by Mr. Jaffrey. A further 12 of the 111 were allegedly expelled. Most of the 111 students remained in, and completed, the program.

[23] Counsel for the defendants advised at the hearing that a total of approximately 100 additional students enrolled in the September 2006 and January, June and September 2007 sessions. No information was provided as to the number of students who withdrew from these subsequent sessions, and no information was provided as to the number of students enrolled in the January 2008 session.

[24] Based on this information, and assuming that 25 students enrolled in the January 2008 session (the average number of students enrolled in the four preceding sessions), the proposed Class is comprised of approximately 236 individuals.

[25] CBC was granted "Approved for Program Survey" status in November of 2006, but as of the date of the hearing was not yet accredited. It hoped to be accredited in November of 2007. In the course of further oral submissions on December 18, 2007, counsel for the defendants confirmed that CBC was not granted accreditation after CDAC's site visit and advised that he understands that CBC is appealing the CDAC's decision. Counsel for the plaintiffs advised that CBC is no longer listed on the CDAC's website as having "Approved for Program Survey" status.

[26] The students in the session that commenced in June 2005 graduated in January 2007, were found eligible to write the Exam, and wrote the Exam, in May of 2007. They enjoyed a high rate of success. Students in the September 2005 session graduated in late April 2007 and were permitted to write the Exam in September 2007. Students enrolled in the January 2006 session graduated in, and were also permitted to write the Exam in, September 2007.

[27] For a portion of the proposed class period, CBC's dental hygiene program was also subject to the oversight of the Superintendent of private career colleges appointed under the *Private Career Colleges Act, 2005*, S.O. 2005, c. 28, Sched. L.

[28] Pursuant to the *Private Career Colleges Act, 2005*, which received Royal Assent in July 2005 and came into force in September 2006, a private career college which offers a non-accredited dental hygiene program must obtain the approval of the Superintendent before advertising the program, collecting fees, or delivering the program. As CBC had enrolled students before this provision came into effect, it was permitted to continue delivering its program, pending program approval by the Superintendent. The CBC was given a deadline to submit a program approval application, submitted its application by the deadline, and its program was approved by the Ministry of Training, Colleges and Universities in April of 2006.

[29] In July of 2005; the Ministry advised all private career colleges offering non-accredited dental hygiene programs that they must include a prescribed disclaimer in their student contracts about the implications of enrolling in a non-accredited program on eligibility to write the Exam. The precise form of the disclaimer has been revised from time to time.

[30] Ms. Thompson's evidence is that another student told her that sometime after Ms. Thompson withdrew from the program (that is, sometime after January 25, 2006), CBC began to offer some sort of written notice to prospective students advising that graduates would not have the guaranteed right to write the Exam, but that practice appears to have been discontinued: the enrolment agreements on CBC's website on April 18, 2006 and December 20, 2006 do not include the disclaimer that graduates are not guaranteed to write the Exam.

[31] CBC's evidence is that some, but not all, of the persons who enrolled in the January 2006 session would have signed such a disclaimer, and that the disclaimer was not given to any persons who enrolled prior to January 2006. Mr. Jaffrey explains that it began using the disclaimer in response to the Ministry's requirement for a disclaimer.

### III THE TEST FOR CERTIFICATION

[32] Section 5(1) of the CPA sets out the test for certification:

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.

The plaintiffs must show some basis in fact for each of the certification requirements in section 5(1), other than the requirement in section 5(1)(a) that the pleading discloses a cause of action. See *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 25.

#### **IV THE 5(1)(a) REQUIREMENT: CAUSE OF ACTION**

##### ***The Test***

[33] In determining whether the pleading discloses a cause of action, no evidence is admissible. The pleading will be struck out only if it is plain, obvious and beyond a reasonable doubt that the plaintiff cannot succeed. See *Hollick* at para. 25 and *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 41 (C.A.). The material facts pleaded must be accepted as true, unless patently ridiculous or incapable of proof.

[34] Counsel for the plaintiffs unequivocally confirmed during the course of the hearing both that the plaintiffs do not advance a claim for what defendants describe as “educational negligence” and that, contrary to the Statement of Claim, no claim is advanced against Mr. Jaffrey and Ms. Calapini personally for breach of contract or breach of collateral warranty.

##### ***The Requirements of the Various Causes of Action Pleaded***

###### ***Negligent Misrepresentation (express, implied and by omission)***

[35] The elements of the tort of negligent misrepresentation are summarized in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 at 110 (S.C.C.):

1. there must be a duty of care based on a “special relationship” between the representor and the representee;
2. the representation in question must be untrue, inaccurate or misleading;
3. the representor must have acted negligently in making the representation;

4. the representee must have relied, in a reasonable manner, on the negligent misrepresentation;
5. the reliance must have been detrimental to the representee in the sense that damages resulted.

[36] An implied representation can give rise to actionable negligence: *Queen v. Cognos*, at paras. 74-76.

[37] *Lysko v. Braley* (2006), 79 O.R. (3d) 721 (C.A.), at para. 45, held that an alleged omission can be the basis of a claim for negligent misrepresentation, where it is advanced in the context of a positive misrepresentation. As held in *Queen v. Cognos*, at 123, “a failure to divulge highly relevant information is a pertinent consideration in determining whether a misrepresentation was negligently made.”

[38] The failure to divulge information in *Queen v. Cognos* was a relevant consideration in determining whether a representation was made negligently. As the Supreme Court noted, at para. 58, the case did not entail the imposition of a duty of care to make full disclosure. At para. 54, it described such a standard, in the context of a pre-employment interview, as a “fundamentally new standard of care”.

#### *Breach of Collateral Warranty*

[39] A statement will be considered to be a collateral warranty where the evidence discloses that the parties intended or must be taken to have intended that the representation was to form part of the basis of the contractual relations between them. If a representation is made in the course of dealing for a contract which, to the knowledge of the person making the representation, induces the other party to enter into the contract, it can be inferred that the representation is a collateral warranty and its breach is actionable in damages. *Granitile Inc. v. Canada*, [1998] O.J. No. 5028 (Gen. Div.), at para. 125.

#### *Breach of the Competition Act*

[40] Section 52(1) of the *Competition Act* provides that, “No person shall, for the purpose of promoting, directly or indirectly... any business interest, by any means whatever, knowingly or recklessly make, or permit to be made, a representation to the public that is false or misleading in a material respect.” Section 52(1.2) provides that a reference to the making of a representation includes permitting a representation to be made. Section 36(1) of the *Competition Act* provides a civil right of action for damages to any person who has suffered loss or damage as a result of a breach of section 52. Pursuant to section 36(4), such an action must be brought within two years from a day on which the conduct was engaged in. While, pursuant to section 52 (1.1), it is not necessary to prove that a person was in fact misled or deceived in order to establish a breach of section 52, in order to obtain damages under section 36(1), a causal connection between the alleged breach of section 52 and the damages claimed under section 36 must be proven: *Williams v. Mutual Life Assurance Co. of Canada* (2000), 51 O.R. (3d) 54, para. 34 (S.C.J.); *Lawrence v. Atlas Cold Storage Holdings Inc.*, [2006] O.J. No. 3748 (S.C.J.); and *Hyprescon Inc. v. Ipex Inc.*, [2007] O.J. No. 1327, paras. 65-71 (S.C.J.).

*Breach of the Business Practices Act*

[41] Section 2 of the *Business Practices Act* provides that a “false, misleading or deceptive consumer representation” including, without limiting the generality of the foregoing, “a representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such failure deceives or tends to deceive” is an “unfair practice”. Section 4 of the *Business Practices Act* provides that an agreement, written, oral or implied, entered into by a consumer after a person has engaged in an unfair practice that induced the consumer to enter into the agreement may be rescinded by the consumer, and the consumer is entitled to any remedy that is available in law, including damages. Where rescission is not, for certain reasons, possible, the consumer is entitled to recover the amount by which the amount paid under the agreement exceeds the fair value of the goods or services received under the agreement, or damages, or both.

[42] Section 4(5) requires that notice of the claim by the consumer be given to each other party to the agreement in writing within six months after the agreement is entered into. Unlike the *Consumer Protection Act*, discussed below, which replaced the *Business Practices Act* on July 30, 2005, the *Business Practices Act* does not include a provision permitting the court to disregard this requirement to give notice.

[43] Pursuant to section 19 of the *Consumer Protection Act*, the *Business Practices Act* continues to apply to consumer transactions that occurred before its repeal. Section 1 of the *Consumer Protection Act* defines a “consumer transaction” as, “any act or instance of conducting business or other dealings with a consumer, including a consumer agreement”.

*Breach of the Consumer Protection Act*

[44] Sections 14 and 15 of Part III of the *Consumer Protection Act* apply to “consumer transactions” (defined above) that occurred on or after July 30, 2005.

[45] Sections 14 and 15 provide, respectively, that it is an unfair practice for a person to make a “false, misleading or deceptive representation” or an “unconscionable representation”. Section 14(2)(14) provides that, “a representation using exaggeration, innuendo or ambiguity as to a material fact or failing to state a material fact if such use or failure deceives or tends to deceive” is a false, misleading or deceptive representation. Sections 18(1) and (2) of the *Consumer Protection Act* provide a right to rescission to a consumer who entered into a contract after or while an unfair practice took place and, if rescission is not possible, entitle the consumer to recover the amount by which the consumer’s payment under the agreement exceeds the value that the goods or services have to the consumer or to recover damages, or both. Unlike section 4 of the *Business Practices Act*, the *Consumer Protection Act* does not require that the consumer establish that the unfair practice induced him to enter into the contract.

[46] Section 18(3) of the *Consumer Protection Act* provides that a consumer must give notice within one year of entering into the consumer agreement if the consumer seeks a remedy under that Act. Pursuant to section 18(15), a court may disregard the requirement to give the notice if it is in the interests of justice to do so.

*The Pleading*

[47] Key portions of the pleading are as follows:

- At specifically identified meetings before the plaintiffs enrolled, Mr. Jaffrey and Ms. Calapini represented to Ms. Matoni and Ms. Thompson, respectively, that she would have an automatic right to write the Exam. (paras. 28 and 30)
- CBC failed to disclose that there was no guarantee that class members would be entitled to write the Exam.
- Implicit in the statement made by CBC, in advertisements and a handbook, that it offered a "Dental Hygiene program" was that such a program was equivalent to an accredited program and that class members would have the right to write the Exam. (paras. 21-23)
- The plaintiffs relied on these representations to their detriment. (para. 24)
- Ms. Matoni and Ms. Thompson signed registration forms and contracts and paid a \$500 deposit on April 13, 2005 and July 12, 2005, respectively, for the session commencing in September, 2005. (para. 33)
- On January 25, 2006, Ms. Thompson advised Mr. Jaffery orally that she was withdrawing from the program and demanded a refund of her tuition. Ms. Thompson confirmed her withdrawal from the program and her request for a refund by letter dated January 26, 2006.
- By letter dated January 27, 2006, Ms. Matoni advised CBC and Mr. Jaffery of her withdrawal from the program and demanded a refund of her tuition.
- The defendants were in a special relationship with the plaintiffs because of their special knowledge, accordingly owed a duty to disclose the significance of non-accreditation, did not do so, and breached this duty. (paras. 45-47)
- CBC had not applied for eligibility before offering the program to the public. (para. 16)
- The failure to disclose that the plaintiffs would not have the guaranteed right to write the Exam amounts to negligent misrepresentation by omission. (para. 48)
- The plaintiffs would not have enrolled if they had been told that there was a risk that they would not be able to write the Exam following graduation. (para. 43)
- Mr. Jaffrey, a director and employee, and Ms. Calapini, the General Manager, and together the sole shareholders and directing and controlling minds of

CBC, made, authorized, acquiesced in, condoned or encouraged the misrepresentations and failures to disclose. (paras. 6, 31 and 32)

- The defendants breached section 52 of the *Competition Act*, sections 2, 3 and 4 of the *Business Practices Act* and sections 14 and 15 of the *Consumer Protection Act* by their alleged misrepresentations and failure to disclose.
- The terms, implied or otherwise, of the contracts the plaintiffs and class members entered into with CBC include that there was no risk that the program would not be accredited or they might not be able to write the Exam in the same manner and at the same time as if they had enrolled in an accredited program (para. 35); CBC's 2005 application for accreditation was rejected (para. 16 and 37 ) and the program has not been accredited; and class members do not have the automatic right to write the Exam (para. 16).
- The defendants knew or ought to have known that the plaintiffs were enrolling so that they would have the guaranteed right to write the Exam (para. 34). The representations made, and failure to advise that there was no automatic right to write the Exam, were made or done to induce the plaintiffs and the class members to enter into contracts with CBC and constitute a collateral warranty that there was no risk that they would not be able to write the Exam in the same manner and at the same time as graduates of an accredited program; that the parties intended that these representations form part of their contractual relationship; and that the plaintiffs relied on this collateral warranty in entering into contracts with CBC (para. 44).
- The plaintiffs left secure and gainful employment in order to enroll in the program. They sustained damages, including loss of tuition and loss of income while they were enrolled in the program and thereafter.

### *Analysis and Conclusion*

#### *Breach of Contract, Negligent Misrepresentation, Breach of Collateral Warranty and Breach of the Competition Act*

[48] Counsel for the defendants argues that the plaintiffs have no cause of action for negligent misrepresentation (express, implied or by omission), breach of representation that is an implied term of the contracts between them and CBC, breach of collateral warranty, or breach of the *Competition Act* for two reasons.

[49] First, he argues that to be actionable, the representation or warranty must be a false statement of past or present fact, and the misrepresentation or breach of representation or warranty alleged is as to a future state of events, namely the ability to write the Exam in the future.

[50] As noted by Molloy J. at para. 126 of *Granitile*, a case involving an allegation of breach of a collateral warranty, statements which appear to be representations as to future conduct may contain within them implied statements of fact. In that case, Molloy J. referred

to *Esso Petroleum Co. Ltd. v. Mardon*, [1976] 1Q.B. 801 (C.A.), in which Omrod L.J., in considering the argument that the statement at issue was about future facts and therefore could not constitute a warranty, commented that whether a statement amounted to a warranty was a question of fact to be determined on the totality of the evidence as to the intention of the parties.

[51] Assuming without deciding that counsel for the defendants' view of the law is correct, in this case the alleged representation and warranty could be seen as a statement of present or existing fact, namely the present absence of undisclosed risk. Whether this is so, is, as suggested in *Esso*, an issue for trial.

[52] Second, and in the same vein, counsel for the defendants argues that these claims cannot succeed because the plaintiffs failed to plead that they were denied the right to write the Exam, and they have therefore not pleaded a misrepresentation. As indicated above, the alleged misrepresentation is as to risk.

[53] It is not plain, obvious and beyond a reasonable doubt that the claims against CBC for misrepresentation (express, implied or by omission), breach of contract, breach of collateral warranty or breach of the *Competition Act* cannot succeed. I am satisfied that the required elements of those claims, and the material facts supporting them, are adequately pleaded.

[54] In their Statement of Claim, the plaintiffs plead that the defendants owed a duty to them to disclose the significance of non-accreditation. Moreover, at the certification hearing they tabled a proposed Common Issue 3, entitled "Duty to Disclose", in addition to a proposed Common Issue 2, entitled Negligent Misrepresentation, which addresses representations, express, implied and by omission.

[55] In *Lysko v. Braley*, the motions judge struck out a claim alleging misrepresentation by omission. The Court of Appeal found that the motions judge had misapprehended the allegations in the statement of claim. It specifically determined, at para. 45, that, "This is not a case where no representations were made. To the contrary, the appellant has made allegations of express positive misrepresentations of the financial state of the League. The alleged misrepresentation by omission should be understood in that context and, as such, fall within *Cognos...*". Implicit in *Lysko* is that, had no representation been made, the claim would have been struck.

[56] Following the hearing, I asked counsel for the plaintiffs to clarify whether or not the plaintiffs were pleading duty to disclose or duty to warn as a separate cause of action. Counsel confirmed in its supplemental submissions that the plaintiffs do not assert these as separate causes of action and that they plead misrepresentation by omission as a subset of the tort of negligent misrepresentation.

#### *Claim under the Business Practices Act*

[57] Ms. Matoni and Ms. Thompson plead that they signed contracts on April 13, 2005 and July 12, 2005, respectively. They plead that there were terms of those contracts, in

addition to those contained in the written contracts signed, but do not plead that they entered into subsequent or additional contracts or amended the contracts they signed.

[58] As noted above, pursuant to section 4(5) of the *Business Practices Act*, Ms. Matoni and Ms. Thompson were required to have given notice to CBC in writing of their claim within six months after the agreement was entered into.

[59] The only written notices pleaded by them are the written notices of withdrawal that they provided to CBC on January 27, 2006, in the case of Ms. Matoni, and January 26, 2006, in the case of Ms. Thompson. (In the case of Ms. Thompson, her written notice confirmed her oral withdrawal on January 25, 2007.) Assuming, but not determining, that these notices constitute "notice" for the purposes of section 4(5) of the *Business Practices Act*, the notices are not pleaded to have been given within six months after the agreements were entered into.

[60] In their supplemental submissions, the plaintiffs argue that the operation of section 4(5) of the *Business Practices Act* is a defence that should be pleaded by the defendants, and whether the plaintiffs' claims are statute barred should be determined after it is so pleaded by the defendants or at any determination of the individual issues following a trial and not at this stage. The plaintiffs further argue that if pleaded by the defendants as a defence, the plaintiffs may be able to rely on the principles of discoverability or fraudulent concealment.

[61] The plaintiffs refer me to *Guerin v. Canada*, [1984] 2 S.C.R. 335 for the principle that where there has been a fraudulent concealment of the existence of a cause of action, the limitation period will not start to run until the plaintiff discovers the fraud, or until the time when, with reasonable diligence, he ought to have discovered it. *Guerin* indicates that the fraud need not amount to deceit or common law fraud; conduct which is unconscionable having regard to the relationship between the parties is sufficient. The plaintiffs argue that while they did not plead fraudulent concealment, because, in their view it was not necessary to do so at this juncture, the evidence before me on this motion is that while the defendants had been notified no later than November 21, 2005 that their application for "Accreditation Eligible" status had been rejected, this information was not given to the class until January 2006.

[62] If the principle of fraudulent concealment tolled the limitation period, then Ms. Thompson, who gave written notice confirming her withdrawal about six months and two weeks after she signed her contract, may be in a position to advance a claim under the *Business Practices Act*.

[63] It is in my view not plain and obvious and beyond a reasonable doubt that at least one of the plaintiffs' claims under the *Business Practices Act* cannot succeed.

[64] I am aware that evidence is not considered on the 5(1)(a) analysis; what is relevant are the material facts pleaded.

[65] In this case, as is common, the defendants did not file a statement of defence before the certification motion was heard. Nor did the defendants raise the plaintiffs' failure

to plead that notice under the *Business Practices Act* in their factum, or at the certification hearing. The issue arose, subsequent to the hearing, as a result of questions raised by the Court. Had the defendants raised this issue, the plaintiffs could have amended their statement of claim, without leave, to plead the additional facts referred to above. In all of the circumstances, I am of the view that the proper course is to defer the determination of this question until the limitation period has been pleaded by way of defence and the plaintiffs have had an opportunity to respond.

*Claim under the Consumer Protection Act*

[66] I am satisfied, however, that neither Ms. Matoni nor Ms. Thompson has a cause of action under the *Consumer Protection Act*.

[67] As noted above, the *Consumer Protection Act* applies to “consumer transactions” that occur on or after July 30, 2005. While “consumer transactions” include more than a consumer agreement, Part III of the *Consumer Protection Act* affords a remedy only with respect to agreements entered into after or while the unfair practice took place. Here, the plaintiffs plead agreements entered into before the *Consumer Protection Act* came into effect. Only unfair practices that occurred before or while the agreement was entered into would entitle plaintiffs to relief under the *Consumer Protection Act*. All such unfair practices would have necessarily occurred prior to July 30, 2005.

[68] I note that following the hearing, I specifically requested further assistance from counsel on this issue. Counsel for the plaintiffs’ supplemental submissions acknowledged that, “Pursuant to the transitional provisions of the *Consumer Protection Act* some of the Class Members ( including the Representative Plaintiffs) may be required to advance claims under the *Consumer Protection Act*’s predecessor legislation the *Business Practices Act*.... As sections 14 through 19 of the *Consumer Protection Act* subsequently came into force on July 30, 2005, that act will apply to Class Members who entered into contracts with the Defendants after July 30, 2005.”

[69] Counsel for the plaintiffs advised that their research revealed no authorities considering the transitional provisions of the *Consumer Protection Act*.

[70] Notwithstanding this absence of jurisprudence, and noting the plaintiffs’ own interpretation of the transitional provisions of the *Consumer Protection Act*, I am satisfied that it is plain and obvious that the *Consumer Protection Act* does not provide a remedy in respect of a consumer agreement entered into before it came into effect, and that the plaintiffs accordingly do not have a cause of action under the *Consumer Protection Act*.

[71] In their supplemental submissions, the plaintiffs argue, however, that given the similarities between the *Business Practices Act* and the *Consumer Protection Act*, the fact that they do not themselves have a cause of action under the *Consumer Protection Act* does not bar them from asserting such a cause of action on behalf of class members who do. For this proposition, they rely on two actions commenced under the CPA: *Boulangier v. Johnson & Johnson Corp.*, [2003] O.J. No. 1374, paras. 33, 41 and 48 (S.C.J. [Div. Ct.]) and *Healey v. Lakeridge Health Corp.*, [2006] O.J. No. 4277, para. 21 (S.C.J.).

[72] In *Boulanger*, the representative plaintiff, a resident of Ontario, sought to advance claims for the subrogated interests of health insurers in provinces other than Ontario. The Court determined that *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603 (S.C.J.), which held that for each defendant named in a class action there must be a representative plaintiff who has a valid cause of action against that defendant, did not apply. There was a valid cause of action against the named defendants and a representative plaintiff is entitled to claim relief on behalf of class members that the representative herself does not have.

[73] In *Healey*, Cullity J. cites *Boulanger*, and concludes that academic commentary to the effect that a representative plaintiff can assert a cause of action against a defendant on behalf of other class members which he or she does not assert personally, provided that the causes of action all share a common issue of fact or law, is correct.

[74] *Healey* involved allegations that the defendants were negligent in exposing class members to tuberculosis. There was a composite class comprised of several discrete groups. A claim in negligence was pleaded in respect of each of the groups. The action was certified. Cullity J. did not find that the representative plaintiff did not have a cause of action in negligence, but that other class members did.

[75] Counsel for the defendant does not refer me to any cases contrary to *Boulanger* and *Healey*, but urges me to disregard them.

[76] The representative plaintiffs have valid causes of action against the defendants. The *Consumer Protection Act* is successor legislation to the *Business Practices Act*, under which, I have concluded, the plaintiffs have a cause of action. Both statutes address unfair practices. Based on *Boulanger* and *Healey*, I am satisfied, for the purpose of section 5(1)(a), that the proposed representative plaintiffs can assert breach of the *Consumer Protection Act* on behalf of class members who entered into contracts after July 30, 2005.

[77] Moreover, and significantly, the evidence before me is that the plaintiffs limited their contract with the Class because the defendants put them on notice of their intention to bring an action against them for intentional interference with economic relations. But for this, the representative plaintiffs might well have included a class member who entered into a contract after July 30, 2005.

#### *Personal Liability*

[78] Counsel for the defendants also argues that the plaintiffs have no cause of action against Mr. Jaffrey or Ms. Calapini, personally. *ADGA Systems International Ltd. v. Valcom Ltd.* (1999), 43 O.R. (3d) 101 (C.A.) explains that where properly pleaded, officers or employees can be liable for tortious conduct even when acting in the course of duty. Counsel for the defendants argues that the plaintiffs have not pleaded the claims against the individuals with sufficient particularity. The plaintiffs plead that Mr. Jaffrey, a director and

employee, and Ms. Calapini, the General Manager, made, authorized, acquiesced in, condoned or encouraged the misrepresentations and failures to disclose pleaded (paras. 6, 31 and 32). They have in my view adequately pleaded the claim based on tortious conduct.

[79] The *Competition Act* contemplates claims against a person making the representation, and not just his or her employer. I am not satisfied that it is plain, obvious and beyond a reasonable doubt that the plaintiffs cannot succeed against these defendants personally under the *Competition Act*.

[80] Section 4(2) of the *Business Practices Act* and section 18(2) of the *Consumer Protection Act* provide that each person who engages in an unfair practice is jointly and severally liable with the person who entered into the agreement with the consumer. These sections, which extend liability beyond the contracting entity, can also be seen as contemplating personal claims.

### *Conclusion*

[81] I am satisfied that the pleadings disclose “a cause of action” and the plaintiffs have therefore met the requirements of section 5(1)(a) of the CPA.

## **V THE 5(1)(b) REQUIREMENT: AN IDENTIFIABLE CLASS**

[82] Class definition is important because it identifies the persons who are entitled to notice and relief, if awarded, and who will be bound by any judgment or settlement if they do not opt out.

[83] The class must be defined by reference to objective criteria, without reference to the merits of the action. There must be some rational relationship between the class and the common issues. The plaintiff has an obligation, although not an onerous one, to show that the class is not unnecessarily broad, in the sense that it could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issues. (*Hollick* at paras. 17, 20-21; *Cloud* at para. 45.)

[84] The plaintiffs propose the following class:

All persons who enrolled in the dental hygiene program at the Canadian Business College since June 2005.

[85] In response to the concern I expressed that there was no “end date”, counsel for the plaintiffs proposed that the class definition be amended to add, “and prior to such program being accredited by the Commission on Dental Accreditation of Canada” or words to like effect.

[86] That change is not in my view sufficient. The class should close no later than the time at which notice of certification is given to ensure that notification of class members is effective.

[87] As noted above, the evidence is that Ms. Matoni's Registration Form and Contract is dated April 13, 2005. From counsel's submission, I understood that the class definition was intended to capture persons who enrolled in CBC's dental hygiene program prior to accreditation, and was not intended to exclude persons who enrolled in advance of the commencement of the first session in June of 2005. For clarity, the class definition should be reworked to make clear that the June 2005 date refers to the start date of the first session of the program, and not the date of enrolment.

[88] As indicated in Part II above under "Background", at this juncture the proposed class consists of approximately 236 individuals.

[89] Counsel for the defendants concedes that the class is defined by objective criteria, as required, but argues that, because it is defined by reference to enrolment, it is overly broad. He submits it should be comprised only of persons who withdrew from the program because only they can possibly prove damages. Assuming the information as to the number of persons who voluntarily withdrew from the program, reviewed above under "Background", is accurate, the class would, on the defendants' definition, consist of 22 individuals.

[90] The plaintiffs acknowledge that they and other Class members who withdrew from the program after learning that CBC's initial step in the accreditation process was unsuccessful will seek greater damages than those who remained in the program and wrote the Exam. They also do not dispute that persons who enrolled in the January 2006 session experienced no delay in writing the Exam.

[91] Counsel for the plaintiffs referred me to *Taylor v. Canada (Minister of Health)*, [2007] O.J. No. 3312, at para. 62 (S.C.J.), where Cullity J. remarked that, because of the requirement that the class definition not incorporate elements going to the merits of the claim, the possibility that some class members will be unable to prove damages almost invariably exists.

[92] They also referred me to *Place Concorde East Limited Partnership v. Shelter Corp. of Canada Ltd.*, [2006] O.J. No. 1964, at para. 76. (C.A.). There, referring to H. McGregor, *McGregor on Damages*, 17<sup>th</sup> ed., (London: Sweet and Maxwell, 2003) at para. 10-006, the Court of Appeal cited the general rule that nominal damages *may* be given in all cases of breach of contract and in torts actionable per se. Thus, counsel for the plaintiffs argues, if a breach of contract or collateral warranty were established, class members who wrote the Exam at the same time as they would have had the program been accredited, experienced no delay in registration as a Dental Hygienist and who, as a result, are unable to prove damages, may nonetheless be entitled to nominal damages. Therefore, counsel argues, they are properly included in the class, and the class is not overly broad.

[93] The tort of negligent misrepresentation is not a tort, such as defamation, battery or trespass, that is actionable per se; plaintiffs asserting negligent misrepresentation must establish actual damages. Similarly, section 36 of the *Competition Act* requires a plaintiff to have suffered actual damages to sue for recovery based on a breach of section 52. Proof of actual damages is not, however, required under the *Business Practices Act*, or under the *Consumer Protection Act*.

[94] If successful on their substantive claims, persons who did not withdraw from the program, and who experienced delay in registration as a Dental Hygienist because the program is not accredited, might possibly prove damages or establish that the amount that they paid for under the agreement for the program exceeded the value to them of the program. Assuming that the other requirements for certification are met, I am satisfied that, subject to amending the Class definition to provide for an end date and to clarify the start date, the proposed Class definition is satisfactory. Having regard, however, to my ultimate conclusions in considering the requirements of section 5(1)(d) and (e), the scope of the class proposed is overly broad and should be modified as set out under "Summary Conclusion" at the end of these Reasons.

## VI THE 5(1)(c) REQUIREMENT: COMMON ISSUES

### *The Test*

[95] Section 1 of the CPA defines common issues:

"common issues" means,

- (a) common but not necessarily identical issues of fact, or
- (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts[.]

[96] *Hollick*, at para. 18, explains the test to be applied:

As I wrote in *Western Canadian Shopping Centres*, the underlying question is 'whether allowing the suit to proceed as a representative one will avoid duplication of fact finding or legal analysis'. Thus an issue will be common 'only where its resolution is necessary to the resolution of each class member's claim (para. 39). Further, an issue will not be 'common' in the requisite sense unless the issue is a 'substantial...ingredient' of each of the class member's [*sic*] claims.

[97] *Hollick*: As *Cloud* notes, at para. 52, this is a low bar. At para. 53, *Cloud* explains

In other words, an issue can constitute a substantial ingredient of the claims and satisfy s. 5(1)(c) even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution. In such a case the task posed by s. 5(1)(c) is to test whether there are aspects of the case that meet the commonality requirement rather than to elucidate the various individual issues which may remain after the common trial.

[98] As *Cloud* explains, at para. 65, the comparative extent of individual issues is a factor in assessing whether a class proceeding is the preferable procedure, not in considering whether the common issues requirement has been met.

***The Proposed Common Issues***

[99] The proposed common issues, as refined by the plaintiffs' counsel both during and following the hearing, and my analysis of each, follow.

***Proposed Common Issue 1: Breach of Contract***

[100] a. *What are the relevant or material contractual obligations of the corporate defendants to the Class?*

b. *Was it an express or implied term of the Class members' contracts with the corporate defendants that:*

(i) *there was no risk that the Class members would not, upon their graduation, have the automatic or guaranteed right to write the National Board Examination; and*

(ii) *there was no material information or risks related to the program, its curriculum, or accreditation status that had not been disclosed by the corporate defendants, such that the Class members would or might not be able to write the National Board Examination or otherwise might not become a registered dental hygienist in the same manner and at the same time as if they had enrolled in an accredited dental hygiene program at another institution.*

c. *If the answer to any of 1(b) above is "yes", was that express or implied contractual term breached? In other words, did the Class get what it paid for?*

d. *If the answer to question 1(c) is yes, what remedy, if any, are the Class members entitled to?*

(i) *Are the Class members entitled to the remedy of rescission?;*

(ii) *Are the Class members entitled to a rebate of some or all of their tuition and other expenses paid to CBC?; and,*

(iii) *Are the Class members entitled to damages for breach of contract?*

[101] I understand that the heart of the plaintiffs' case in contract is an allegation of breach of an implied term. Nonetheless, as the proposed common issue makes reference to express terms, I will first address the proposed common issue in relation to the express terms.

[102] The material terms of the documents signed by class members during the class period differ.

[103] For example, the form of document entitled "Enrolment Agreement" downloaded from CBC's website on December 20, 2006 incorporates by reference sections 25 to 33 of O. Reg 415/06 made under the *Private Career Colleges Act, 2005*. Among other things, these provisions provide for partial refunds to a student who voluntarily withdraws from the program. The forms of contract signed by Ms. Matoni and Ms. Thompson, and the Registration Form and Contract downloaded from CBC's website on April 19, 2006, provide that no refund will be paid if the student withdraws. CBC's failure to refund the tuition paid by the students who withdrew appears to have been the genesis of this action; these differences are material.

[104] The forms signed by Ms. Matoni and Ms. Thompson do not disclose that the program is non-accredited, or the implications of non-accreditation. The plaintiffs acknowledge that some students were given a written notice that they did not have a guaranteed right to write the Exam, and Mr. Jaffrey's evidence is that some, but not all, of the students enrolled in the January 2006 session signed a disclaimer, acknowledging that graduates of the program were not guaranteed to write the Exam. The form of Registration Form and Contract downloaded from CBC's website on April 19, 2006 specifically discloses that the program is non-accredited, but does not disclose the implications of this to the student's ability to write the Exam. The January 2006 disclaimer was not posted on the website on April 19, 2006. The form of Enrolment Agreement downloaded on December 20, 2006 does not on its face include the required disclaimer; however, it requires the signatory to acknowledge that she has received a copy of several documents, including something called "Waiver Document", which did not form part of the evidence.

[105] At least in relation to determining the express terms of the contracts, it will have to be determined which documents comprised the applicable contract at the various times and what the relevant or material contractual obligations of CBC are under the various contracts. The determination of what documents comprise the contract between CBC and one class member is not necessary to the resolution of the claim of breach of an express term of a contract of a class member subject to a different contract and is not a substantial ingredient of the second class member's claim. Different fact finding processes would be undertaken with respect to each contract.

[106] Proposed common issue 1a, as it refers to the "express" terms of the contracts, is not a common issue for the class as defined.

[107] Proposed common issue 1b is similarly not a common issue as it relates to the "express" terms of the contracts for the class as broadly defined. In my view it cannot be, because, as discussed above, the forms of contracts differed during the class period. Also, the fact that the Ministry required the disclaimer during part of the class period and some contracts entitled withdrawing students to a partial refund may affect the interpretation of the express terms of contracts concluded during that period.

[108] In the result, 1c is not a common issue for the class as defined as it relates to breach of express terms.

[109] Counsel for the plaintiffs argued that this case is similar to *Hickey-Button v. Loyalist College of Applied Arts & Technology*, [2006] O.J. No. 2393 (C.A.). In that case,

students who enrolled in a nursing program at a community college alleged that it was a term of their contract with the community college, and the community college had represented to them, that after two years they would have the opportunity to transfer to Queen's University, and after a further two years of study, obtain a nursing degree from Queen's. This – the so-called “Queen's option” - was preferable to the two traditional alternatives: a four year university program, with higher admission standards and higher tuition; or a three-year community college diploma in nursing, followed by two additional years of university.

[110] The Court of Appeal overturned the decision of the Divisional Court, which had upheld the motions judge. Both had concluded that the plaintiffs relied on the terms of a “verbal” contract, the terms of the contract would vary from student to student, and whether the contract contained the “Queen's option” was therefore not a common issue. The Court of Appeal held, at para. 32, that they had mischaracterized the plaintiffs' contract claim: they “maintained that the terms of the contract were to be found in the written material supplied to all students in response to their applications. The appellants did not rely on any oral or “verbal” contract.”

[111] In *Hickey-Button*, unlike this case, the plaintiffs relied on common written material provided to all class members. An express term was at issue.

[112] While I have concluded that none of proposed common issues 1a, b or c, as they relate to “express” terms is common for the Class as defined, there is some basis in fact for concluding that they would be common issues for a subclass, consisting of persons who enrolled in the June 2005 or September 2005 sessions. The evidence is that Ms. Matoni and Ms. Thompson, who enrolled on April 13, 2005 and July 12, 2005, respectively, for the September 2005 session, signed the same document, entitled “Registration Form and Contract”. Given that Ms. Matoni signed her contract in April 2005, there is some basis for assuming, for the purposes of the certification motion only, that this was the form in use for the June 2005 session. There is therefore some basis in fact for finding that 1b, c and d as they relate to the express terms of the applicable contract for the June and September 2005 sessions are a common issues. However, given the express terms of that written contract, these are not significant common issues.

[113] As noted above, the plaintiffs argue that class members' contracts with CBC included, in addition to the written registration agreement, certain implied terms. The heart of the plaintiffs' claim for breach of contract is the alleged breach of implied terms. They argue that the determination of the implied terms is a common issue.

[114] Terms may be implied (1) based on usage or custom, (2) as the legal incidents of a particular class or kind of contract, or (3) based on the presumed intention of the parties where the implied term must be necessary to give business efficacy to a contract or as otherwise meeting the “officious bystander” test as a term which the parties would say that they had obviously assumed. When determining “presumed intention”, the court must focus on the actual intentions of the parties, and not the intentions of reasonable parties. *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619.

[115] Generally, it seems a term might be implied on either of the first two bases on a class-wide basis, depending on the nature of the term. The third basis, namely presumed

intention, which focuses on the actual intentions of the parties, does not, however, appear in any event susceptible to determination on a class-wide basis.

[116] My impression is that the plaintiffs' claim for breach of implied term is essentially founded on the second basis, and that they seek, primarily, to argue that the implication of the term is required by the nature of the contract.

[117] The term set out in 1b(ii) refers to risks that have not been disclosed. The same qualification should clearly apply to 1b(i).

[118] Proposed common issues 1a and b, rephrased to read as follows, would constitute a common issue for the class:

*Was it a term of Class members' contracts with the corporate defendants, implied by custom or usage or as a legal incident of the particular class or kind of contract, that there was no undisclosed risk to class members that they would not, upon their graduation, (i) have the automatic or guaranteed right to write the Exam or, (ii) become a registered dental hygienist in the same manner and at the same time as if they had enrolled in an accredited dental hygiene program at another institution?*

[119] 1c (whether there was a breach of that term) is not, however, a common issue. It will entail a determination of what was disclosed to each class member, orally and in writing. As discussed in more detail under proposed common issue 2, the same express oral or written representation was not made to all class members. As 1c is not a common issue, 1d is not a common issue.

***Proposed Common Issue 2: Negligent Misrepresentation***

[112] a. *Are the defendants (or any of them) in a special relationship with the Class Members?*

b. *Did the defendants (or any of them) make any representations (expressly, impliedly, by omission or otherwise) relating to the ability and timing of the Class members either to write the National Board Exam or otherwise to become registered dental hygienists prior to and/or after the Class members' enrolment in the program?*

c. *If the answer to b is "yes", were those representations false or otherwise misleading?*

d. *If the answer to c is "yes", did the defendants (or any of them) act negligently in making the representation?*

e. *If the answer to d is "yes", did the Class reasonably rely on those misrepresentations to their detriment by enrolling or remaining in the program or otherwise?*

[113] Counsel for the defendants concedes, and I agree, that 2a is a common issue. It entails common issues of fact and law.

[114] As framed, 2b is not a common issue. This is not a case, such as *Lewis v. Canterot Investments Ltd.*, [2006] O.J. No. 1999 (S.C.J.) or *Murphy v. BDO Dunwoody*, [2006] O.J. No. 2729 (S.C.J.), where the same written representations were made to all class members. In those cases, the making of the misrepresentation was found to constitute a common issue, and the actions were certified as class proceedings.

[115] In *Lewis v. Canterot*, the claim turned on alleged misrepresentations regarding maintenance fees and monthly assessments made in the condominium declaration, budget and a sales flyer provided to purchasers of residential condominium units.

[116] In *Murphy v. Dunwoody*, investors alleged that a company's auditors misrepresented the financial circumstances of the company in a financial projection that they had prepared. Cullity J. concluded, at para. 25, that, "whether such a misrepresentation had been made by implication, or otherwise, would, I believe, be determined objectively by reference to the meaning that the projections would, or could, convey to a reasonable person. If that is correct, it could be determined on a class wide basis."

[117] Here, as detailed below, the same express oral or written representation was not made to all class members. Because 2b is not a common issue, c, d, and e are also not common issues.

[118] The evidence of the plaintiffs on this motion is that different express, oral representations were made to them. While, prior to enrolment, both Ms. Thompson and Ms. Matoni were told that the program was non-accredited, no express, positive, oral representations were made to Ms. Matoni regarding her ability to write the Exam. Ms. Thompson's evidence is that when she enrolled, she was also told that the program would be accredited by the time she graduated and she would be able to write the Exam soon after her graduation in March 2007. On cross-examination, Ms. Thompson first said that she was not told that graduates of unaccredited programs are not automatically eligible to write the Exam. She subsequently testified she was told both not to worry - the program would be accredited and she would be able to write the Exam - and that she would have an automatic right to write the Exam *if* the program was accredited. Ms. Thompson's further evidence is that on January 25, 2006, Mr. Jaffrey specifically declined her request to provide his written assurance that she would have the guaranteed right to write the Exam.

[119] Ms. Calapini's evidence is that she told applicants that they would have to apply to write the Exam.

[120] Evidence will be required as to what, if any, express, oral representations were made to each class member and, what, specifically, each class member was not told. Some class members, such as Ms. Thompson, may have a claim for negligent misrepresentation based on express misrepresentation; others, such as Ms. Matoni, may not.

[121] According to the evidence, various class members also received different written materials.

[122] Ms. Thompson viewed CBC's website prior to enrolling. It described the program as a "Dental Hygiene" or "Dental Hygienist" program and did not, to the best of her recollection, disclose that graduates were not automatically eligible to write the Exam. CBC provided a handbook for the Dental Hygiene Program dated 07/09/2005 (the "Handbook") and a document entitled "Program Outline" to Ms. Thompson. The Handbook, among other things, states that upon successful completion of the dental hygiene program the graduate will be able to, "Function as a professional Dental Hygienist". The Handbook did not explain that graduates would first have to be granted eligibility to write the Exam, and then pass the Exam. The Program Outline, indicated as "Effective: 2005-2006", states that graduates must successfully complete the Exam to be eligible for registration with the College as a dental hygienist but does not indicate that, because the program is non-accredited, graduates are not automatically eligible to write the Exam.

[123] Ms. Matoni's evidence is that she was attracted to the program by an advertisement in the "24" newspaper promoting CBC's "Dental Hygienist Program". Later that month, she went to CBC's premises. At that time, she was given a one-page untitled document describing the program. This document is different than the Handbook and Program Outline provided to Ms. Thompson. While it does not say that upon successful completion the graduate will be able to, "Function as a professional Dental Hygienist", it does say that, "As a Dental Hygienist, the graduate may work...in a variety of practice settings...." It does not indicate that the program is non-accredited, that graduates must pass the Exam to be registered with the College as dental hygienists or that graduates of the program are not automatically eligible to write the Exam.

[124] The only other document provided to Ms. Matoni prior to or at the time of her enrolment was the Registration Form and Contract, referred to above under my consideration of proposed Common Issue 1. As noted above, that document does not disclose that the program is non-accredited, or the implications of non-accreditation. As also noted above, Ms. Thompson signed the same form of document. To that extent, they received common written materials.

[125] For the 2006/2007 academic year, CBC replaced the Program Outline provided to Ms. Thompson with a document that the parties refer to as a "course calendar". Like the Program Outline, it states that graduates must successfully complete the Exam to be eligible for registration with the College as a dental hygienist but does not indicate that, because the program is non-accredited, graduates are not automatically eligible to write the Exam.

[126] Counsel for the plaintiffs argue that what is significant in this case is not what was said to class members, but what was not said: namely, that there was a risk that class members could not write the Exam as of right. They rely on the alleged failure to disclose this fact to argue that the various, different representations that were made were all made negligently. Yet, as indicated above, from the materials filed on this motion, it appears that some members of the class (both as defined by the plaintiffs, and as redefined by me) were advised in writing that graduates of the program were not guaranteed to write the Exam. Both the plaintiffs and Mr. Jaffrey refer to a waiver to that effect in use sometime around January 2006. Moreover, there is evidence that precisely what class members were told also varies. One needs to know what each class member was told, to determine what he or she was not

told. The plaintiffs have not provided the requisite “some basis in fact” that what was “not said” is common to the class, as defined by the plaintiffs, or as re-defined by me in my consideration of the “identifiable class” requirement or on any other basis.

[127] Proposed common issue 2 is not a common issue.

***Proposed Common Issue 3: Duty to Disclose or Misrepresentation by Omission***

[128] As indicated above, at the time of the certification hearing, counsel for the plaintiffs entitled this proposed common issue, “Duty to Disclose”. Following the hearing, they confirmed that the plaintiffs do not advance “duty to disclose” as a separate cause of action; rather, they advance misrepresentation by omission, which is addressed in proposed Common Issue 2, discussed above. By way of their supplemental written submissions, they re-titled this proposed common issue, “Duty to Disclose or Misrepresentation by Omission”. Misrepresentation by omission is addressed above in my consideration of proposed Common Issue 2. I do not need to address what counsel for the plaintiffs advises is merely a re-phrasing of a portion of proposed Common Issue 2. Proposed Common Issue 3 is reproduced below, for sake of completeness.

- a. *Did the Defendants owe a duty of care to the Class in the circumstances to disclose all material facts or risks associated with the Program regarding the Class Members' ability to, and the timing of their ability to, become registered dental hygienists?*
- b. *If the answer to 3(a) is “yes”, what is the content of that duty of care and what information or material facts should reasonably have been provided to the Class? More particularly, but without limiting the generality of the foregoing, were the Defendants under a duty to disclose to the Class, prior to and during the course of their enrolment that:*
  - (i) *the Program was not accredited and not accreditation eligible; and the significance of the Program's lack of accreditation and accreditation eligibility;*
  - (ii) *the Program's lack of accreditation and accreditation eligibility would delay or otherwise limit the Class members' ability both to write the National Board Examination and to become a registered Dental Hygienist;*
  - (iii) *the Class may not have the right to write the National Board Exam following graduation and successfully passing that Exam was necessary in order to become a Registered Dental Hygienist.*
- c. *Did the Defendants breach that duty of care or duty to disclose?*
- d. *If the answer to any of subparagraphs 3(a) through 3(c) above is “yes”, did the Class suffer damages and what remedy, if any, are the Class Members entitled to?*

***Proposed Common Issue 4: Breach of Collateral Warranty***

- [132] a. *Did the Defendants make any pre-contractual representations (expressly, impliedly, by omission or otherwise) to the Class members?*
- b. *If the answer to 4(a) above is yes, did those representations induce the Class members into enrolling in and remaining in the program?*
- c. *If the answer to 4(b) is yes, did those pre-contractual representations amount to a collateral warranty with the Class?*
- d. *If the answer to 4(c) is "yes", did the defendants' conduct amount to a breach of any such collateral warranty?*
- e. *If the answer to 4(d) is "yes" what remedy, if any, are the Class members entitled to?*

[133] Given the broad manner in which it is framed, 4a might be seen as raising a common issue of fact: did CBC's procedure for enrolment of students result in the making of "any" pre-contractual representations to prospective students? Based on the evidence on this motion, there is some basis in fact for finding this a common issue.

[134] 4b is not, however, a common issue. 4a does not refer to a particular, common representation being made to all class members. Hence, 4b entails determining both what pre-contractual representations were made to each class member, and possibly what was not said, and whether those representations, express or implied, induced that class member to enroll in the program. Both are questions of fact, which will have to be determined with respect to each member of the class.

[135] Even if it was established that the same representation (namely that there was no risk that graduates would be unable to write the Exam) was made to all class members, the plaintiffs have not established some basis in fact on this motion that nothing but the representation could have induced the contract, and it is therefore a logical factual inference that the representation induced the contract in the case of each class member. There is evidence that admission to dental hygiene programs is highly competitive. For example, Ms. Thompson had previously been unable to gain admission to an accredited program, and Ms. Matoni had previously been unable to gain admission to another non-accredited program. There is also evidence that CBC's tuition fees were "very competitive". Evidence, such as that provided by Ms. Matoni and Ms. Thompson that they would not have entered into the contract but for the alleged misrepresentation, would be required from each class member.

[136] 4c presumably addresses the requirement that the defendant have knowledge that the representation would induce the party to enter into the contract. If whether a representation induced class members to enter into the contract was a common issue, then I believe this would be a common issue; the defendant could be assumed to know that the ability to write the Exam was a pertinent consideration for class members. Given that whether the representation induced the class members to enroll is not a common issue, I conclude that 4c is not a common issue.

[137] If 4a through c were common issues, then 4 d and e would be common issues. Given my earlier conclusions, they are not.

***Proposed Common Issue 5: Competition Act Breaches***

[138] a. *Did the Defendants breach section 52 of the Competition Act in the course of advertising, marketing or promoting the Program prior to or during the Class Period?*

b. *If the answer to 5a is "yes" are class members entitled to a damage award pursuant to section 36 of the Competition Act?*

[139] 5a can be seen as a common issue: each class member will have to establish a breach of section 52 to have a possible remedy. Section 52 requires proof only that there has been "a representation to the public that is false or misleading in a material respect." However, as noted earlier, the same express oral or written representations were not made to all class members. Hence, to the extent that 5a is a common issue, given the causality requirements referred to below, it is not a significant one.

[140] At the certification hearing, 5b asked, "If the answer to 5a is "yes", what remedy or remedies or damages, if any, are the Class Members entitled to under the Act?" Counsel clarified in supplemental written submissions that 5b was intended to address entitlement to a damages award under section 36 of the *Competition Act*, and the proposed common issue has been re-phrased accordingly.

[141] Section 36 of the *Competition Act* provides that any person who has suffered loss or damage *as a result of a breach of section 52* may, "sue for and recover from the person who engaged in the conduct...an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him of any investigation in connection with the matter and of proceeding under this section." As noted above, a causal connection between the alleged breach of section 52 and the damages claimed under section 36 must be proven.

[142] 5b is not a common issue. Each class member will have to prove that she suffered some loss or damage as a result of the false or misleading representation. This will entail a determination of what representations were made to the class member. Causality is individual.

***Proposed Common Issue 6: Consumer Protection Act and Business Practices Act Breaches***

[143] a. *Did the defendants breach Part III of the Consumer Protection Act or section 3 or 4 of the Business Practices Act in relation to their promotion of the program before or during the Class period?*

b. *If the answer to question 6a is yes, what remedy, if any, are the Class members entitled to under the Acts (including the statutory remedy of rescission)?*

c. Does the Class, or any portion thereof, require, and is it entitled to, a declaration waiving the notice provisions of section 18 of the Consumer Protection Act 2002, S.O. 2002 c., 30?

[143] Proposed common issue 6a, as phrased, can be seen as a common issue. Whether the defendants have breached these provisions turns on whether they have made, "a false, misleading or deceptive representation". A failure, "to state a material fact if such failure deceives or tends to deceive" constitutes a false, misleading or deceptive representation. I believe that whether the failure to state a material fact *tends* to deceive can be determined objectively, by reference to what would be conveyed to a reasonable person. The determination of whether the defendants engaged in an unfair practice under these statutes involves common issues of fact and common issues of law. The resolution of 6a is necessary to the resolution of each class member's claim.

[144] Section 4 of the *Business Practices Act*, however, requires a consumer to establish that he entered into the agreement after the unfair practice, and that the unfair practice induced him to enter into the agreement in order to be entitled to a remedy. The Shorter Oxford English Dictionary, Third Edition, defines "induce" as to lead a person by some persuasion or some influence to some action. Whether or not the unfair practice induced the consumer to enter into the contract is an individual issue, entailing an analysis akin to the causality analysis under the *Competition Act*. Hence, in the case of the *Business Practices Act*, to the extent that 6a is a common issue, it is not a significant one.

[145] Evidence will also have to be adduced as to the date each class member entered into a contract, and when the alleged unfair practices occurred. The dates of the contracts can presumably be provided from the corporate defendants' records. Each class member will have an interest in the proof of the duration of each alleged unfair practice. These, however, are not significant individual issues.

[146] If the principle of fraudulent concealment tolling the limitation period, discussed in my consideration of the plaintiffs' claims under the *Business Practices Act* in the context of the section 5(1)(a) analysis, becomes an issue, it would also be a common issue. However, aspects of any limitation period defences raised would also be individual.

[147] In their supplemental written submissions, counsel for the plaintiffs clarifies that 6b is intended to address whether the class members are entitled to rescission, and what categories or heads of damages class members are entitled to. Therefore, 6b does not address the fact of loss.

[148] While whether the unfair practice induced the consumer to enter into the contract is not a common issue, 6b, what remedy class members are entitled to under the *Business Practices Act*, assuming that the unfair practice induced the contract, may nonetheless be a common issue. The possibilities are rescission, recovery of an amount by which the amount paid under the agreement exceeds the fair value of the goods or services received and/or damages, and exemplary damages. Whether rescission is possible may, for example, turn on whether the student commenced the course. Whether exemplary damages are appropriate presumably turns on the nature of the unfair practice.

[149] Under s. 18(1) of the *Consumer Protection Act*, the consumer does not have to establish that the unfair practice induced her to enter into the contract. In the case of the *Consumer Protection Act*, 6a is a significant common issue. While class members will still have to establish that they entered into agreements after or while the unfair practice is engaged in, as indicated above, that individual timing issue can be reasonably easily addressed, by reference to the defendants' records, if necessary. The same remedies are available as under the *Business Practices Act*. I am satisfied that in the case of the *Consumer Protection Act*, 6b involves common issues of law arising from common, but not necessarily identical, issues of fact and is also a common issue. 6b overlaps with Common Issue 8: Punitive Damages, discussed below.

[150] Section 18(3) of the *Consumer Protection Act* provides that a consumer must give notice within one year of entering into the consumer agreement if the consumer seeks to rescind the agreement or seeks to recover the amount by which the consumer's payment under the agreement exceeds the value that the goods or services have to the consumer or to recover damages, or both, if rescission of the agreement is not possible for certain reasons. Pursuant to section 18(15), a court may disregard the requirement to give notice if it is in the interests of justice to do so. I am satisfied that proposed common issue 6c - whether the court should disregard the notice period - is a common issue.

[151] Common issue 6 is accordingly a common issue with respect to claims under the *Consumer Protection Act*.

***Proposed Common Issues 7 and 8: Damages and Punitive Damages***

*Common Issue 7: Damages or Other Relief*

- [153] a. *Can damages or some of the Class members' damages be determined on an aggregate basis on behalf of the Class?*
- b. *If the answer to 7(a) is "yes", what is the quantum of those damages?*
- c. *Can the Court determine what other damages or, alternatively, other heads or categories of damages the Class members are entitled to?*
- d. *If the answer to 7(b) is "yes", how is a damage award to be calculated and distributed among the Class?*

*Common Issue 8: Punitive Damage*

- [154] a. *Is the Class entitled to an award of punitive or exemplary damages based upon the defendants' conduct?*
- b. *If the answer to 8(a) is "yes," can the punitive damage award be determined on an aggregate basis?*
- c. *If the answer to 8(b) is "yes", how is that punitive damage award to be distributed among the Class?*

[152] If a class member proved that an implied term of the contract was breached, or if a class member established that she suffered some loss as a result of a breach of the *Competition Act*, both of which require individual proof, then *some* of the damages suffered by *some* members of the class might be calculated on an aggregate basis. For example, in the case of class members who withdrew from CBC, CBC's records presumably indicate the amount of tuition paid by each.

[153] Whether the conduct of the defendant justified an award of punitive damages has been accepted as a common issue in a number of class actions. The claim for punitive damages is based on the defendants' alleged conduct towards class members. Some common issues of fact in relation to the defendants' conduct and knowledge are involved; however, individual disclosure is also an issue in this case. Assuming, but not determining, that 8 is a common issue, it will not affect the outcome of this motion.

***Proposed Common Issue 9: Personal Liability***

[154] The Plaintiffs propose alternative ways of phrasing this proposed common issue:

- a. *Are Jaffery and Calapini (or either of them) personally liable for any of the damages sustained by the Class?*

OR

- a. *Were Jaffery or Calapini (or both of them) the directors, controlling minds, employees or shareholders of the corporate defendants (or either of them) at any material time?*
- b. *Did Jaffery or Calapini (or both of them) make, authorize, acquiesce in, condone or encourage the making of any one or more of the following:*
- (i) *common law misrepresentations (as set out in common issue 2);*
  - (ii) *failures to disclose (as set out in common issue 3);*
  - (iii) *statutory misrepresentations (as set out in common issues 5 & 6);*
  - (iv) *such that they are personally liable for the damages sustained by the Class.*

[155] 9 a of the second alternative is a common issue.

[156] The defendants argue that the first proposed formulation of common issue 9 and 9 b cannot be a common issues because it will be necessary to examine Mr. Jaffrey and Ms. Calapini's conduct towards each individual class member separately.

[157] As I have concluded that negligent misrepresentation is not a common issue, 9 b (i), personal liability for negligent misrepresentation, is not a common issue. As I have

determined that there is no cause of action, separate and apart from a claim in negligent misrepresentation based on an omission, for breach of duty to disclose, 9 b (ii) is not a common issue.

[158] As indicated under my discussion of the cause of action requirement, the *Competition Act* contemplates claims against a person making the representation and not just his employer and the *Business Practices Act* and *Consumer Protection Act* contemplate claims against persons other than the contracting entity.

[159] In cross-examination, Ms. Calapini described her duties as meeting all potential students, described herself as responsible for all her staff members, including the teachers and instructors, and described Mr. Jaffrey as the CEO, responsible for, among other things, regulatory matters and government rules. In her cross-examination, Ms. Wolda, who for a period of approximately 6 months was the acting program director of the dental hygiene program, indicated that "head office" was responsible for preparing the brochures and course calendars, and that Mr. Jaffrey and Ms. Calapini were in the head office. Common issue 9 involves common issues of fact regarding Mr. Jaffrey's and Ms. Calapini's conduct, as applicable to all class members, in relation to the alleged misrepresentations and common issues of law arising from that conduct. The issues are necessary to the resolution of each class member's claim against Mr. Jaffrey and Ms. Calapini under these statutes.

[160] I am satisfied that there is some basis in fact for finding proposed common issue 9 a common issue in relation to the alleged breach of the *Competition Act*, the *Business Practices Act* and the *Consumer Protection Act*.

## VII THE 5(1)(d) REQUIREMENT: PREFERABLE PROCEDURE

### *The Test*

[T]he preferability requirement has two concepts at its core. The first is whether or not the class action would be a fair, efficient and manageable method of advancing the claim. The second is whether the class action would be preferable to other reasonably available means of resolving the claims of class members.

(*Cloud* at para. 73)

[161] The question of preferability takes into account the importance of the common issues in relation to the claims as a whole. *Hollick* at para. 30.

[162] The analysis of the preferable procedure, "should be conducted through the lens of the three principal advantages of class actions - judicial economy, access to justice, and behavior modification...". *Hollick* at para. 27.

[163] As a starting point, I think it is helpful to catalogue what common issues have been identified, and assess their importance in relation to the claims as a whole. This is a qualitative, and not a quantitative, assessment.

[164] The plaintiffs assert breach of express and implied terms of the enrolment contracts. I have concluded that breach of express terms is a common issue only for a subclass, comprised of persons who enrolled in the June 2005 or September 2005 sessions who, it appears, likely signed the same form of written contract. As also noted above, given the express terms of the form of contract signed, a determination of this common issue would not significantly advance the litigation. The "heart" of the plaintiffs' contract claim is its claim for breach of implied terms.

[165] I have concluded that breach of terms implied on the basis of presumed intention is not a common issue for the Class (or any subclass). However, whether a term can be implied, by custom or usage or as a legal incident of the particular class or kind of contract, that there was no undisclosed risk to class members that they would not, upon their graduation: (i) have the automatic or guaranteed right to write the Exam or, (ii) become a registered dental hygienist in the same manner and at the same time as if they had enrolled in an accredited dental hygiene program at another institution, is a common issue for the class as re-defined by me in my analysis of the "identifiable class" requirement. Whether the implied term was breached is an individual and not a common issue: evidence would be required as to what was said and not said to each class member.

[166] Entitlement to, and calculation of at least a portion of the damages for breach of contract, may also require individual determination.

[167] I have concluded that except for whether any of the defendants is in a special relationship with the class members, the proposed common issues under negligent misrepresentation and breach of collateral warranty are individual and not common issues.

[168] Whether the defendants have breached the *Competition Act* can be seen as a common issue, although not a significant one, but whether class members have suffered loss as a result, are entitled to damages under s. 36 of the *Competition Act*, and the quantum of those damages are individual issues. As noted above, a causal connection between the particular breach of the *Competition Act* that may be established and the damages claimed must be proven, and, in this case, proof of the causal connection will entail an individual inquiry into, among other things, what was said to each Class member.

[169] Whether the defendants have breached the *Business Practices Act* can be seen as a common issue, although, again, not a significant one, but whether the unfair practice induced the class member to enter into her contract is an individual issue comparable to the causality issue which arises under the *Competition Act*.

[170] If the claims for breach of contract, negligent misrepresentation, breach of collateral warranty, breach of the *Competition Act* and breach of the *Business Practices Act* were the only claims advanced, I would conclude that certification was not the preferable procedure and dismiss the plaintiffs' motion on that basis. The individual issues overwhelm the common issues arising out of those causes of action. Such a class action would not be manageable and would not result in judicial economy. Moreover, class counsel do not commit to represent class members on a contingency basis with respect to the determination of the individual issues. Class counsel contemplates that the individual issues be determined by procedures analogous to the simplified procedures under Rule 76 of the *Rules of Civil*

*Procedure.* Given the plethora of significant individual issues that class members would have to prove following a common issues trial, certification of those claims would not increase access to justice in any meaningful way. Following the common issues trial, Class members would still face what for many would be a daunting task.

[171] The plaintiffs, however, also allege breach of the *Consumer Protection Act*.

[172] A claim under the *Consumer Protection Act*, does not require proof that a claimant was induced to enter into the contract by the misrepresentation, permits a claimant to recover damages or the amount by which the consumer's payment under the contract exceeds the value that the goods or services have to the claimant, if rescission of the contract is not possible, and permits the court to disregard the requirement that a consumer give written notice within one year of entering into the consumer agreement if the consumer seeks a remedy under the legislation. It appears to be the most significant remedy available to most proposed Class members. In my view, a class proceeding is clearly the preferable procedure for resolving the claims of class members under the *Consumer Protection Act*.

[173] If a reduced class prevailed at the common issues trial on their claim under the *Consumer Protection Act* (including obtaining a declaration waiving the notice requirement under section 18 of the *Consumer Protection Act*), the only individual issues would be the date of each class members' contract (which could presumably be confirmed by the defendants' records), the dates when the alleged unfair practices occurred (the determination of which would benefit a number of class members), and the determination of any damages that could not be determined under section 24 of the CPA. The amount, if any, by which the amount paid by the class members under the contract exceed the fair value of the goods or services received would likely be susceptible to determination on a simplified, formulaic basis. This – dealing only with class members' claims under the *Consumer Protection Act* as a class proceeding – would be a fair, efficient and manageable method of advancing the claims of those class members and would be preferable to resolving the claims of those class members on an individual basis. There may be no need for such class members to proceed with their claims in contract, negligence and under the *Competition Act* against the defendants.

[174] While I have concluded that meaningful access to justice would not be achieved by certifying the claims for breach of contract, negligent misrepresentation, breach of collateral warranty, breach of the *Competition Act* and breach of the *Business Practices Act*, certifying the claims for breach of the *Consumer Protection Act*, which will not leave a daunting array of individual issues to be advanced by the class members at their expense, will, in my view, serve the objective of access to justice.

[175] Certification in relation to the claims under the *Consumer Protection Act* better serves the objective of access to justice than multiple, individual claims, either in Superior Court, utilizing the simplified procedures under Rule 76 of the *Rules of Civil Procedure* or otherwise, or in Small Claims Court. It would also, I believe, promote judicial economy.

[176] The plaintiffs argue that the objective of behaviour modification also weighs strongly in favour of certification. They provided evidence of CBC's advertisement for its

dental hygiene program, on its website as of December 20, 2006. That advertisement represents that the program leads to a "registered diploma", does not indicate that its program is non-accredited.

[177] Each of the *Competition Act*, the *Business Practices Act* and the *Consumer Protection Act* provides criminal sanctions for a breach of the provisions the plaintiffs allege have been breached. Accordingly, the objective of behaviour modification does not weigh in favour of certification to the extent it otherwise would.

[178] In my view, a class proceeding is the preferable procedure as it relates to the claims under the *Consumer Protection Act*.

### VIII 5(1)(e): THE REPRESENTATIVE PLAINTIFF

[179] I have concluded that only the claim under the *Consumer Protection Act* should be certified, and that the proposed representative plaintiffs do not personally have a claim under the *Consumer Protection Act*. In light of this, the proposed representative plaintiffs are not, in my view, appropriate representative plaintiffs. They would have no interest in the common issues. This conclusion is not inconsistent with *Boulangier* and *Healey*, referred to under, and which pertain to, the analysis under section 5(1)(a).

[180] In the circumstances, however, this should not result in the dismissal of this motion at this stage. As indicated earlier in these reasons, had the defendants not notified the proposed representative plaintiffs of their intention to bring an action against them for intentional interference with economic relations, the representative plaintiffs might well have included a person who entered into a contract with CBC after July 30, 2005. Accordingly, the representative plaintiffs should have a reasonable opportunity, free from interference from the defendants, to make such persons aware of this claim, and to add any such person as an additional proposed representative plaintiff. The basis on which this may occur shall be determined at a case conference, to be scheduled by the parties following the release of these reasons. I believe that section 12 of the CPA provides me with the authority to proceed in this manner.

[181] While the defendants advance other arguments as to why the plaintiffs are not appropriate representative plaintiffs, they were not convincing, and, given the above conclusion, I need not address them.

[182] In their litigation plan, the parties proposed that, following the common issues trial, individual issues that cannot be determined under section 24 of the CPA be determined by a referee pursuant to section 25(1) (b) of the CPA. In their oral submissions before me, they proposed that procedures analogous to the simplified procedures under Rule 76 of the *Rules of Civil Procedure* could be directed.

[183] The individual issues under the *Consumer Protection Act* will be minimal.

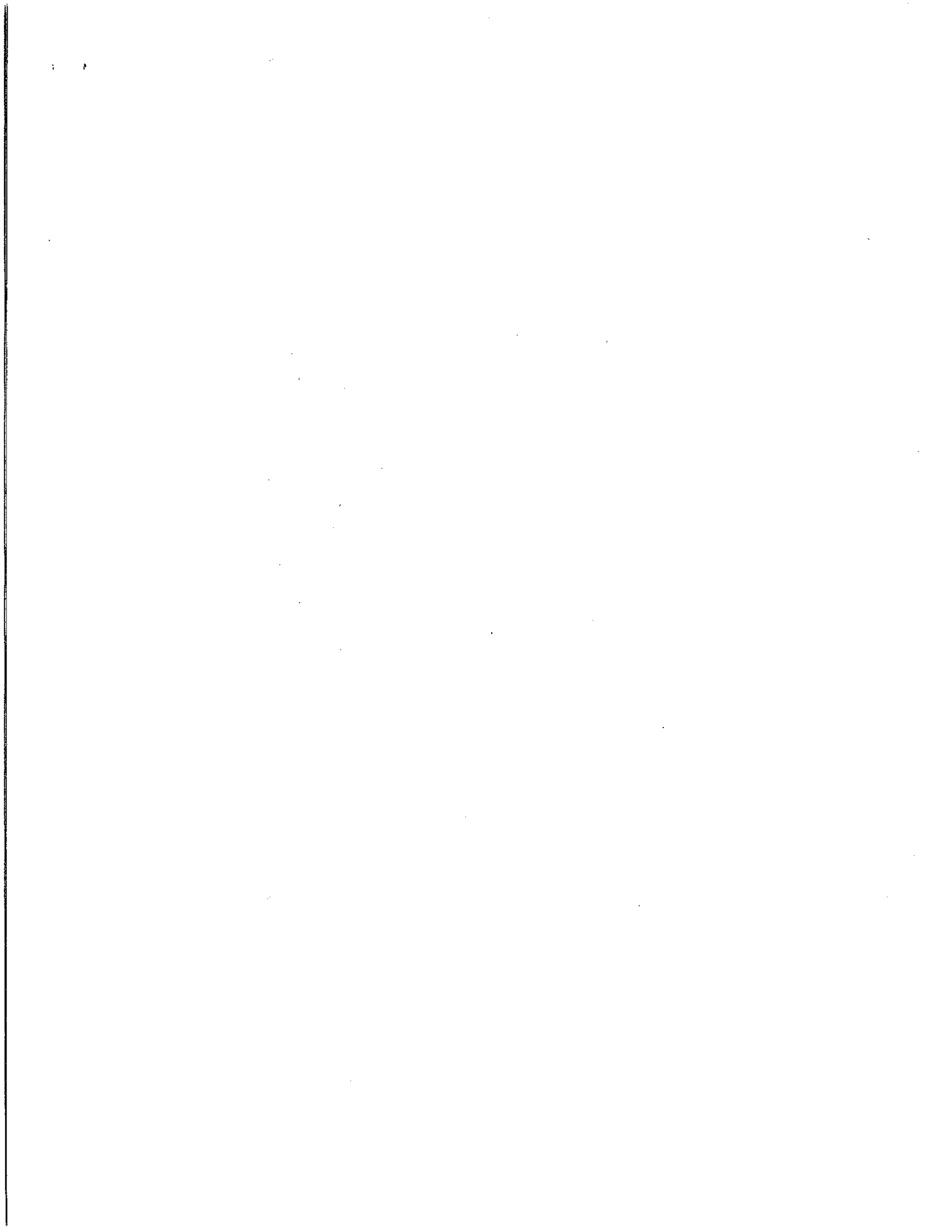
[184] I am satisfied that the plaintiffs' plan would be workable in its essentials. The actual procedure for resolving individual issues would be determined by the common issues judge, who may determine to depart from the plaintiffs' plan.

**IX SUMMARY CONCLUSION**

[185] The claims under the *Consumer Protection Act* against CBC and the individual defendants shall be certified, subject to the addition of an appropriate representative plaintiff as provided above under the analysis of the requirement of section 5(1)(e) of the CPA, and the modification of the proposed class to exclude persons who entered into contracts with CBC on or before July 30, 2007 and otherwise as contemplated by these reasons. The balance of the claims shall not be certified.

  
Hoy J.

**Released:** January 22, 2008



COURT FILE NO.: 06-CV-310529CP

DATE: 20080829

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KATARZYNA ALICJA MATONI and  
KAREN E. THOMPSON

Plaintiffs

)  
)  
) David F. O'Connor and J. Adam Dewar,  
) for the Plaintiffs

- and -

C.B.S. INTERACTIVE MULTIMEDIA  
INC., c.o.b. as CANADIAN BUSINESS  
COLLEGE; CANADIAN BUSINESS  
SCHOOL INC., c.o.b. as CANADIAN  
BUSINESS COLLEGE; MAZHER  
JAFFERY and ROSELYN CALAPINI

Defendants

)  
)  
)  
)  
) Douglas M. Cunningham, for the  
) Defendants

Proceeding under the *Class Proceedings Act, 1992*

)  
) HEARD: October 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup>, 2007  
) Supplemental written submissions provided  
) by counsel to the plaintiffs on October 16,  
) 2007, October 18, 2007, October 24, 2007  
) and December 17, 2007 and by counsel to  
) the defendants on October 23, 2007,  
) October 29, 2007 and December 17, 2007.  
) Supplemental oral submissions on  
) December 18, 2007.  
) Further supplemental written submissions  
) on July 25, 2008 and July 31, 2008.

Hov J.

FURTHER SUPPLEMENTAL  
REASONS FOR DECISION

[1] In reasons released on January 22, 2008 ( the "Reasons"), I certified claims under the *Consumer Protection Act, 2002*, S.O. 2002, c. 30 (the "Act") against C.B.S. Interactive Multimedia Inc. and Canadian Business School Inc. (individually and collectively, "CBC") and the individual defendants, subject to the addition of an appropriate representative

plaintiff, as provided in the Reasons under the analysis of the requirement of section 5(1)(e) of the *Class Proceedings Act, 1992*, S.O. 1992, c.6, as amended (the "CPA") and the modification of the proposed class to exclude persons who entered into contracts with CBC on or before July 30, 2005<sup>1</sup> and otherwise as contemplated by the Reasons. I did not certify the balance of the claims.

[2] In Supplemental Reasons for Decision released contemporaneously with these Further Supplemental Reasons for Decision, I address issues raised by counsel with respect to the Reasons. These Further Supplemental Reasons should be read in conjunction with the Reasons and the Supplemental Reasons.

[3] In response to the Reasons, Theodosia Monckton is proposed as a representative plaintiff in respect of the claims under the Act. She filed an affidavit, sworn March 18, 2008, in relation to her claim. Her counsel has provided a draft Amended Statement of Claim, reflecting her claim. Mazher Jaffrey of CBC filed a responding affidavit, sworn April 7, 2008, much of which consists of argument. CBC cross-examined Ms. Monckton on May 8, 2008, and I heard a refusals motion on June 27, 2008. CBC filed written submissions in relation to the appropriateness of Ms. Monckton as a representative plaintiff on July 25, 2008, and counsel for Ms. Monckton submitted written submissions in reply on July 31, 2008.

[4] I have concluded that Ms. Monckton is an appropriate representative plaintiff, and the claims under the Act against CBC are accordingly certified.

[5] In light of the evidence before me, the class definition should, however, be further refined to ensure that a class proceeding is an efficient and manageable method of advancing the claim. Subject to drafting comments that may be made by counsel, the class shall be defined as follows: All persons who, after July 30, 2005 and prior to the earlier of (i) CBC's dental hygiene program (the "program") being accredited by the Commission on Dental Accreditation of Canada and (ii) the date notice of certification is given to class members, entered into contracts for enrolment in the program, other than persons who (a) signed waivers substantially in the form referred to in paragraph 11 below at or prior to the time they entered into such contracts and prior to the time they paid any monies to CBC, (b) refused to sign waivers substantially in the form referred to in paragraph 11 below after they entered into such contracts or paid any monies to CBC, withdrew from the program, and were reimbursed by CBC for all costs incurred by them in relation to their enrolment in the program, and (c) signed waivers substantially in the form referred to in paragraph 11 below after they entered into such contracts or paid any monies to CBC, received an offer from CBC at the time presented with such waivers to reimburse them for their costs in relation to their enrolment in the program should they wish to withdraw from the program and declined such offer.

[6] I note, in face of CBC's submissions addressing the merits of Ms. Monckton's claim, that merits are addressed at the common issues trial, and not at certification.

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<sup>1</sup> The reference to July 30, 2007 in the Reasons is a typographical error and should read July 30, 2005.

*Ms. Monckton's Evidence*

[7] Ms. Monckton came across CBC's website around June 2005 while conducting research on becoming a registered dental hygienist. At the time, she was working as a dental assistant in Vancouver. Dental hygiene programs are offered in British Columbia only in three community colleges and Ms. Monckton did not have the educational prerequisites to apply to those programs. She spoke to Roselyn Calapini of CBC a number of times about the program.

[8] On or about September 1, 2005, she signed and faxed to CBC a copy of their Registration Form and made a \$500 deposit with her credit card. The Registration Form signed by Ms. Monckton does not disclose that the program is non-accredited, or that students therefore do not have a guaranteed right to write the Exam (as defined in para. 7 of the Reasons and referred to in the waiver set out in paragraph 11 below as the "NDHCE".)

[9] Mr. Jaffrey told Ms. Monckton, while conducting a tour of CBC's facilities on or about October 7, 2007, that CBC had applied for accreditation status and would soon be accredited, and that there was effectively no difference between CBC's program and an accredited dental hygiene program at any other school.

[10] On or about November 23, 2005, Ms. Monckton received a package from CBC which included: a letter advising her that she had been selected for admission and demanding payment of \$6,857.40 by December 2, 2005, failing which she risked disqualification from admission; a fee schedule; and a one-page advertisement regarding the program. None of these documents indicate that the program was non-accredited, and that the ability to write the Exam was therefore not guaranteed.

[11] Ms. Monckton paid the \$6,857.40 required around December 1, 2005, gave up her employment, moved to Toronto and commenced classes around January 30, 2008. On the first day, the class was told that they were required to sign a waiver, and that if they did not, they would be removed from the program and forfeit monies paid to CBC. She signed the waiver, which provided as follows:

The Dental Hygiene program offered at Canadian Business College is not accredited by the Commission on Dental Accreditation of Canada. Graduates from this program are not guaranteed to write the National Dental Hygiene Certification Examination (NDHCE). Graduates are also required to take a provincial clinical competency assessment in addition to the NDHCE. Students are responsible to contact the National Dental Hygiene Certification Board and College of Dental Hygienists of Ontario (CDHO) to find out about details with respect to writing the NDHCE and registering with the CDHO.

I acknowledge that I have read the above notice and understand how this pertains to my employment as a graduate of a non-accredited Dental Hygiene Program. Further, with this

knowledge, I request admission to the Dental Hygiene Program at Canadian Business College.”

[12] Ms. Monckton did not receive the letter from CBC dated November 14, 2005, which purported to include a copy of the waiver, until after January 30, 2006. It had been sent to her parent's address in Regina. That letter indicates that if the waiver is not received by January 20, 2006, Ms. Monckton risks being withdrawn from the program and forfeiting any funds.

[13] Ms. Monckton developed substantive concerns about the program and the lack of disclosure of the program's accreditation status, and withdrew from the program on February 24, 2006. The principal reason that she withdrew was that no information was being given to the students about the accreditation process, and she did not feel that she would be able to graduate and write the Exam or be able to be employed within a reasonable amount of time. She requested the return of the 12 post-dated cheques for future tuition payments that she had deposited with CBC. CBC advised her by letter dated February 24, 2006 that her withdrawal did not affect her obligation to pay tuition. Ms. Monckton did not seek the return of the \$7,357.40 already paid.

[14] Ms. Monckton did not initiate a lawsuit for return of the monies paid by her, or other damages. She spoke with a lawyer, but found out about this proposed class proceeding and concluded that, “this would be the way I would like to go”.

[15] Ms. Monckton enrolled in another non-accredited program in or about March of 2006, and graduated from that program and wrote the Exam in September of 2007. She became a registered dental hygienist in Saskatchewan in November 2007. She never intended to become a registered dental hygienist in Ontario, and did not undergo Ontario's provincial competency assessment. She did not have to pass a provincial competency exam in Saskatchewan.

*Mr. Jaffrey's Evidence*

[16] Mr. Jaffrey denies that he told Ms. Monckton that the program would soon be accredited and that there was effectively no difference between CBC's program and an accredited dental hygiene program, and denies being present at any meeting with students on January 30, 2008. His evidence is that he met with Ms. Monckton and certain other students on February 7, 2006 to discuss their substantive concerns regarding the quality of the program.

[17] Approximately six students declined to sign the waiver and were given a refund by CBC.

[18] CBC did not pursue Ms. Monckton for the remaining tuition instalments.

[19] In March of 2006, Ms. Monckton complained to the Ministry of Training, Colleges and Universities regarding CBC. The complaints included insufficient facilities, insufficient student/teacher supplies and student resources and “other concerns”, including that the refund policy was not disclosed, important documents with respect to the lack of program

accreditation were withheld from students until weeks before the program commenced and students were told that the program and the school were fully registered with the Ministry.

*Analysis*

[20] Ms. Monckton entered into a contract after July 30, 2005, and is therefore, unlike Ms. Matoni and Ms. Thompson, in a position to advance a claim under the Act. She has retained competent counsel, and I am satisfied that she will vigorously and capably represent the proposed class.

[21] Counsel for CBC argues that Ms. Monckton is not an appropriate representative plaintiff because she has not established any basis in fact for alleging that CBC breached the Act in relation to its promotion of the program. The evidence, however, is that neither the Registration Form nor the materials included in the November package disclosed that she did not have a guaranteed right to write the Exam because the program was non-accredited. Under the Act, failing to state a material fact is a false, misleading or deceptive representation if such failure deceives or tends to deceive.<sup>2</sup>

[22] Counsel for CBC also argues that Ms. Monckton is not an appropriate representative plaintiff because her action is barred by the waiver she signed on January 30, 2006. In face of the evidence that the waiver was signed after Ms. Monckton had paid a total of \$7,357.40, been accepted for admission to the program, left her job, moved to Toronto and been advised that monies paid would be forfeited, it does not in my view result in her not being an appropriate representative plaintiff. The existence of the waivers, however, has led me to refine the class definition in the manner set out above.

[23] While the fact that Ms. Monckton subsequently enrolled in another non-accredited program may be a factor on the merits, it does not lead me to conclude that she is not an appropriate representative plaintiff. There is evidence that she had substantive concerns about CBC's program. She presumably did not have those concerns about the program she subsequently enrolled in, and would have been aware of the lack of a guaranteed right to write the Exam on graduation prior to enrolling in that program.

[24] Nor does the fact that Ms. Monckton did not have any intention of becoming a registered dental hygienist in Ontario lead me to conclude that she is not an appropriate representative plaintiff. The Exam is a national exam, and Ms. Monckton was required to write it. As I understand it, the alleged failure to disclose that students did not have a guaranteed right to write the Exam is the heart of the case.

Alexandra He (Hoyd)

Released: August 29, 2008

<sup>2</sup> I do not determine that this is a material fact, or that failing to state it deceives or tends to deceive.

**COURT FILE NO.: 06-CV-310529CP  
DATE: 20080829**

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

**KATARZYNA ALICJA MATONI and  
KAREN E. THOMPSON**

**- and -**

**C.B.S. INTERACTIVE MULTIMEDIA INC.,  
c.o.b. as CANADIAN BUSINESS COLLEGE;  
CANADIAN BUSINESS SCHOOL INC.,  
c.o.b. as CANADIAN BUSINESS COLLEGE;  
MAZHER JAFFERY and  
ROSELYN CALAPINI**

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**FURTHER SUPPLEMENTAL  
REASONS FOR DECISION**

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**Hoy J.**

**Released: August 29, 2008**