

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Riazi v. Vancouver School District No. 39*,
2011 BCSC 407

Date: 20110405
Docket: S095624
Registry: Vancouver

Between:

Sarah Riazi and Ali Agha Riazi

Plaintiffs

And

The Board of Education of School District No. 39 (Vancouver)

Defendant

Before: The Honourable Madam Justice Dardi

Reasons for Judgment

Counsel for the Plaintiffs:

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Place and Date of Hearing:

Vancouver, B.C.
May 31 and June 1, 2010

Written Submissions:

October 8, 2010, November 1, 2010,
and November 15, 2010

Place and Date of Judgment:

Vancouver, B.C.
April 5, 2011

INTRODUCTION

[1] In this action the plaintiffs seek the return of fees charged and collected by the defendant School Board for instruction it offered in certain secondary level summer school courses. The essential question on this application is whether the plaintiffs' action is suitable for certification as a class proceeding pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [CPA].

[2] The plaintiffs assert that the crux of this dispute turns on the statutory interpretation of the *School Act*, R.S.B.C. 1996, c. 412. The Board contends that whether or not it can charge for summer school courses would devolve into the determination of complex individual issues and that therefore this action is not appropriate for a class proceeding.

[3] To establish their action as a class proceeding the plaintiffs must satisfy the criteria set out in s. 4(1) of the CPA. At several points during the course of the hearing, the plaintiffs amended the definition of the putative class that they sought to certify. In reply submissions they proposed the following amended class definition:

All persons resident in British Columbia and born on or before July 30, 1984 who have been billed fees by, and have paid fees to, during the period commencing July 30, 2003 and ending on [the certification date] to the Board of Education of School District No. 39 (Vancouver) for instruction in summer school secondary-level completion courses and/or summer school secondary-level remedial courses.

[4] Following the conclusion of the hearing, the plaintiffs sent "Second Further Reply Submissions of the Plaintiffs On Certification" by correspondence dated June 1, 2010, without obtaining the consent of the Board. Counsel for the Board provided a response by letter dated June 2, 2010. He objected to the further submissions, but in the event the Court determined it was appropriate to review he provided a response submission. The proper procedure is described in the July 12, 2010 Practice Directive "Corresponding with the Court". Ordinarily, further submissions are not accepted without leave of the court. It is only in exceptional circumstances that the court should permit further argument after the completion of oral submissions: *Richmond Taxi Co. Holdings v. Robbins*, 2007 BCSC 1680 at

para. 81. However, in the unusual circumstances of this case—the amendment of the proposed class definition and common issues during the course of the hearing—I have considered all of the further submissions of both parties, including those provided pursuant to my memorandum to counsel dated July 27, 2010.

[5] Before turning to the analysis it is necessary to outline the positions of the parties and summarize the evidence upon which they rely. In doing so I am not making any findings of fact.

POSITION OF THE PARTIES

Plaintiffs' Position

[6] The plaintiffs submit that the *School Act* requires the Board to provide certain educational programs free of charge to students of school age resident in British Columbia. They contend that the Board contravened s. 82 of the *School Act* by charging fees for summer school secondary-level completion courses and/or summer school secondary-level remedial courses. The plaintiffs seek an order that the common issues to be determined in these proceedings are as follows:

- I. Do summer school completion courses at the secondary level constitute an “educational program” within the definition of that phrase contained in s. 1 of the *Act*?
- II. Do summer school remedial courses at the secondary level constitute an “educational program” within the definition of that phrase contained in s. 1 of the *Act*?
- III. If the answer to common issue (i) is yes, did the defendant contravene s. 82(1)(a) of the *Act* when it charged and collected tuition fees from the class members for summer school secondary level completion courses?
- IV. If the answer to common issue (ii) is yes, did the defendant contravene s. 82(1)(a) of the *Act* when it charged and collected tuition fees from the class members for summer school secondary level remedial courses?
- V. Was the defendant’s levy of tuition fees for instruction in summer school completion courses and/or remedial courses beyond the defendant’s powers and objects under the *Act*, and therefore *ultra vires* the defendant?
- VI. If the answer to common issue (v) is yes, is the defendant then responsible to make restitution to the class members in the amount of the tuition fees wrongfully charged and collected as aforesaid?

- VII. Did the class members pay tuition fees to the defendant for instruction in summer school completion and/or remedial courses under a mistake of law?
- VIII. Was the defendant unjustly enriched by the collection of tuition fees for summer school completion and/or remedial courses?
- IX. If the answer to common issue (vii) is yes, are the class members entitled to a declaration that the defendant holds the summer school tuition fees wrongly charged and collected as aforesaid as constructive trustees for the benefit of the class members?
- X. If the answer to common issue (vii) is yes, is the defendant obliged to make an accounting to the class of all such summer school tuition fees wrongfully charged and collected as aforesaid?
- XI. If the answer to common issue (vii) is yes, is the defendant then responsible to make restitution to the class members in the amount of the summer school tuition fees wrongfully charged and collected as aforesaid?
- XII. Did the defendant refund summer school tuition fees paid for instruction in 2007 summer school secondary level completion and/or remedial courses offered by the defendant on the grounds that they had been collected in contravention of the provisions of the *Act*?
- XIII. If the answer to common issue (xii) is yes, are the class members entitled to recover the monies paid by them to the defendant for tuition in summer school completion and/or remedial courses as monies had and received to the use of the class members?

Plaintiffs' Evidence

[7] During the 2003-2004 school year, Kyvan Riazi, the plaintiffs' son, resided in the City of Vancouver in the Province of British Columbia. He was a regular student enrolled in grade 9 at the Lord Byng Secondary School, a school located in the Board's school district.

[8] During the 2003-2004 school year, Kyvan failed to complete the course requirements for both Science 9 and English 9. The plaintiffs enrolled him in summer school courses which were offered by the Board.

[9] The plaintiffs were charged and paid course fees to the Board as follows:

- a) \$274 for the 2004 summer term for Science 9 Remedial; and
- b) \$274 for the 2004 summer term for English 9 Remedial.

[10] It is uncontroversial that the successful completion of Science 9 and English 9 are pre-requisites for advancement to Science 10 and English 10, respectively. Both Science 10 and English 10, among other courses, are required for secondary school graduation.

[11] In their reply submission the plaintiffs tendered an amended statement of claim which deleted the reference to their son having been required to take the summer school courses. For purposes of these reasons, I have considered the proposed amended statement of claim: *Fakhri et al. v. Alfalfa's Canada Inc. cba Capers*, 2003 BCSC 1717 at para. 42.

School Board's Position

[12] The Board asserts that the class definition is flawed, there are no true common issues which will materially advance the claims of the individual class members, and a class proceeding is not the preferable procedure to resolve this claim. The Board's primary opposition to this application is grounded in its submission that because the Court will be required to assess for each claimant whether any given course taken during summer school "lead to graduation" for that particular claimant, and/or was optional or required for that particular claimant, the individual issues overwhelm any possible common issues. Therefore, in the context of the claim as a whole, a class proceeding is not the preferable procedure.

School Board's Evidence

[13] Laurie Anderson, the Associate-Superintendent for Continuing and International Education for the Board, is responsible for the Board's summer school program. I set out below a summary of his evidence.

[14] Students who are 19 and under both within and outside School District #39, are eligible to take summer courses offered by the Board. After the age of 19, any individuals wishing to take courses would be in a separate adult education stream that runs a year-round curriculum.

[15] Mr. Anderson deposes that no student is required to take a summer school course and “student choice is fundamental to all summer school offerings”.

[16] Mr. Anderson also describes in his affidavit a variety of reasons why students enrol in summer school courses.

[17] In reviewing the summer school courses offered by the Board, Mr. Anderson deposes that other considerations include:

- (a) The varying communications with students, the individual schools, the community and the School Board, regarding the summer school courses;
- (b) The variety of students who may choose to attend summer school courses;
- (c) The variety of reasons why students choose to attend a summer school course;
- (d) The variety of courses that are offered in the summer; and
- (e) The different fees paid by different students for different summer school courses.

[18] In his affidavit he explains that with respect to the range of summer school courses offered by the Board, credit towards secondary school education is only given for two categories of courses: completion and remedial.

[19] The Board’s secondary school remedial summer program is designed to help students who failed a course, or who received a low “pass” in one or two courses during the regular school year, complete the course requirements. Students who successfully complete a remedial summer course receive a grade of “pass only”.

[20] Prior to 2008, the Board charged tuition fees of at least \$194 for instruction in summer remedial courses.

[21] Secondary completion courses are graded in the same manner as courses offered during the regular school year. Prior to 2008, the Board charged tuition fees of at least \$425 for instruction in summer completion courses.

[22] From 2002 to 2009 the Board charged a variety of different fees for summer courses. Mr. Anderson deposes as follows:

81. In 2007, the Ministry advised the School Board that it would compensate the School Board for certain amounts to be refunded to students for certain summer courses. This was a decision by the Ministry and not the School Board. At no time did the School Board make a decision that any particular summer school fee was charged illegally. Rather the School Board simply followed Ministry direction, and received the corresponding compensation for any foregone summer school fees.

82. The School board did issue the refunds and received the offsetting amount from the Ministry. Attached as Exhibit "P" to this my affidavit is a chart setting out the refunds issued in 2007. The difference between tuition collected and funds returned represents the people the School Board were unable to locate for a number of different reasons.

83. Since 2007, the Ministry funds the School Board the amounts allocated to each student who takes courses that the Ministry believes constitutes a course "leading to graduation". Any other course offerings will not be funded by the Ministry.

CERTIFICATION REQUIREMENTS

[23] The *CPA* is a procedural statute. Section 4 of the *CPA* sets out the statutory requirements for certification and provides:

4 (1) The court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of 2 or more persons;
- (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
- (e) there is a representative plaintiff who
 - (i) would fairly and adequately represent the interests of the class,
 - (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
 - (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[24] In essence, the Court must assess whether there is a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient and manageable way that will advance the proceeding: *Glover v.*

Toronto (City) (2009), 70 C.P.C. (6th) 303 at para. 16, 176 A.C.W.S. (3d) 947 (Ont. S.C.J.).

ANALYSIS

General Interpretive Principles

[25] As observed by the Court in *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2010 BCSC 472 at para. 19, the provisions of s. 4(1) are mandatory: “[t]he court must certify an action as a class proceeding if all of the criteria of s. 4(1) of the *CPA* are met and if there is no other reason to refuse to make the order”. The plaintiffs bear the onus of establishing that the action satisfies these requirements.

[26] In interpreting the *CPA*, a court should keep in mind the significant advantages that a class action offers as a procedural tool. In *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158 at para. 15, the Court formulated those advantages as follows: enhancement of judicial efficiency by avoiding unnecessary duplication in fact-finding and legal analysis; improved access to justice for those claims that might not otherwise be asserted; and modification of the behaviour of actual and potential wrongdoers.

[27] At the certification stage of the class proceeding, the court should apply a liberal and purposive analysis and construe the provisions of the *CPA* generously: *Hollick* at para. 15; and *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, 2009 BCCA 503 at para. 64. The focus is on the form of the action, rather than an assessment of the merits of the claim. The plaintiffs, however, must still show that there is a basis in fact for each of the criteria listed in s. 4(1) other than the requirement that the pleadings disclose a cause of action: *Hollick* at para. 25.

[28] I turn next to consider each of the statutory requirements for certification. The parties agree on the legal principles that govern the consideration of each of the statutory requirements of the *CPA*.

Causes of Action

[29] The requirement under s. 4(1)(a) of the *CPA* with respect to disclosing a cause of action is a relatively low threshold. The judicial test is essentially the same as that applied on an application brought pursuant to Rule 9-5(1), which is the same as former Rule 19(24). The plaintiff will fail under s. 4(1)(a) only if the claim is “certain to fail” or if it is “plain and obvious” that the statement of claim discloses no reasonable cause of action: *Samos Investments Inc. v. Pattison*, 2001 BCSC 1790 at para. 59, aff’d 2003 BCCA 87; and *Endean v. Canadian Red Cross Society* (1998), 48 B.C.L.R. (3d) 90 at paras. 6-8 (C.A.).

[30] In essence the plaintiffs advance the following causes of action:

- (a) they and the other members of the proposed class have suffered damages and loss as a result of paying summer school tuition fees which they allege were charged and collected in contravention of s. 82(1)(a) of the *Act*;
- (b) the Board has been unjustly enriched as a result of an act *ultra vires* its legislative powers and/or a mistake of law; and
- (c) the plaintiffs seek to recover those monies under the doctrine of monies had and received.

[31] The Board concedes and I find that the statement of claim discloses a cause of action for the proposed class certification.

[32] In the result, the requirement under s. 4(1)(a) of the *CPA* is satisfied.

Identifiable Class

[33] For the purposes of s. 4(1)(b) of the *CPA*, the question is whether there is an identifiable class of two or more persons who have a potential claim for relief against the defendants. The size of the potential class is a factor which may affect the preferability analysis.

[34] The identifiable class requirement mandates some rational relationship between the class and the proposed common issues. It is incumbent on the putative representative to show that the class is defined sufficiently narrowly: *Hollick* at para. 20. In *Hollick* at para. 21, McLachlin C.J.C. clarified this requirement as follows:

The requirement is not an onerous one. The representative need not show that everyone in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not unnecessarily broad – that is, that the class could not be defined more narrowly without arbitrarily excluding some people who share the same interest in the resolution of the common issue. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended...”

[Emphasis in original.]

[35] As referred to earlier, the plaintiffs propose the following revised class definition:

All persons resident in British Columbia and born on or before July 30, 1984 who have been billed fees by, and have paid fees to, during the period commencing July 30, 2003 and ending on [the certification date] to the Board of Education of School District No. 39 (Vancouver) for instruction in summer school secondary-level completion courses and/or summer school secondary-level remedial courses.

[36] The Board raises various objections to the class definition. The revised class definition proposed by the plaintiffs resolves the following issues that were raised by the Board:

- a) It creates a class of adult claimants while preserving the rights of infant claimants who may have the benefit of the postponement provisions of the *Limitations Act*, R.S.B.C. 1996, c. 266, to advance claims outside the class proceeding;
- b) It provides for both start and end dates for the class definition. I note parenthetically that it is not clear on the record whether those courses funded by the Ministry from 2007 to date correspond with secondary level completion or remedial courses referred to in the class definition. In any case those persons

who have not actually paid tuition fees for the courses referred to in the class definition would not be included in the class;

- c) It eliminates the “claims to” language included in the original class definition, which the Board objected to as it introduced an unnecessary element of subjectivity into the class definition;
- d) It provides for certainty and objectivity, both for the Board and the class members, as to the courses in respect of which a tuition refund is being sought on behalf of the class;

The proposed class definition is limited to those who paid for instruction in secondary-level completion and/or remedial courses. It is therefore possible to determine the members of the class on objectively determinable criteria. The class definition is sufficiently cohesive; each student’s individual reasons for enrolling in summer school would not be determinative of whether they fall within the class;

- e) The Board also argues that the definition has internal geographical inconsistencies that render the definition over-inclusive. Section 82(1)(a) of the *School Act* provides that a board must provide certain instruction free of charge to “every student of school age resident in BC and enrolled in an educational program in a school operated by the board”. I agree with the plaintiffs that, on a plain reading of the legislation, it is arguable that class members must simply establish that they were resident in B.C. and enrolled at a school operated by the defendant Board at the time that summer school fees were paid to the Board. Whether or not a student attended a school within the Board’s jurisdiction during the regular school year is arguably irrelevant to the analysis of what instruction if any must be provided free of charge by the Board in July and August.

[37] In my view there is an identifiable class. The plaintiffs have defined the class with reference to stated objective criteria: a person is a member of the class if he or she paid fees for the specified summer school courses. Whether a given person is a member of the class can be determined without reference to the merits of the action: *Hollick* at para. 17.

[38] Nonetheless I have a concern about the class definition as it is currently drafted. The relevant provisions of s. 82(1) of the *School Act* mandate that a school board must provide free of charge certain instruction to students of school age resident in British Columbia. As currently drafted, the B.C. residency requirement in the class definition relates to the payor of the fees and not the student receiving the instruction. Moreover, as currently drafted, the class could include adult students receiving instruction. There should be a specific reference to “tuition fees”. For clarity the class definition should be reformulated.

[39] In the result, I am not prepared to certify the class as currently drafted. In my view the following revised class definition would be precise, objective and presently ascertainable:

All persons resident in British Columbia and born on or before July 30, 1984 who have been billed **tuition** fees by, and have paid **tuition** fees to, during the period commencing July 30, 2003 and ending on [the certification date] to the Board of Education of School District No. 39 (Vancouver) for instruction **to a student, who was of school age as defined in the *School Act* and resident in British Columbia**, in summer school secondary-level completion courses and/or summer school secondary-level remedial courses.

[40] The parties are at liberty to make further submissions on the issue of the class definition. Counsel should also clarify whether “tuition fees” excludes the attendance deposits charged by the Board for those students taking a Ministry-funded course.

Common Issues

[41] Section 1 of the *CPA* defines common issues as “common but not necessarily identical issues of fact” or “common but not necessarily identical issues of law that

arise from common but not necessarily identical facts”. This is the critical inquiry which lies at the heart of a class proceeding: *Campbell v. Flexwatt Corp.* (1997), 44 B.C.L.R. (3d) 343 at para. 52 (C.A.).

[42] In *Western Canadian Shopping Centres Ltd. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534 at para. 39, the comments of McLachlin C.J.C. with respect to the test of “commonality” are instructive:

Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. 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. It is not essential that the class members be identically situated *vis-à-vis* the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member’s claim. However, the class members’ claims must share a substantial common ingredient to justify a class action.

[43] The court must not engage in weighing the merits of the proposed common issues. The resolution of the point in question must be applicable to all in the class or subclass who will be bound by it and must be capable of extrapolation to all defendants who will be bound by it: *Harrington v. Dow Corning Corp.*, 2000 BCCA 605 at paras. 20-24. The authorities establish that the resolution of the common issues must advance the litigation, but it is not necessary that the resolution of the common issues be determinative of liability.

[44] The question of whether the common issues justify a class action may require the court to examine the significance of the common issues in relation to the individual issues. This will depend on consideration of the preferable procedure, which will be discussed under the next heading.

[45] In *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184 at para. 33, McLachlin C.J.C. observes that while the *CPA* clearly contemplates that the predominance of common issues “over issues affecting only individual members” will be a factor in the preferability inquiry, “it makes equally clear that predominance should not be a factor at the commonality stage”. She concludes at para. 33 that “the

question at the commonality stage is, at least under the British Columbia *Class Proceedings Act*, quite narrow”.

(i) Statutory Framework

[46] Before turning to the analysis it is necessary to refer to the relevant provisions of the *School Act*, and the judicial consideration of those provisions.

[47] The *School Act* governs the delivery of education in this province. The Minister sets the standards required for learning outcomes and sets policy for the implementation of educational services. The *School Act* delegates authority for the provision of education programs to boards of education: *Wiggins v. British Columbia*, 2009 BCSC 121 at paras. 5-6.

[48] Broadly speaking, pursuant to the provisions of the *School Act*, the Board is responsible for the management of the schools within its school district and must make an educational program available to all persons of school age who enrol in a school in the district: ss. 74-75 of the *School Act*.

[49] The Interpretation section of the *School Act*, s. 1, states as follows:

“educational program” means an organized set of learning activities that, in the opinion of

(a) the board, in the case of learning activities provided by the board, ...

is designed to enable learners to become literate, to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy;

...

“school age” means the age between the date on which a person is permitted under s. 3(1) to enrol in an educational program provided by a board and the end of the school year in which the person reaches the age of 19 years;

...

“school year” means the period beginning on July 1 and ending on the following June 30;

[50] The relevant sections of the *School Act* provide as follows:

82 (1) A board must provide free of charge to every student of school age resident in British Columbia and enrolled in an educational program in a school operated by the board,

- (a) instruction in an educational program sufficient to meet the general requirements for graduation,
- (b) instruction in an educational program after the student has met the general requirements for graduation, and
- (c) educational resource materials necessary to participate in the educational program.

(2) For the purposes of subsection (1), a student is resident in British Columbia if the student and the guardian of the person of the student are ordinarily resident in British Columbia.

...

168 (1) The minister, subject to this Act and the regulations,

- (a) has charge of the maintenance and management of all Provincial schools established under this Act,
- (b) must advise the Lieutenant Governor in Council on all matters relating to education in British Columbia,
- (c) may designate a member of the public service to act on behalf of the minister, and
- (d) may charge fees with respect to any goods or services provided by the minister or the ministry, and may establish different fees for different circumstances.

(2) The minister may make orders for the purpose of carrying out any of the minister's powers, duties or functions under this Act and, without restriction, may make orders

- (a) governing the provision of educational programs,
- (b) subject to subsection (5), determining the general requirements for graduation from an educational program, ...

[51] Pursuant to s. 168(2)(b) the Minister made an order entitled "Graduation Requirements Order", M205/95.

[52] The phrase "instruction in an educational program" is defined in the *School Regulation*, B.C. Reg. 265/89, at s. 1(2) to mean:

[T]he communication of information or knowledge to students, who are in attendance and under supervision, sufficient to meet the learning outcomes or assessment requirements of an educational program provided by a board.

(ii) Judicial consideration of the School Act

[53] The parties referred to two authorities that have considered the provisions of the *School Act*. It is important to observe at the outset that neither case considered the *School Act* in the context of summer school. In addition, while the cases considered fees charged for activities and materials related to school courses, neither case adjudicated upon the propriety of the Board charging fees for the provision of the actual instruction in school courses offered for credit.

[54] In *McDonald v. Greater Victoria School District No. 61* (1997), 35 B.C.L.R. (3d) 334, 47 A.C.W.S. (3d) 833 (S.C.), the petitioner parents sought a declaration regarding a school board's policy whereby fees were charged to students for textbooks, yearbooks and extracurricular activities. The court concluded that instructional materials for school courses were to be provided free of charge, but that the school board could charge for yearbooks and activity charges which were not actual components of the school curriculum.

[55] Section 100(1) of the *School Act* (1989), S.B.C., c. 61, which was the predecessor of s. 82(1) of the current *School Act*, read as follows at the time of the *McDonald* decision:

100(1) A board shall provide free of charge to every student of school age resident in its school district and enrolled in an educational program in a school,

(a) instruction in an educational program sufficient to meet the general requirements for graduation set out in the orders of the minister,

(a.1) instruction in an educational program after the student has met the general requirements for graduation, and

(b) educational resource materials necessary to participate in the educational program.

[56] The court, in interpreting "instruction in an educational program" in the former s. 100(1) stated as follows:

[9] While there is some logic in his position, for this definition is extremely wide, repeating as it does part of the Preamble, one must keep in mind that there has to be some limit to an educational program: in my opinion, that limit is reached where a School Board provides instruction leading to graduation

under s. 100(1)(a). Other learning activities, though certainly contributing to the education of a student, must be considered as optional and outside the essential curriculum.

[10] “Instruction in an educational program”, then, means everything that is done by the teacher for his or her class during school hours. If such instruction includes such things as field trips and other illustrative “hands on” experiences, then any expense involved cannot fall upon the student.

[Emphasis added.]

[57] In *Young v. British Columbia (Minister of Education)*, 2006 BCSC 1415, the petitioners sought declaratory relief for fees charged by a school board for class materials such as the rental of instruments needed for music classes and equipment for woodworking projects, and for school field trips. The petitioners sought a declaration that certain sections of the School Board Fees Order 125/90 made by the Minister of Education pursuant to s. 168(2)(j) of the *School Act* were beyond the power of the Minister to make. The petitioners thus asked that certain sections of the Order be struck, and in the alternative, for a declaration that the Order did not empower school boards to charge fees for materials or equipment which are necessary to meet learning outcomes of an educational program.

[58] The school boards were not parties to the petition and the petitioners did not seek any relief against any school board. As noted by the court in *Young* at para. 30, although the crux of the claim was that school boards were charging for things they ought not charge for, the claim was advanced only as an attack on the School Board Fees Order and the power of the Minister to make that Order.

[59] The court in *Young* analyzed the statutory provisions as follows:

[36] This phrase [“educational program”], defined in the same way by the then current version of the *School Act*, was held by Drake J. to be limited so as to require free instruction leading to graduation in *McDonald v. Greater Victoria District No. 61*, [1997] B.C.J. No. 1007 (S.C.) (QL).

[37] The expanded phrase "instruction in an educational program" has been defined by the *School Regulation*, B.C. Reg. 265/89, passed pursuant to the *School Act*, to mean:

... the communication of information or knowledge to students, who are in attendance and under supervision, sufficient to meet the learning outcomes or assessment requirements of an educational program provided by a board;

...

[39] Without the benefit of the interpretation of the phrase “educational program” by Drake J. in *McDonald*, some difficulty might arise from the dissimilarities in the usage of the phrase in the two definitions. They are dissimilar because the definition of “educational program” in the statute speaks to realization of a student’s potential, and the acquisition of skills and attitudes that would benefit society, whereas the definition of “instruction in an educational program” set out in the regulation has a more narrow focus, dealing as it does with the conveyance of the knowledge or learning necessary for a student to pass examinations or fulfill course requirements established by a school board.

[40] Drake J. resolved the potential difficulty by arriving at an interpretation of the phrase “educational program”, as defined in the statute, which predicted quite accurately the definition subsequently put forward in the regulation, in a way that resolved potential inconsistency.
[Emphasis added.]

[60] The court reasoned as follows:

[41] In my view the definition of the phrase “instruction in an educational program”, although originating in subordinate regulation, is not inconsistent when the definition of “educational program” is read into the opening portion of s. 82 as follows:

82 (1) A board must provide free of charge to every student of school age resident in British Columbia and enrolled in ... *an organized set of learning activities that, in the opinion of, ... (a) the board, ...is designed to enable learners to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy* ... in a school operated by the board, ...

This can then be logically followed by inserting the expanded definition of “instruction in an educational program” from the regulations into subsection (a) of s. 82(1) as follows:

82 (1) (a) *the communication of information or knowledge to students, who are in attendance and under supervision, sufficient to meet the learning outcomes or assessment requirements of an educational program provided by a board;*
... sufficient to meet the general requirements for graduation,
...

[42] It seems to me that taking the more general definition of “educational program” from the statute, and following it with the more specific “instruction in an educational program”, which is aimed at achieving successful graduation of the student, provides a logically coherent and internally consistent interpretation of s. 82(1). Such an interpretation would also be consistent with the decision of Drake J. in *McDonald*, and with the response

of government to that decision, in the form of regulations creating the definitions set out above.

[Emphasis in original.]

[61] In determining whether s. 5 of the School Board Fees Order dealing with field trips was beyond the Minister to order, the court, after holding that a school board is only obliged to provide instruction free of charge that is “sufficient to meet the general requirements for graduation”, concluded at para. 56 that such a determination depended on the nature and purpose of the field trip. The court stated as follows:

[56] If a field trip is necessary, in the sense that a student will have more difficulty successfully completing the course that gives rise to the field trip, or if a student’s attendance on the field trip is mandatory, then it must be free of charge to the student. If, on the other hand, the field trip is an enhancement on the class or course, not necessary for its successful completion, and attendance is optional, the school may attempt to recover expenses from the students who choose to attend.

[62] In the context of this legal framework I turn to address common issues I-IV.

(iii) Common Issues I-IV

[63] The proposed common issues I-IV are framed as follows:

- I. Do summer school completion courses at the secondary level constitute an “educational program” within the definition of that phrase contained in s. 1 of the *Act*?
- II. Do summer school remedial courses at the secondary level constitute an “educational program” within the definition of that phrase contained in s. 1 of the *Act*?
- III. If the answer to common issue I is yes, did the defendant contravene s. 82(1)(a) of the *Act* when it charged and collected tuition fees from the class members for summer school secondary level completion courses?
- IV. If the answer to common issue II is yes, did the defendant contravene s. 82(1)(a) of the *Act* when it charged and collected tuition fees from the class members for summer school secondary level remedial courses?

[64] The interpretation of ss. 1 and 82 of the *School Act* constitutes the heart of this lawsuit.

[65] The principles governing the modern approach to statutory interpretation are well-settled. In summary “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: Elmer A. Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) at 87; *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21. The principles of interpretation also mandate that statutory provisions dealing with the same subject matter should be read together where possible to avoid conflict. Statutory provisions are presumed to work together to form a rational and internally consistent framework: *Assessor of Areas #20 and #23 v. Interior Health Authority*, 2006 BCSC 930 at para. 23.

[66] At the hearing of the common issues, the court will be required to determine, as the threshold issue, whether summer school courses offered by the Board constitute “an educational program” or whether “an educational program” is limited to that program offered to students between September and June.

[67] The plaintiffs will argue at the hearing of the common issues that summer school completion and remedial courses offered for academic credit constitute “an educational program” within the meaning of that term as defined in s. 1 of the *School Act*, and incorporated into s. 82 of the *School Act*. They assert that given the ordinary and grammatical sense of the words, summer school falls within the definition of “educational program” in the Interpretation section of the *School Act*. Moreover, as interpreted in *Young and McDonald* that definition is very broad and could reasonably include any course offered by the Board for academic credit at any time during the calendar year.

[68] In response, the Board will argue at the common issues trial that summer school does not constitute “an educational program” as referenced in the *School Act*, but rather, the Board’s offerings from September-June are its “educational program”. The Board submits that it discharges its obligation under s. 82 and the Graduation Requirements Order by offering a sufficient number of courses free of charge during the September-June period. It therefore contends that once it has complied with its

obligation to provide free of charge instruction in an educational program sufficient to meet the general requirements for graduation during the September-June period, it is not restricted by the words of the *School Act* or the Graduation Requirements Order from charging a fee for courses it offers in the July-August period.

[69] In my view it is possible that the plaintiffs may succeed in their argument that if the Board offers courses in summer school, those classes are not excluded from the term “educational program” as that term is referenced in s. 82 of the *School Act*. Notably the *School Act* is silent as to when and how an educational program is to be provided. The words do not suggest any limitation as to the times, dates, terms, or seasons in which a school board may or must offer educational programs in its schools. The legislators did not choose to make an explicit distinction between the July-August and September-June terms. In fact, the *School Act* explicitly states in s. 1(1) that the “school year” commences July 1 and ends June 30 of the next year.

[70] If the court determines, as the pivotal issue, that summer school constitutes an “educational program”, the next issue for consideration will be construing the legislative framework to determine what, if any, summer school offerings it is obliged to provide free of charge.

[71] The plaintiffs submit that on a reasonable interpretation of s. 82, secondary level completion and remedial courses offered for credit in July and August must be provided for free. They argue that the *School Act* does not render the reasons for enrolment in a particular course relevant to whether a school board is obligated to offer instruction in those courses free of charge to a particular student.

[72] In response, the Board’s overarching submission is that the court in *Young*, in its statutory analysis, limited the requirement for free instruction to those courses “leading to graduation”. It also argues that *Young* mandates that the key dividing line for the test regarding what must be provided free of charge is whether, for each individual student, enrolment in a particular summer school course was optional or required. Therefore, according to the Board, each class member’s enrolment raises

a host of individual issues as to the reason for enrolment and communications concerning enrolment.

[73] The plaintiffs also submit that those summer school courses offered for academic credit prior to graduation “lead to” secondary school graduation and therefore fall within the scope of “educational program” as it was interpreted by the court in *McDonald*. Moreover they contend that since completion and remedial courses are offered for credit and target the same provincial learning objectives as courses taught during the September-June term, it cannot be said that the courses are “outside the essential curriculum”. This analysis would be conducted at a program-wide level and would not necessitate any consideration of individual issues such as an individual student’s reason for enrolment. It also obviates any inquiry as to whether the course was required or optional for any individual claimant.

[74] Although the Board relies on *Young* for the proposition that optional courses need not be provided free of charge, I note that in *Young* the court adjudicated upon the propriety of charging fees for activities and materials that were an enhancement of a course and did not adjudicate on the actual provision of instruction for any particular course. The court concluded at para. 62:

[62] In summary, a school board is not permitted to charge students fees for any materials, or for musical instruments, that are required for students to successfully complete a course leading to graduation. Similarly, any portion of a course that occurs outside the classroom or school, and which the teacher considers necessary for "... the communication of information or knowledge to students ... sufficient to meet the learning outcomes or assessment requirements of an educational program provided by a board;" must be free to the student. Field trips, or other extracurricular outings or events, not considered by the teacher or the school to be so necessary, should be purely voluntary and a school board may charge fees. ...

[Emphasis added.]

[75] Similarly, in *McDonald* the court concluded at para. 10 that it was not proper to charge fees for everything that “is done by the teacher for his or her class during school hours”. However, fees could be charged for extracurricular activities or materials, such as yearbooks, which were characterized as falling outside the essential curriculum.

[76] Arguably, *Young* does not apply to the determination of what educational program or course must be provided for free. In my view it is possible that the interpretation of *Young* as contended by the Board is too broad and the principle to be derived from the case is no broader than providing guidance as to educational resource materials, activities, or level of instruction that the Board must provide for free once a student is enrolled in a course. For example, optional activities that are an enhancement of a course and not necessary for its successful completion, such as a fieldtrip, need not be offered free of charge.

[77] In my view s. 82(b) may also inform the statutory analysis. Section 82 provides that the Board must provide free instruction to students even after they have met the requirements for graduation:

82 (1) A board must provide free of charge to every student of school age resident in British Columbia and enrolled in an educational program in a school operated by the board,

(a) instruction in an educational program sufficient to meet the general requirements for graduation,

(b) instruction in an educational program after the student has met the general requirements for graduation, ...

[Emphasis added.]

I respectfully observe that it appears that neither the court in *Young* nor *McDonald* considered s. 82(b) so those cases may be of limited assistance in deciding the issues in this action.

[78] At the hearing of common issues, the court will also be required to analyze subsection 82(1)(b) to achieve a logically coherent and internally consistent interpretation of s. 82(1). It is a possible interpretation that even if a student has achieved sufficient credits for graduation, the Board is obliged to provide any credit courses offered during summer school for free to all students of school age resident in B.C. and enrolled in a school operated by the Board. In light of its plain language, it is arguably illogical to limit s. 82 to courses strictly required for a student to successfully graduate given that it expressly provides that an educational program must be provided free of charge even after the requirements for graduation have

been met by a student. It is at least arguable that the “optional versus required” or “leading to graduation” analysis would not be pertinent.

[79] In short, although the courts in *Young* and *McDonald* articulated that there is a limit to what a school board has to provide for free, it may be possible for the plaintiffs to successfully argue at the trial of the common issues that secondary level completion and remedial courses offered for credit by the Board during the summer term constitute an educational program pursuant to s. 82(1) and must therefore be provided free of charge. This statutory interpretation analysis could arguably be undertaken with reference to the program itself and without reference to the particular student’s circumstances or requirements for graduation. In the result, the individuality concerns urged on the Court by the Board would not be engaged. The only individual issues for determination would be the factual issues of the age, residency, and enrolment for each student for whom payment was made, and whether the tuition paid was for a completion course or a remedial course.

[80] Moreover, the analysis of whether, as the Board contends, all summer school offerings are optional and therefore need not be provided free of charge to any student, does not engage any individual issues.

[81] As aptly stated by the Board, what is relevant for certification is where the key arguments are to lie, not who will succeed on any particular argument. Given that a certification hearing does not involve an assessment of the merits of the claim I conclude that issues I to IV are clear common issues. The common issues are a substantial ingredient of each class member’s claim. The resolution of the issues outlined above is necessary to resolve each class member’s individual claim and the resolution of the common issues will significantly advance the litigation. These questions may be advanced by the class as a whole without consideration of each individual member’s circumstances and regardless of their individual graduation requirements. The answers will be the same for each member of the class and success for one class member will mean success for all.

[82] The affidavit material tendered by the Board establishes that there are in excess of 3,000 registrants who, for the year commencing July 30, 2003, and for each year thereafter until at least 2007, paid fees for summer school secondary-level completion courses and/or summer school remedial courses. Although I note that these numbers may include some adult students who would be excluded from the class definition, it can reasonably be inferred that there is an evidentiary basis to support the assertion that there is an identifiable class with a rational relationship to the proposed common issues.

[83] In summary, I am satisfied that there is some basis in fact for the plaintiffs' claim and that the evidence meets the minimum evidentiary threshold required on a certification application.

(iv) The Remaining Common Issues (V-VIII)

[84] With the exception of common issues XII and XIII, I am satisfied that the balance of the common issues proposed by the plaintiffs are appropriate.

[85] With respect to common issues XII and XIII, I am not persuaded that the reasons why the Board may have refunded certain fees and any policy decisions made by the Ministry regarding the refunding of summer school fees in 2007 are relevant to the issues raised in this proceeding.

[86] It may be appropriate that the hearing of common issues proceed in two stages, and issues I-IV proceed first. If and when appropriate, the parties will be at liberty to make further submissions in this regard. This issue may be canvassed at a case planning conference in due course.

Preferable Procedure

[87] The core considerations which anchor the preferability requirement are whether the class action would be a fair, efficient and manageable method of advancing the claim, and whether the class action is preferable to other procedures. Courts must approach this analysis practically with consideration of the impact of the

class proceedings on members of the class, the defendant and the court. According to s. 4(2) of the *CPA*:

(2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:

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

[88] The court must consider all of these factors in determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues. No single factor is determinative. The “preferability” inquiry should be conducted through the lens of the three principle procedural advantages of class actions: judicial economy, access to justice, and behavioural modification: *Hollick* at para. 15.

[89] I will first consider the five factors and then consider the overall issue of whether certification is consistent with the purposes of the *CPA*.

(a) Do questions of fact or law common to the members of the class predominate over any question affecting only individual members?

[90] The Board argues that *Young* mandates that the “leading to graduation” and the mandatory vs. optional issues are individual ones that will differ with each plaintiff and therefore a class action is not the preferable procedure for advancing the claim.

[91] It submits that as in *Ziegler v. Sherkston Resorts Inc.* (1996), 30 O.R. (3d) 375, 4 C.P.C. (4th) 225 (Gen. Div), and *Ogden v. Gulf Log Salvage Co-operative Assn*, 2005 BCSC 56, to determine if the statute was breached the court must assess the circumstances from each individual class member. It points out that even if all the CPA requirements are met, a court can conclude, as in *Hollick and Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173, 35 C.P.C. (4th) 43 (S.C.J.), aff'd 46 O.R. (3d) 315, 1 C.P.C. (5th) 82 (S.C.J.), that a class action was not appropriate because of complexity and individualistic inquiry that would be required at the individual trials.

[92] I have concluded that the claims of the putative class members raise issues which are common to the class as a whole. As referred to earlier, this litigation at its core turns on the statutory interpretation of the *School Act*. The plaintiffs may succeed in showing that the proper construction of the *School Act* does not require any consideration of a claimant's individual reasons for enrolling in summer courses offered by the Board. Therefore, in contrast to the authorities relied on by the Board, in determining the common issues, the court will not be required to examine evidence that is individual to each class member.

[93] On balance, the common issues are likely to predominate over the individual issues. If the plaintiffs succeed on the statutory interpretation issue, the only individual issues for determination would be the factual issues of the age, residency and enrolment for each student for whom payment was made, and whether the tuition paid was for a remedial course or a completion course.

(b) Do a significant number of the members of the class have a valid interest in individually controlling the prosecution as separate actions?

[94] On the basis of the parties' evidence there is no reason to anticipate that any members of the class have an interest in individually controlling the prosecution of separate actions. There was no opposition by potential class members to the certification of this claim as a class proceeding.

(c) Would the class proceedings involve claims that are or have been the subject of any other proceedings?

[95] There was no evidence adduced about summer school fees having been the subject of other proceedings in British Columbia.

(d) Would other means of resolving the claims be less practical or less efficient?

[96] In this case, there are no mechanisms for resolving the claims of the class members other than civil actions. The only litigation alternatives to these proceedings are a plethora of individual actions or no individual actions. This is not a viable or realistic alternative.

[97] Access to justice is a significant consideration. But for the class action, it is unlikely the majority of claims would be advanced at all, since the cost of doing so would be out of proportion to the potential recovery.

[98] In short, the pursuit of a large number of individual claims “would be impractical, uneconomic, and contrary to the efficient administration of justice”: *Cooper v. Merrill Lynch*, 2006 BCSC 1905 at para. 87.

(e) Do class proceedings create greater difficulties than individual proceedings?

[99] The Board argues that class resolution is not more efficient than other methods because the case turns on the individual evidence of each student. Accordingly the Board argues the claimants would still have to press separate claims and as in *Tiemstra v. ICBC* (1997), 149 D.L.R. (4th) 419, 38 B.C.L.R. (3d) 377 (C.A.), a class action is not preferable because the action would inevitably devolve into individual disputes.

[100] The Board therefore asserts that this action will become a monster of complexity and cost. As in *Tiemstra*, the Board contends that because of the need for individual trials and evidence and the credibility issues that will arise regarding each plaintiff’s reasons for taking summer courses, the plaintiffs will nonetheless be

faced with the same cost-benefit analysis that they would have if this were not a class action suit.

[101] I have concluded that if the plaintiffs are successful in their arguments regarding the interpretation of s. 82(1) of the *School Act*, there would be no necessity to litigate in relation to a student's individual circumstances. If the legal issue is determined to turn on a course-by-course basis, each student's reasons and motivation for enrolling in summer school and communications between the school and each student become irrelevant. There would be no necessity for complicated individual trials.

[102] In short, the proposed common issues in this case satisfy the objective articulated in *Western Canadian Shopping Centre Ltd.* On the basis of the evidence available at this stage, a class proceeding is the preferable procedure for the fair, efficient and manageable resolution of the common issues. The common issues will impact a large group. A trial of the common issues would significantly advance the litigation and has the potential to determine the entire case. Pursuant to s. 27 of the *CPA*, if appropriate, simplified structure and procedures can be implemented for determination of any individual issues.

Representative Plaintiff

[103] As part of the requirements for certification, s. 4(1)(e) of the *CPA* requires that:

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

[104] In *Western Canadian Shopping Centres*, McLachlin C.J.C. at para. 41 clarified the requirements for the adequacy of the representative plaintiff:

The proposed representative need not be “typical” of the class, nor the “best” possible representative. The court should be satisfied, however, that the proposed representative will vigorously and capably prosecute the interests of the class...

[105] This is uncontroversial; I find Ms. Riazi has no conflict in representing the entire class and that she meets all the requirements of adequately representing the class in these proceedings. The litigation plan is adequate for this stage of the proceeding.

CONCLUSION

[106] I emphasize that I have restricted my assessment of the issues to the standards regarding a certification application. It is not appropriate at this stage to engage in a vigorous review of the merits; that will be for trial.

[107] Except for the class definition, the requirements of s. 4(1) of the *CPA* have been satisfied. If the class definition is reformulated to reflect the analysis in these reasons for judgment I will certify the proposed action as a class action and certify the following common issues:

- I. Do summer school completion courses at the secondary level constitute an “educational program” within the definition of that phrase contained in s. 1 of the *Act*?
- II. Do summer school remedial courses at the secondary level constitute an “educational program” within the definition of that phrase contained in s. 1 of the *Act*?
- III. If the answer to common issue (i) is yes, did the defendant contravene s. 82(1)(a) of the *Act* when it charged and collected tuition fees from the class members for summer school secondary level completion courses?
- IV. If the answer to common issue (ii) is yes, did the defendant contravene s. 82(1)(a) of the *Act* when it charged and collected tuition fees from the class members for summer school secondary level remedial courses?
- V. Was the defendant’s levy of tuition fees for instruction in summer school completion courses and/or remedial courses beyond the defendant’s powers and objects under the *Act*, and therefore *ultra vires* the defendant?
- VI. If the answer to common issue (v) is yes, is the defendant then responsible to make restitution to the class members in the amount of the tuition fees wrongfully charged and collected as aforesaid?

- VII. Did the class members pay tuition fees to the defendant for instruction in summer school completion and/or remedial courses under a mistake of law?
- VIII. Was the defendant unjustly enriched by the collection of tuition fees for summer school completion and/or remedial courses?
- IX. If the answer to common issue (vii) is yes, are the class members entitled to a declaration that the defendant holds the summer school tuition fees wrongly charged and collected as aforesaid as constructive trustees for the benefit of the class members?
- X. If the answer to common issue (vii) is yes, is the defendant obliged to make an accounting to the class of all such summer school tuition fees wrongfully charged and collected as aforesaid?
- XI. If the answer to common issue (vii) is yes, is the defendant then responsible to make restitution to the class members in the amount of the summer school tuition fees wrongfully charged and collected as aforesaid?

[108] If counsel require a further hearing on the class definition they should contact Supreme Court Scheduling to arrange a hearing.

“Dardi J.”