

IN THE MATTER OF a Complaint  
Pursuant to section 6 of the *Human  
Rights Code*, R.S.N.L. 1990, c.H-14

File No. 2592

BETWEEN:

SONYA HARVEY

COMPLAINANT

AND:

WOODFORD TRAINING CENTRE INC.

RESPONDANT

Jamie Merrigan (Chief Adjudicator)

Heard: June 10- 13 and June 20<sup>th</sup>, 2008

Decision: January 21, 2009

Appearances:

On Behalf of the Complainant:

Appeared Personally

On Behalf of the Commission:

Helen Conway

On Behalf of the Respondent:

Francis P. Fowler Q.C. and Janine Flaherty

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DECISION OF THE ADJUDICATOR

**INTRODUCTION**

1. The Complainant, Sonya Harvey, was a student enrolled in the Respondent's private training institution. In the fall of 2004 she was taking a post secondary training program in the field of esthetics.

2. The Respondent is a private training institution within the meaning of the *Private Training Institutions Act* R.S.N.L 1990 c. P-25. This legislation will be referred to in this decision as the *Act*. The Respondent will be referred to as Woodford. In order to be enrolled in the Respondent's esthetics program students are required to provide a medical certificate stating that they are free from communicable and contagious disease.

3. On November 3, 2004 the Complainant provided the Respondent with a note from her doctor which stated that she suffered from a communicable disease. It was not stated in that note that the communicable disease she suffers from is hepatitis c. The Complainant states that she was told that as a result of this note she had to withdraw from the program and if she did not withdraw she would be terminated from the program. The Respondent states that upon presenting this note the Complainant advised that she would be withdrawing from the program on the advice of her doctor. The parties agree that she did leave the program.

4. After leaving the program the Complainant made a complaint to the Human Rights Commission alleging that there was a denial of service to her within the meaning of section 6(1) of the *Human Rights Code* R.S.N.L. 1990 c. H-14 and that this denial was not based upon a good faith qualification. The *Human Rights Code* will be referred to in this decision as the *Code*. The Respondent disputes this allegation.

### **ISSUES**

5. As a result of this dispute a number of issues must be decided. These are:
1. Did the Complainant voluntarily leave the program on her doctor's advice or was she forced from the Respondent's esthetics program because she suffered from hepatitis c?
  2. If the Complainant was forced from the Respondent's esthetics program because she suffered from hepatitis c was this a breach of section 6(1) of the *Code*?
  3. If this was a breach of section 6(1) of the *Code* is it a breach which is permitted as a result of good faith qualification within the meaning of section 6(2) of the *Code*?
  4. If this is not a breach permitted under section 6(2) of the *Code* what remedy should the Complainant receive?

### **EVIDENCE AT THE HEARING**

6. In order to accommodate the schedules of some of the witnesses the parties did not call their evidence or present their cases in the usual order. The testimony of Ms. Banfield was interrupted by the testimony of Ms. Hanrahan, and some witnesses for the Respondent preceded those of the Complaint. The evidence is summarized in the order that the witnesses began their testimony.

Sonya Harvey

7. The Complainant, Sonya Harvey, testified first in the hearing. On the date of the hearing she was 24 years old. Ms Harvey testified that from the age of 13 she used drugs and alcohol, progressing from marijuana to harder drugs including cocaine, heroin and oxycontin. At one point she turned to prostitution to support her addictions. She had attempted at various times to end these addictions.

8. Ms. Harvey testified that in June of 2004 she was “clean” and had stopped using alcohol and drugs, save and except methadone which she consumed in the presence of a pharmacist on a daily basis. This was a part of a program to treat her addiction.

9. She testified that she met the president of Woodford, Sharon Woodford, when she applied to the esthetics program. Ms. Harvey was up front about her personal history, although she acknowledged this was to a large extent public knowledge. She said she could not say so for sure if her mother attended that meeting but stated that her mother does that sort of thing a lot. She was accepted, as she put it, on the spot. Ms Woodford helped her fill out forms including student loan forms. She started at Woodford on September 3<sup>rd</sup>, 2004.

10. Like all students at Woodford Ms. Harvey was required to provide a medical certificate stating that she was free from communicable diseases. She provided a note from Dr. Acevedo which stated “Sonya Harvey has a medical condition that is only transmitted through sexual contact.” This note was dated September 30, 2004 and a copy was entered as Exhibit SH-1. She testified she provided this to Ms. Woodford and there was no conversation about the note. In cross examination she stated Ms. Woodford’s reaction was even though it was a communicable disease it was acceptable as it was spread only through sexual contact.

11. Ms. Harvey had failed to complete high school or junior high and she testified that being accepted into this program boosted her self-esteem. She felt that the school provided her with her social life, she trusted her fellow students and her studies went well. A copy of her transcript of marks was entered as Exhibit SH-2 and supports her recollections. Her marks in the two courses graded were 73% and 90%.

12. After providing the note of September 30, 2004 Ms. Harvey arranged testing for hepatitis c. She was not aware of any obligation to provide medical certificates to the school on an ongoing basis, but took the test of her own volition. She subsequently received a call from her doctor, Dr. Acevedo, who advised her that she had to come in and receive the results of her test. When she did so she was told she had hepatitis c. At that meeting she asked if there was any treatment. As she was worried about school she asked for note and wanted to be advised if the disease was easily transmitted. She was told the disease was blood born, it could be transmitted through bodily fluids and through blood to blood contact. She was not suffering any symptoms from the disease.

13. She was advised that there was always a chance of transmission. The risk could not be eliminated but it could be reduced. Among methods discussed were the wearing of latex gloves and a mask, as well as sterilization and disinfection of instruments. They discussed the disease in general and the things she could do to control it. This included not drinking alcohol as this affected liver function, continuing her addictions counseling and having her liver enzymes checked.

14. Ms. Harvey decided to inform Woodford of this result. When asked why she decided to do this she stated that the admission form stated that applicants had to advise if they had a communicable disease. While she did not believe it was required of her, she wanted to be honest and to be sure that there was no opportunity for her to get in trouble. She received another medical certificate at Dr. Acevedo's office when she was advised of the disease. This was again in the form of a note that read "Sonya Harvey suffers from a communicable disease. It is transmitted by exchange of bodily fluids ie. Sexual contact or direct contact with blood. There is a risk of transmission of this disease if there are open wounds, therefore gloves will minimize the risk but it won't be eliminated." A copy of this note was entered as Exhibit SH-3.

15. She told her teacher, Debbie Banfield about the diagnosis first and also gave her the note. This occurred either the same day or the day after the diagnosis. She was advised that Ms. Banfield had to go and speak to Ms. Woodford. Ms. Harvey was not sure if she spoke to Ms. Woodford the same day or the day after. At this point in her testimony she explained that her history of drug use has left her a bit mixed up. At the conclusion of her testimony, she clarified that she suffers problems with long and short-term memory.

16. She could not recall if the meeting with Ms. Woodford occurred on the 3<sup>rd</sup> or 4<sup>th</sup> of November 2004. Ms. Harvey recalls that her mother and possibly Ms. Banfield were present at the meeting. Sonya Harvey was upset, crying and very emotional at the meeting. Around that point she was asked to withdraw from the program because of her diagnosis of hepatitis c. Ms. Woodford was understanding but she was concerned about transmission of the disease in her program and with meeting standards. Ms. Harvey signed papers withdrawing from the program. The document was in her handwriting and was also entered as Exhibit SH-4. She could not recall if her mother was present when she signed it, but she believed Ms. Woodford and Ms. Banfield were. She says she did not withdraw voluntarily but states that she was told if she did not withdraw she would be terminated.

17. Ms. Harvey testified that she was not offered any accommodation to enable her to stay in the program nor was she offered a chance to transfer to an alternate program, either of which she states she would have accepted. When asked if she would take the precautions required she stated she would do so. When shown Dr. Acevedo's note of November 3<sup>rd</sup>, 2004 she indicated that she took it to mean that she could minimize the risk of transmission but there was still a small risk of transmission. She discussed her understanding of the precautions required had she remained in the program. She would

wear gloves and a mask if necessary. If she bled she would make sure she sanitized and disinfected. She would be extra careful to sanitize the tools.

18. When she was diagnosed she had been in the program about two months and she had obtained a student loan. Approximately \$2900.00 was owing at the time of the hearing. She could not recall the total amount of tuition for the course and she was not offered a refund of her tuition.

19. The Human Rights Commission Investigation Report was entered as Exhibit SH-5. A review of appendix H to Exhibit SH-5 shows that the amount of tuition paid at the time of termination was \$2816.39.

20. Ms. Harvey testified that she had no intention of quitting the course on November 3, 2004. She did not recall any problems with attendance or discipline. She enjoyed the program and as a result did well in it. In general the school was supportive and positive. Ms. Harvey had hoped to have a career as an esthetician. She felt this was realistic as Woodford had a high success rate and was a very good school. Instead she was removed from the program. She felt isolated and began to drink again. She eventually resumed the use of drugs.

21. Ms. Harvey has once again stopped taking drugs and drinking. She successfully completed a program for young mothers at the Portage drug treatment program in Montreal. She has had a son, who is healthy and free of hepatitis c. Currently she is not sure she would take an esthetics program if she had the chance. She thinks she will take the GED. As she has no symptoms, the treatment for hepatitis c causes illness and she has a small child she has not yet undergone treatment.

22. In cross-examination Ms. Harvey testified she had been a drug user for approximately seven years and she used cocaine, heroine, oxycontin, dilantin, morphine and alcohol. She agreed that a lot of these drugs were taken intravenously and that she engaged in prostitution to pay for her drugs. She agreed that most people would call this high-risk behavior.

23. As a result of her drug addiction she had been convicted of possession of controlled drugs once and was at one time charged with 42 counts of double doctoring oxycontin. She could not remember how many of these charges she was convicted of but agrees she was convicted on some of them.

24. Ms. Harvey was asked to give a history of her attempts to end her addiction. She indicated that she had attended residential treatment programs through Portage on three occasions. The first time was in New Brunswick and the second two times were in Montreal. Just prior to the hearing she had completed the mother and child program in Montreal which took approximately five and a half months. Of those three attempts the most recent one was the only one which she completed, though on a previous occasion her attendance had been pursuant to a court order. When she started at Woodford she had

abstained from drugs for three months on her own by seeing an addictions counselor and by engaging in a methadone treatment program.

25. In her training she did facials, manicures and pedicures on other students. If she did a pedicure or manicure she would do it on another student. To the best of her recollection between September 30 and November 3, 2004 none of the students that she saw wore latex gloves while performing procedures on each other. When she was asked in her experience how often would she see a little blood, she replied not very often, she never saw it. She conceded it was very possible to draw blood as they were using sharp instruments. When asked if she ever drew blood she said not that she remembered. She was asked if she had ever cut her partner and she said no.

26. When asked about the effect of the methadone she was taking she said it varies but it did not make her physically sick and it did not "make her stoned." She felt she functioned normally on methadone. She felt she would be safe to drive while on methadone. When asked if she drove while she was on methadone she indicated she was not sure if she had a car at that time but she understood that there were lots of people who did drive while using methadone.

27. She was asked if while on methadone she was ill in class. She replied that this was not due to methadone but because she was bulimic. She could not recall being sick at Woodford but it was quite possible she was and it was also possible that if she was late for her methadone that could make her sick.

28. She was shown the Termination Report of November 3, 2004 (Exhibit SH-4) which she confirmed was in her own hand writing. She agreed that it said she was voluntarily withdrawing from the program. When asked if she was hoping to return to Woodford she said "yes". She did not want to quit the esthetics business and she was very fragile at that time. She was then asked what Sharon Woodford told her at that time. She replied "I could either terminate myself or be terminated." She then testified, "I voluntarily withdrew to save myself the humiliation."

#### Maureen Harvey

29. Maureen Harvey is Sonya Harvey's mother. She testified that her daughter had an extensive drug problem but was in a methadone program when she attended Woodford. Methadone was administered through a pharmacy and her daughter was required to attend and take the methadone orally before the pharmacist. She had attended with her daughter and observed her do this. Sonya responded very well to this treatment. She attended every day and took periodic drug testing. Maureen Harvey was asked if she ever witnessed her daughter get sick from the methadone. She testified that she saw her get sick but she could not say if it was from the methadone.

30. As her daughter became accustomed to the methadone she began looking to her future. She and her daughter went to Woodford to look at admission in approximately

the first part of August. Both of them met with Sharon Woodford. It was an amicable meeting in which the Harveys did not hide anything. They explained Ms. Harvey's history was already in the provincial media and she was a known addict. When asked if Ms. Woodford was sympathetic from the outset she responded "absolutely." Ms. Woodford was supportive and encouraging. They were advised that Sonya would need a funding source but that could be worked out. Maureen Harvey was aware of the requirement for a medical certificate with respect to communicable diseases and this was stated on the brochure the school had provided. She was aware that her daughter provided a certificate but it seemed like a formality as it did not happen until later in the month after she had started school. Maureen Harvey was not sure whether the application for school was completed at the initial meeting with Ms. Woodford or after. She could not recall the exact date that her daughter was formally informed of acceptance but she did recall that it was upon acceptance of the student loan. Her recollection is that she assisted her daughter in completing the forms and on the first day of school she brought her daughter to school and took pictures.

31. As far as she understood her daughters' academic performance was very good. She was studying at home, her mother was helping her review materials and she was passing the course. There was an ongoing concern about hepatitis c given her past and Sonya Harvey decided she would find out if she had it and if necessary, deal with it. When asked if she was involved in any testing, Maureen Harvey testified that she was not, that it was confidential matter between her daughter and her doctor.

32. Maureen Harvey said that she remembered her daughter's diagnosis vividly because she was a member of the Mothers Against Drunk Driving ("MADD") board of directors. She believes this was the first or second of November but she is certain it was a Monday because that was when MADD had their usual meeting. Sonya Harvey called her mother at the meeting and she was very upset. Her mother had to go and console her. Maureen Harvey attended a meeting with Sharon Woodford on that Wednesday.

33. I note that this fits with the time line subsequently outlined by Dr. Acevedo in his testimony and also upon a review of the calendar she is correct in recalling that November 1, 2004 was a Monday and November 3, 2004 was a Wednesday.

34. When asked if there was any discussion about the approach to the school she testified that at the outset there was too much shock. It may have been the next day Sonya Harvey said maybe I will have to quit school. For the most part she was concerned with whether or not she could stay in school.

35. Maureen Harvey did not attend the school at the outset. She thought that her daughter had a meeting with an instructor and maybe with Ms. Woodford. Maureen Harvey attended the school the following day for a meeting which was attended by Ms. Woodford, Ms. Banfield, Ms. Harvey, and herself. Maureen Harvey was somewhat familiar with the concept of accommodation as she had worked with a health board as a research analyst. At this meeting they talked about the accommodations that could be

made for Sonya Harvey to continue. They discussed transferring her to another program at the school such as hairstyling.

36. Maureen Harvey testified that her objective was to see if anything could be done to keep her daughter in esthetics or to enroll her in another program. She was told that the medical requirements and risks were the same for hairstyling so there would be no consideration of transferring Sonya Harvey. She asked Ms. Woodford if Sonya Harvey could remain in school if she used latex gloves but was told no as the risk was still there. When asked what exactly had been said to her at the meeting Maureen Harvey said it was something like “resign or we will fire you”, that type of statement. She does not recall the exact words but there was really no choice given to her daughter.

37. Maureen Harvey was very disappointed as she had looked at this as a pivotal point in her daughter’s life. She testified that there was no offer to refund tuition but because of student loans, there had to be a document forwarded to student loans to ensure that Woodford did not receive the next payment. This was referred to as “concluding the transaction.” She stated the tone of the meeting was one of disappointment but there was no outright animosity.

38. She could not say with one hundred percent certainty that she was present when the termination report was signed but she believed it was done in her presence.

39. When her daughter left the program she spiraled downhill very quickly and her substance abuse problems resurfaced. Her daughter does not yet have any symptoms of hepatitis c. In February of 2008 she gave birth to a healthy baby boy who does not have hepatitis c. She was asked about the precautionary measures that are taken at home and how they observed her daughter to be with following the necessary steps. She said she was very good. They are aware that certain precautions had to be taken like not sharing nail clippers, razors, or anything sharp. As far as she is concerned her daughter would take the necessary precautions for her esthetics program.

#### Sharon Woodford

40. Sharon Woodford is the sole owner and president of Woodford. She has been in the hairstyling industry for almost 40 years. She started Woodford in September of 1995 after many years of teaching in the provincial vocational school system. In 2004 she added the esthetics program. It was apparent from her testimony that she has built this business up from scratch and takes great pride in this accomplishment. Students in the school have won numerous awards within the professions of hair styling and esthetics.

41. When a private training institution wishes to establish a new program the program first has to be written. Ms. Debbie Banfield wrote the esthetics program for Woodford and primarily dealt with the Department of Education in the development of the program. This program must be submitted to and approved by the private training section of the Department of Education. Program contents, method of delivery, rules and

regulations and pre-requisites all have to be approved. Ms. Woodford entered as exhibit SW-1 a fax dated May 26, 2004 from Roberta Moores of the Department of Education to Debbie Banfield. This fax advised that the attached standards would be sufficient. The attached standards included under the heading "Entrance Requirements" that "Students must be free of communicable disease". It also lists "Sterilizer (Autoclave/Dry Heat Sterilizer)" among the equipment required.

42. Ms. Woodford testified that this requirement was a part of the national standard. The current standards of the National Institute of Esthetics was entered as Exhibit SW-3 to support this assertion. It is clear from this exhibit that the National Institute of Esthetics is another training institution and not a governing body like the Law Society or a Medical Board. The document states that the dean of that institution, a Ms. Sherry Docherty developed the curriculum for the National Association of Career Colleges ("NAAC"). The document filed does not identify Ms. Docherty's training or experience. She is not identified as a medical doctor or other person with training or experience in the field of communicable diseases.

43. Ms. Woodford stated that she believed the requirement that students be free from communicable diseases was required as students did not always follow all of the safety and sanitary procedures that they are taught. As the students practiced on each other this standard was in part to protect the other students.

44. She testified that this was a mandatory requirement of the Department of Education.

45. A letter from Wayne Oakely, the then Superintendent of Private Training Institutions to Ms. Woodford dated June 15, 2004 was entered as exhibit SW-2. It states that the esthetics program was approved contingent upon a site visit and upon the curriculum continuing to meet the standards as articulated by NAAC. A further fax from the Department of Education dated May 28, 2004 was entered as exhibit SW-4. This fax includes the admission requirement, that "Students must be free from communicable disease."

46. This requirement is reflected in a pamphlet provided by Woodford and found at Appendix B to exhibit SH-5 which states "Regulations Requires [sic]: A medical certificate stating freedom from communicable and contagious diseases." Ms. Woodford identified this as a pamphlet that was in use at the time that Ms. Harvey attended her school.

47. Ms. Woodford testified that she felt she could not change the standards. If she wants to add to or change a program she needs approval from the Department of Education. She also requires the Department's approval to raise tuition or to hire staff.

48. She testified that each student is supposed to have their "letter" on the first day of registration. She later testified that the students are required to present a medical certificate on the first day of classes. She admitted this does not always happen. She

stated that hopefully they will get it within the first month. They were given some leeway but if it was not received they would be out of the school. In cross examination it was drawn to her attention that although this was, according to her, a mandatory requirement she waived it for the first note without advising or consulting the Department of Education. She was asked if the time frame of within the first month was a deadline. She responded that it was not a written deadline.

49. In cross examination Ms. Woodford stated that medical certificates are only required at the outset of the program. Ms. Woodford was asked what would happen if student contracted a communicable disease part way through the programs and she said it had never happened and she had not turned her mind toward it. She would consult with the Department of Education if it did. There was no policy or plan in place to address that situation.

50. Ms. Woodford stated that her memory is pretty good. Ms. Woodford knew quite a lot about Ms. Harvey from what she saw on television. It was also a small area and as she put it “everyone gets to know about everyone else”. This includes Ms. Harvey’s problems with oxycontin, things that she did, places she had been and that she was a very troubled child. This was discussed at the initial intake meeting. She felt that Ms. Harvey was “on the ball” and her mother was “talking about wanting to get her life straightened out” and all her problems with drugs and lifestyle. Ms. Woodford felt she could give Ms. Harvey a chance. Ms. Harvey was accepted into the program as a mature student as she did not have the educational requirements to enter on a purely academic basis.

51. Ms. Woodford recalled getting the first note from Dr. Acevedo. She felt that as the school was not “about sexual contact” it was acceptable as the students and staff were not at any type of risk. She agreed the note did not say Ms. Harvey was free of communicable disease but she felt she was giving Ms. Harvey more of a chance than perhaps she should have.

52. She felt the first three or four weeks Ms. Harvey was working fairly well. Everyone knew she would be late because of her methadone as this had been discussed between Ms. Woodford and Maureen Harvey when they first met. This was reflected in her marks which Ms. Woodford understood were 10% to 20 % of her overall course.

53. Ms. Woodford could remember the day that Ms. Harvey withdrew from the school. Ms. Harvey had been to her doctor that morning and she was late for school. She came in a taxi to see her instructor Debbie Banfield. Ms. Banfield and Ms. Harvey met in Ms. Banfield’s office. Ms. Banfield was responsible for filling out the report form. After Ms. Harvey had spoken to Ms. Banfield she came to Ms. Woodford with Dr. Acevedo’s note. She had filled out her termination report with Ms. Banfield and brought it to Ms. Woodford in her office. Ms. Harvey was upset that she had to leave and stated she was doing so on her doctor’s advice. Her doctor told her that the medication she would be going on would be make her very sick and she would not be able to continue on with her program. Ms. Woodford was happy Ms. Harvey was withdrawing from the program and she was going to get better. Ms. Woodford stated that if Ms. Harvey had

done the treatment she could have been back in with a new group of students and be done her schooling by now. Ms. Woodford honestly seemed to believe even at the date of the hearing that Ms. Harvey could be cured of her disease.

54. Ms. Woodford testified that Ms. Harvey gave up of her own free will. Only Ms. Woodford and Ms. Harvey were at the final meeting. In both direct examination and cross examination she clearly and repeatedly denied that Maureen Harvey attended any meeting with respect to Ms. Harvey's termination. She stated she had no contact with Maureen Harvey on the issue of termination. Maureen Harvey did not contact her and she would not contact the parent of a mature student.

55. Ms. Woodford testified that if Ms. Harvey had done her treatment and "got better" [sic] she would have been allowed to come back to Woodford.

56. Ms. Woodford stated if Ms. Harvey had asked to stay (which Ms. Woodford noted she did not) Ms. Woodford would have responded that she had a communicable disease, that they were putting other people at risk and Ms. Woodford would have gone to the Department of Education. She does not know what the Department of Education would do if she let someone in with a communicable disease. In cross-examination it was put to Ms. Woodford that she actually said if Ms. Harvey did not voluntarily withdraw she would be removed. Ms. Woodford denied saying this. Her attention was drawn to Exhibit SH-6, Woodford's response to the complaint. In the response Ms. Woodford stated "had Ms. Harvey not voluntarily withdrew from the program, we would have felt it necessary to terminate her attendance as she was no longer able to meet a condition of her acceptance." This document also states "Ms. Harvey understood that this certificate [the note of November 3, 200] disentitled her to carry on with her program and she voluntarily withdrew from it." (Emphasis added) No mention is made of contacting the Department. Ms. Woodford recounted another time when she had put a student out for ten days while she contacted the Department.

57. In her testimony Ms. Woodford explained that students do waxing, manicure and pedicures. They also remove black heads and pustules with needles. There is a risk of exposure to blood. She felt that there was a higher risk of such events with a student. She hoped in the real world if someone had a disease they would be selective about the type of procedures they would do but a student had to do all the procedures. Gloves are not used uniformly in manicures as they are not mandatory. In cross examination she stated that gloves were not required for all tasks but for certain tasks they were. Counsel for the Commission went through the procedures for waxing, manicures and established that the use of gloves depends on the task and the situation.

58. In cross examination she was asked if Woodford had a plan for blood spills. She explained that instructors had emergency first aid training, there was first aid training for students and kits around. When she was asked what would happen to clean up a blood spill on a surface or tool she replied "I imagine it would have to be sanitized and sterilized." She added there was no written policy or plan to inform students what to do. She was sure it was a part of the program in the theory and sanitization part.

59. In cross examination Ms. Woodford was asked if the use of latex gloves would deal with the risk of transmission to other students. Ms. Woodford stated she would go by what the doctor said in his note.

60. Although she is not an aesthetician Ms. Woodford testified that she has been giving manicures since 1969 and in her experience people do get cut when getting manicures. Neither she nor any of the other aestheticians who testified ever mentioned cutting themselves.

61. In October she had complaints from the class that Ms. Harvey had been telling her life story to her fellow students. Some of the students were alarmed by this, as were their parents. They did not want Ms. Harvey working on them. Ms. Woodford gathered the students and told them that Ms. Harvey had the same letter from her doctor as Ms. Woodford had from them and told them that Ms. Harvey had a disease which was only transmitted by sexual contact – it was herpes. As Ms. Woodford had Ms. Banfield's day planner with her she could have given exact date of the conversation. It was October 28, 2004.

62. The instructors were also concerned with the fact that Ms. Harvey was coming in and getting sick in the washroom.

63. In cross examination it was established that the time of termination Ms. Woodford did not know Ms. Harvey had hepatitis c as the note provided did not say what the disease was. She did not do any research about the disease as she did not know what disease it was and she would not know where to start. She stated that she did not even have to think about these issues because after her discussion with her doctor Ms. Harvey had to go into treatment, she was going to be very sick and she was voluntarily withdrawing until she got better.

64. In cross examination Ms. Woodford stated did not make any suggestions about accommodating Ms. Harvey and enabling her to continue as Ms. Harvey was withdrawing. She feels she supported Ms. Harvey by encouraging her to go and get better. Ms. Harvey knew she was going to be extremely sick. Ms. Harvey and her doctor had made up her mind that she was going to withdraw. The only offer of accommodation was that when she got better she could come back.

65. I note that there is no mention of Ms. Harvey stating she was going to be very sick in the termination report (Exhibit SH-4) or response from the respondent (Exhibit SH-6) Dr. Acevedo later testified that there were flu like symptoms from treatment. Dr. Acevedo did not state that his understanding was that treatment would make Ms. Harvey extremely sick. The evidence of Dr. Bursey, who later became Ms. Harvey's treating physician was clear that some patients in treatment do become extremely sick.

66. In cross examination she agreed that there was no offer to refund Ms. Harvey's tuition. When a student withdraws from a program the school is only allowed to keep the tuition equivalent to the number of weeks in the program already completed and if tuition is paid in advance they will refund the unused portion. Woodford has never refunded the used portion of tuition. She is of the view that this is the policy of all schools as she understands this is a policy sent to all schools by the Department of Education.

67. Ms. Woodford was asked in cross examination if they had a program for physical disability and discrimination. She said there was a policy in the school handbook about discrimination. This policy prohibits discrimination upon the basis of, among other things, physical or mental disability.

68. She agreed she was relieved that Ms. Harvey was doing well in her program but denied being relieved when Ms. Harvey left the school.

#### Deborah Banfield

69. Deborah Banfield is an esthetics instructor at Woodford and has been for the last four years. She has taught hairstyling, barbering and esthetics at private training institutions for a total of eleven years. She was Ms. Harvey's primary instructor during her time at Woodford's.

70. Ms. Banfield testified that Ms. Harvey was not in school the morning of November 3, 2004. She came into the class and said she needed to see Ms. Banfield privately. They went into her office. Ms. Harvey said her doctor told her she had hepatitis c. She would need treatment for about six weeks and she could not be in school as she would be very ill. She would not be able to take classes or focus on school. To Ms. Banfield's recollection it was just herself and Ms. Harvey at that meeting initially. It was later that Charmaine Furneaux came to the door and saw Ms. Harvey was crying. Ms. Harvey told Ms. Furneaux she was going to have to leave school because her doctor said she would not be able to continue. Ms. Banfield said she was shocked and sad for Ms. Harvey and they probably cried together. Ms. Banfield felt that Ms. Harvey was a very lovable girl and needed a lot of attention. They had become very close. She was sad to hear that Ms. Harvey was sick. Ms. Banfield said they questioned her and she said on her doctor's advice she had to leave school for this period of time. Ms. Harvey said she would come back to school but she had to take care of her health first. When her treatment was over she could take up where she left off.

71. Ms. Banfield had to notify Judy (Judy Rideout, the office manager at Woodford, according to exhibit SH-5, page 55) or Ms. Woodford and she would have to sign termination papers. She said this was because she knew Ms. Harvey was there on a student loan. She was shown the termination report and identified the handwriting as Ms. Harvey's. She could not recall if she went to Ms. Woodford or Ms. Rideout to get the form but Ms. Harvey did fill out the form in her own handwriting and Ms. Banfield signed it in Ms. Harvey's presence. When asked who else was in the room she stated she

believed that Ms. Furneaux was there at the end but she could not swear to that. She added that she did not keep the forms in her office so Ms. Harvey would have had to go to the office to get the form. She could not recall if she filled it out in her own office or the main office but she does remember Ms. Harvey being in her office with the report and Ms. Banfield recalls signing it herself. She was asked if she recalled meeting with Ms. Woodford and she said no, Ms. Woodford was not in her office when that paper was signed. She was asked if she and Ms. Woodford and Ms. Harvey got together shortly afterwards. She said not in her office at that time. Ms. Harvey took the papers back to Ms. Rideout's office.

72. Ms. Banfield could not recall if it was Ms. Rideout or Ms. Woodford but she was almost certain that she told Ms. Woodford about Ms. Harvey's illness. She believes she would have advised Ms. Woodford of the nature of Ms. Harvey's illness. She was asked if she showed Ms. Woodford the doctor's note and Ms. Banfield recalled that Ms. Harvey took it to the office herself. When asked if she discussed this with Ms. Woodford she said she did not remember. When asked if this might be something that occurred but she did not recall she said yes.

73. She said it appeared Ms. Harvey was upset and advised that she thought she was upset over the news from her doctor that she had to withdraw. She confirmed that Ms. Harvey had no family or a lawyer present at the time she signed the withdrawal and Maureen Harvey was not present. She stated she did not see Maureen Harvey at all that day. She was asked if she felt that in these circumstances Ms. Harvey should have family or a lawyer present. Ms. Banfield said she did not think so because she was an adult in an adult institution and it was not Ms. Banfield's place to contact family on her behalf. She said that Ms. Harvey was very clear she was acting on her doctor's advice. Ms. Banfield was asked if she offered to meet with the doctor and she said absolutely not.

74. She stated that she had questioned Ms. Harvey about what the doctor had said to her with respect to why she had to leave. Ms. Harvey told Ms. Banfield that she knew she would be receiving treatment for a period of six weeks and she would be very sick. She recalled discussing this with Ms. Woodford and that she advised Ms. Woodford that Ms. Harvey was hepatitis c positive.

75. Ms Banfield confirmed that Sonya Harvey had no problems academically but stated that she had two exams that she had done very well on. She was offered help because she had missed notes and when she wanted extra help she got it. She went through the comments in Ms. Harvey's student handbook and confirmed that these were all generally positive.

76. Ms. Banfield was asked if she had any contact with Ms. Harvey after November, 2004. She said Ms. Harvey returned to school that afternoon or the next one and gave her a nice card. She also attended the school Christmas party. She encouraged her to be around and to stay in touch so that returning would be easier. The card was filed as exhibit DB-2. She could not recall if the card was delivered that day or the next day.

Denise Hanrahan

77. Denise Hanrahan is the Superintendent of Private Training Institutions within the meaning of the *Act*. The Superintendent is responsible for review of private training institutions and their programs. Woodford is a private training institution within the meaning of that *Act* and its regulations.

78. She was asked if she could describe the registration process for schools to become approved institutions under the *Act* and regulations. She stated that the party wishing to become an approved institution must first apply. They must stipulate that they are willing to abide by the *Act* and regulations. They must demonstrate that they are capable of being bonded and there are series of reviews that occur. They look at the instructors, the program and the audited financial statements of the institution. They also look at the details of any programs that are offered. There are monitors of private training institutions called program monitors. They are responsible for monitoring the operations, programs and curriculum of institutions. They normally do an annual compliance visit which consists of an audit of documents and some student surveys. Woodford was subject to this oversight at all material times. In general terms upon receiving the application the Department of Education would have reviewed the outline and objectives to look at the type of requirements for entry, for sites and equipment and they would analyze all aspects of the application.

79. She was shown Woodford's application and agreed that their curriculum seemed to be based on a national standard for esthetics supplied by the NACC. She stated that some institutions develop their own curriculum and others purchase one. A lot of private institutions purchase the NAAC curriculums, modify them and submit them for approval by the Department of Education. She was shown Exhibit SW-1. She stated that entrance requirements are normally a part of the curriculum. To her recollection the NACC had just revised these standards but she could not say whether the NACC revisions dealt with this issue in particular. She agreed that she was not in the same position with Department of Education at the time that this application was made. She was asked if a school like Woodford was able to change the entrance requirements without the approval the Department of Education. She answered that if a school makes a change they have to apply to the Department for review and approval of the change.

80. She was asked if the requirement for a certificate stating you are free from communicable disease is a current requirement and she said that there is an ongoing review. She does not know for sure but she suspects that these standards would be included in that review. To the best of her recollection esthetics and three to four other programs are under review. She was subsequently able to provide a list of private post-secondary programs whose entrance requirements state that the students must be free of communicable disease. This was entered as Exhibit D-1. All of the programs listed are esthetics programs. All of them contain the requirement that a student be "free of communicable disease."

81. Ms. Hanrahan stated that if they were doing a compliance check and an issue arose this would be brought to the attention of the institution and they would be asked to take the necessary corrective action. Most issues are dealt with promptly and it is not necessary to look at further compliance requirements. Usually upon a follow-up it is okay. Some of the penalties that they have to enforce the *Act* are ordering that there be no new intakes and deregistering the institution.

82. She was asked if Woodford was to disregard the requirement for a medical certificate, how would that be dealt with? She said this would go into a compliance report, the Department of Education would go to the institution and ask for comment and they would follow-up on compliance. Woodford would be subject to another compliance visit and it would be reported. When she was asked if other rules or health regulations apply she said the *Act*, regulations and other provincial laws still apply. To the best of her knowledge there is a provincial act for communicable disease that lists them.

83. In cross-examination she was asked if she had ever received any request from Woodford regarding the accommodation of a student who had a communicable disease, particularly in September of 2004. She said no and advised that the first they had heard of this issue was on April 11, 2008. Likewise, she confirmed that they were not notified that there was a student who did not have her certificate that she was free from communicable disease. She was asked what would have been done if that had come to their attention that there was a student attending a program without the certificate that she was free communicable disease. She advised that they would have looked into it. She was asked if it would have been possible to modify any of the requirements of a program. She indicated that before any modification of the terms were made you would have to apply to the Department of Education. The Department then would consider whether they could modify the requirement. She was asked if she was aware of any breaches of the *Act* or regulations by Woodford and she said there were none that she knew of.

84. She confirmed that there was an annual audit called a compliance review. In a compliance review the monitor visits and goes through documents and curriculum. In addition to this they view the financial statements and conduct student interviews. When asked specifically what would happen if a medical certificate was missing she said they would go to the school and request it. They give advance notice of the monitors' visits, usually four to six weeks to ensure that students are actually in school. The files chosen for review are chosen at random. She was asked if they had been advised that an institution knew a student was not free of communicable disease what type of action would be taken? She stated a violation of the policy it would probably result in the Department looking at the particular situation. She was asked what would happen if the monitor found no medical certificate. She stated that the institution would be advised to correct the situation.

85. The adjudicator asked Ms. Hanrahan to look at the doctor's note dated September 30, 2004 and was asked if it complied with the requirement. She stated that it does not refer to a communicable disease and she was not sure if it satisfied the requirement. She added that she is not a monitor. She was shown the doctor's note dated November 3,

2004. She stated that this would appear to be a communicable disease. If noted in a file she would expect that it would need to be reviewed further and discussed with the institution, especially if this was subsequent to entrance. The Department would have gone to see if there would be additional information that could explain why in the circumstance it would be okay and in particular whether there could be accommodation of the student. She was also asked if there was a provincial curriculum for esthetics. She said there was not so they had to do a curriculum review. The file has a lot of documents with changes going back and forth. In her view it was a process that involved both the Department of Education and the institution.

#### Dr. Acevedo

86. Dr. Francisco Acevedo testified that he was Ms. Harvey's doctor from September 8, 2004 until December 5, 2005, although he last saw her personally on November 14, 2004. He saw her approximately 20 times.

87. Dr. Acevedo stated that hepatitis c is a disease transmitted by a virus that affects the liver. It is transmitted mainly by blood or sexual contact. He was not able to say how readily the disease can be transferred but was able state that it is transferred mainly by blood-to-blood contact, such as when a blood contacts an open wound or mucous to mucous contact, as in sexual relations. He testified that it is not as common as hepatitis b and affects mostly intravenous drug users and people involved in high risk activities like prostitution. He indicated that the risk of transmission depends on the activities one is engaged in. Social interaction or sharing a drink are unlikely to transfer it. More intimate contact is required. One would try not to have contact with the carrier with bare skin or to have contact with their blood. Dr. Acevedo explained that while the risk of infection was very minimal if precautions were used, it was possible a glove could have a hole in it and blood to blood contact could occur. This applied not only to hepatitis c but also to hepatitis b and HIV.

88. Dr. Acevedo's records indicate that Ms. Harvey saw him on September 30, 2004 for a note for blood work. He saw Ms. Harvey on October 20<sup>th</sup> but his notes do not show that they discussed her hepatitis, so he reasonably surmises that he did not have the results yet. His usual practice when getting a positive test is to ask his secretary to contact the patient and ask them to come in for an appointment. Dr. Acevedo met with Ms. Harvey on November 1, 2004 to discuss her test results. His notes indicate that at that meeting Ms. Harvey was crying and pretty upset. He recommended to her that she stop her studies until she got treatment for the disease and that she not attend school. He gave her a note for the period November 1, until December 31, 2004, excusing her from school. The note was not retained in his file. He advises that she came back on November 3, 2004 because she wanted a different note explaining the disease to give to her school. She was very enthusiastic about her schooling. She was going through a hard time and this was a part of her recovery. This disease would not allow her to continue school until it was treated and she was very upset.

89. Dr. Acevedo stated that he would refer her to a gastroenterologist for treatment. He does not perform the treatment himself but understands that it completely eliminates the virus. He does not know the duration of treatment and he understands the most common side effect of the treatment is flu like symptoms. He gave the note telling her to take until December as the time for the referral appointment would entail some delay owing to the limits of the healthcare system. He knew she would not start treatment until the New Year.

90. Dr. Acevedo was not able to advise as to guidelines about practicing physicians with hepatitis c. He was asked a number of questions regarding methadone treatment on fine motor skills. He stated that while patient was on a regular dosage there should be no impact, however he also stated that his practice did not include many patients on methadone.

### Jackie Lake

91. Jackie Lake is an esthetician who graduated in June of 2005. She was in Sonya Harvey's class. Prior to attending school she had been a secretary for about twenty years. There were about fifteen students in her class at Woodford Training Centre. Sonya Harvey was one of them. She was a lot older than the other students and was referred to as a "mother hen." She sat next to Ms. Harvey. She stated that Ms. Harvey was fine as a seatmate.

92. Ms. Lake wrote up her notes during the day. She would type them up and put them in a binder in the evening making it easier for her to study. Near the end of October, Ms. Banfield asked her if she would lend Ms. Harvey her notes to photocopy. She was a little uncomfortable with this but said she would do it as long as Ms. Harvey still had to try and take her own notes. Ms. Harvey gave her a hug and said thank you. It is not certain how much utility Ms. Harvey got to make of this because she left shortly after while Ms. Lake brought them in.

93. She discussed how students worked on each other as partners and were paired up together on a day-to-day basis. She stated that some girls paired up with each other a lot and she had been paired up with Ms. Harvey. She was asked if she recalled any particular experience and she said that when she was receiving a pedicure she was a bit cautious. She said Ms. Harvey was doing it to her and her toenails were short as they did them every week. Cuticle nippers are tiny scissors which are used to clip away dead skin. She was going to use the nipper on Ms. Lake and Ms. Lake pulled her foot back and said just do a massage. She was concerned that Ms. Harvey might cut her. She was asked if she had ever seen any blood drawn in this process and she said sometimes this happened. She was asked what she observed as Ms. Harvey's behavior and she said some days it was good and some days she was not herself. She was in a bit of a daze.

94. She was asked if she heard any stories from Ms. Harvey with respect to activities outside of the school. This question was objected to and it was ruled to be a proper

question. Ms. Lake answered that she did not know if these were in her past but she mentioned some things, stories that were kind of a bit shocking. These stories involved stripping and sleeping with people for drugs. She noticed people were reluctant to be paired up with Ms. Harvey after hearing these types of stories. She was asked why she was hesitant about being paired up with Ms. Harvey. She felt there was always the possibility when doing some of these activities of cutting someone and drawing blood. After hearing stories that Ms. Harvey had been an intravenous drug user she thought “what if?” She was asked if she provided a certificate to the school as required and she said yes. She was asked what her understanding was about people in her profession with hepatitis c. She stated that they could wear gloves but there was still a risk because they were using sharp objects and there was always the possibility of a puncture.

95. She was asked what she would do if she had hepatitis c. She said she would go back to being a secretary as she would not be able live with herself if she caused somebody else to develop hepatitis c.

96. In cross-examination she was asked how often she worked on Ms. Harvey. She advised that it was more than once and no more than half a dozen times. She was asked if she or Ms. Harvey ever got cut and said no. She was asked to explain her “what if” statement. She said when you found out someone is an intravenous drug user you wonder “what if I catch something from her?” She was asked if she was afraid of catching hepatitis c and she said she did not know that but was thinking more along the lines of HIV. While she provided a certificate that she was free from communicable diseases to the school, she did not have to submit a certificate to her new employer. She assumed that they went by the certificate provided to Woodford but was not able to say for sure. Since she has become an esthetician nobody has required a certificate that she is free from a communicable disease and she assumes that all of her employees subsequent have been relying upon her original certification.

#### Jacqueline Howell

97. Like Ms. Lake, Ms. Howell is also employed as an esthetician and was in the same class as Ms. Harvey. When asked to describe what she did, she said she did manicures, pedicures, make up, and waxing. She works at a full service salon. She felt she generally got along fine with Ms. Harvey. When asked how the other students got along with her she stated that with fourteen girls together there would obviously be some problems. She was asked if Ms. Harvey related any stories to her. She stated that one story was that she was sleeping with a lawyer who would give her money. She would see his kids and things like that. She understood that this was an ongoing relationship. She stated that other students heard this story and their reaction was that they were surprised. She stated she knew who Ms. Harvey was before she came to school so she was always a bit wary of her. She knew a bit of her past through a mutual friend. She was warned that Ms. Harvey was a heavy drug user and this was also on television. Like other students she was worried about the possibility that Ms. Harvey may “have something.” She stated that she had partnered with Ms. Harvey. She felt that Ms. Harvey was a little standoffish

and she talked a lot about her history, about being an oxycontin user. She was asked what the significance of the oxycontin use was to her. She stated that she understood enough about oxycontin addiction to know that some of those people will sleep with people for money. Nobody said that Ms. Harvey had anything but it was always in the back of her mind.

98. She was asked what the obligation would be if an esthetician had hepatitis c. She felt you would have to tell people and that there were certain procedures that you pretty well would not be able to do.

99. In cross-examination she was asked why she attended the hearing. She stated that Ms. Woodford called, she was in despair and wanted someone to testify. When asked if she was friends with Ms. Harvey, she stated that they were acquaintances. She was asked if she was concerned about potentially catching something from Ms. Harvey and she said yes it was always in the back of her mind. She was asked what exactly she was worried about and stated it was her drug use. She stated she was worried she might catch something because of this. She confirmed that she was worried not just because of what she had heard in the media but because of what she heard from a mutual friend. As with the previous witness she was asked if she needed a certificate before she started to work in esthetics. She stated no they did not require a certificate. Like the previous witness she assumed that they relied upon the school. She was asked if this bothered her and she said not really. It was pointed out to her that this also means that all of the estheticians may not have medical certificates and she acknowledged that this meant they could also have a communicable disease.

100. She was asked what would she do if she found out she had hepatitis c. She stated she would tell her employer. She was asked if she would still work and she said yes. She would be more careful.

#### Dr. Bursey

101. Dr. Ford Bursey graduated from Memorial University in 1982 with a medical degree. He interned for one year and then did three years in internal medical with two years in gastrointestinal at the University of Ottawa. He started at the Health Sciences Centre in St. John's in August of 1988 and has been there ever since. His specialty is internal medicine with a certificate of special competence in gastrointestinal matters. He deals with contagious diseases in particular. He was asked if there was a difference between communicable and contagious diseases. He stated that there was no significant difference between them as neither was a term that the medical profession used. Doctors talk about infectious diseases. The distinction in the medical practice is infectious versus non-infectious diseases.

102. He was asked to explain what hepatitis c was. He says when he started training hepatitis c was not called hepatitis c. It went by the name of "non a, non b." It became c after the discovery of a marker for that particular virus. At that time there was no

effective therapy for non a non b hepatitis. Hepatitis c falls into an area of training which is seen by gastroenterologists, hepatologists, infectious disease specialists and family doctors. It is known that there are different varieties of hepatitis c and certain varieties respond better than others to treatment. These are all essentially strains of the same virus. Hepatitis a, b, and c are different diseases. The designation of a, b, or c is just an easy naming convention which developed as the viruses were discovered and has nothing to do with the relationship of the illnesses. He indicated that they are now up to “g” and “h”. This type of infection is a virus that predominately affects the liver. It is also clear that it circulates in the blood but the biggest load of the virus is in the liver. The virus is found in the blood of infected persons. In most adults the virus inserts itself into the liver cells and begins to replicate itself. As the liver responds inflammation occurs. It is the body’s immune response which causes damage to the liver. The healing causes scarring (fibrosis). This network of scar tissue develops into cirrhosis. The sequence of infection is infection, fibrosis, and cirrhosis.

103. If an adult is exposed to the virus 60-80% will go on to have a chronic infection. This is a virus that the body is not so good at getting rid of in contrast with hepatitis a, which people have the ability to completely clear themselves of. Between 60-80% of people infected with hepatitis c keep it. There is no vaccine for it at the moment. Dr. Bursey was asked if there was a cure for hepatitis c. He stated that they do not really talk about a cure. The terminology used to discuss hepatitis c is control and suppression as opposed to cure. In some people who get treatment (these people are called responders) there is no longer a measurable amount of virus. Some respond during treatment and with some of the responders they will not be able to detect the virus for 6-12 months, however, it comes back. There is ongoing research into where the virus remains during these undetectable periods. There are some sustained responders but they are not sure that these people are completely rid of the virus. Follow-up studies show that there are benefits to treatment. If you respond but the virus again becomes detectable the rate of problems and liver damage goes down.

104. When he was asked how common hepatitis c was in Canada he indicated it depended on where you look and how hard. Hepatitis c is not usually looked for in the general population. They have a guess as to the exposure based on data from before blood was tested for hepatitis c. Looking at the various factors it is estimated there are about 250,000 Canadians that have the virus and do not know, however, he stressed that this was a guess. He stated that most infected people do not have symptoms. When he was asked what percentage of people do not have symptoms he explained that most people cannot recall when they were exposed. Even where there is a single exposure they cannot recall if they suffered any flu like symptoms around the time of the exposure. Most new infections are referred to as sub clinical or asymptomatic. He testified that people who are unaware of the fact that they are infected can act as carriers of infection.

105. Dr. Bursey was asked what are some of the ways the infection is transferred. He indicated that it was usually contact with bodily fluids and the most common way by far was intravenous drug use. It has also been transmitted by blood transfusions prior to the new testing regime. They now have fairly good control in terms of blood transfer,

however, the risk is never zero or 100% safe. The infection is a very, very low risk to get today through blood transfusion. In higher risk areas of the world where they do not do proper testing the risk of transfer can be as high as 10%. The phrase "I.V. drug user" covers people who use in different ways. People who are snorting cocaine are viewed as I.V. drug users and can spread the disease by sharing a spoon or straw. Essentially I.V. drug users refer to people involved in the drug culture and it is not an expression in the medical community that is viewed as being isolated to needles.

106. Dr. Bursey was asked if there were other ways that the disease could be spread and he indicated it can be spread by the sharing of razors or anything that might cause you to cut yourself and cause a small amount of blood. This is high risk because it involves a mixing of blood. Near skin contact with body fluids is not high risk. When he was asked about sexual transmission he said there was no answer. It is suspected that the risk of transmission in a long-term stable monogamous relationship is .1% or less if the couples use a barrier. High-risk behaviors involve multiple or anonymous partners although it is hard to determine if it is the multiple exposures or that these types of behaviors also tend to accompany other high risk behaviors such as I.V. drug use. He did clarify that if a partner has hepatitis c and you have been in the long-term monogamous relationship for ten years the risk is less than .1% and normal sexual behavior, i.e. without barriers, is not discouraged at that point. Other ways of transmission are unsanitary tattooing and piercing and the use of unsanitary instruments can spread hepatitis c. He was asked about the transmission from mothers to babies and he said the risk was very small. With hepatitis b there is some suggestion that having a cesarean delivery helps as most child born through a normal vaginal delivery get hepatitis b. The risk is significantly decreased with a cesarean section. Hepatitis c is not the same. He was asked if there was any recommendation made with respect to having children. He indicated that with hepatitis c having children is not contraindicated. There is some risk but it is not high enough to recommend against having children.

107. He was asked if one were exposed to blood in the work place would certain procedures be in order. He indicated that whenever you get exposed the risk of infection is as high as 60-80%. He was asked what precautions he would use. He indicated that the barrier method was the most common. He wears gloves all the time. He was asked if he did this when he knew he was with someone who was infected. He said this was a universal precaution taken with all people as there are people out there with hepatitis c or other infectious diseases that are not known. He asked if all physicians followed this practice and he said they should but in any event it was his practice. He indicated that if an infected blood exposure occurs there is a needle stick protocol. This includes testing the needle stick victim, the person whom the needle had been in and potentially the use of prophylactic immunoglobulin or other drugs. He indicated that no matter how many pairs of gloves you wear there is always the possibility of a needle stick. He indicated that everybody has had paper cuts and there is always a risk. He was asked if there was a different risk in transmission between needle stick and blood splashes and he said that he was unable to comment on that because in order to do this you would have to set up a controlled experiment with deliberate exposure and obviously nobody was going to do that.

108. Dr. Bursey confirmed that Ms. Harvey was his patient. He indicated that he saw her on two occasions. He met with her and her parents and they discussed whether treatment was appropriate (it was) and when she would take it. He was asked if treatment had taken place and he said that it has not. He was asked if she requested a medical certificate and he indicated that he has no record of such a request. He was asked if he had ever had any request for a certificate stating somebody was free a communicable disease and stated not that he could remember. He was asked if he had any recollection of a patient being exposed to the virus in the workplace and he stated that he personally had no recollection of a patient that has ever been exposed to hepatitis c in the workplace. He stated that most of his patients had gone through high-risk activity. He said some of them were willing to share their history of risk and some of them were not. It is not required from a clinical perspective to determine exactly how the virus exposure occurred. Where you got the virus is not particularly relevant to the decisions with respect to treatment. He asks and if somebody tells him he makes a note, if they choose not to share then that is that. He was asked if one can continue to work with hepatitis c. He indicated that there are patients today undergoing treatment who do continue to work. He confirmed that a patient could work while receiving treatment. He was asked if you can continue to work before treatment. He indicated that this was a choice people make for themselves. He stated "it is a condition that with appropriate precautions is low risk for transmission." He also clarified that it was not zero risk. He went on to clarify that there was always the possibility of an accidental exposure and that most medical practitioners take universal precautions on a routine basis as opposed to on a case-by-case basis.

109. In cross examination Dr. Bursey was advised that when you are dealing with an esthetics program the practitioners regularly use cuticle nippers and lancets as well as scissors. He was asked if the skill of somebody in training would be different than the skill of an experienced practitioner. The doctor indicated he would assume so. He indicated he took him a while to teach his son to use nail clippers and any new skill takes time to develop. He stated that most people do know how they got hepatitis c but not everybody is willing to share with him. It may also be that people were under the influence of alcohol at the time that they engaged in the high risk behavior and do not recall. It was suggested to him that just because no cases were identified as having been caused in the workplace does not mean it is not happening. He agreed that this was correct.

110. He indicated that standard precautions for somebody with hepatitis c include not sharing nail clippers and razors, however, they do not suggest that you give up behaviors like kissing. Counsel for the Respondent reviewed the needle stick protocol and Dr. Bursey agreed that this was not practical to put in place in an esthetics salon. He was asked if he wore gloves all the time. He said not when he was seeing people in clinic taking a history but when doing procedures or using a needle he does wear gloves. He was asked would he be more cautious if his patient had hepatitis c and he indicated that the idea with universal precautions was to use the same level of care with everyone. Some views were that if you changed the routine you are more likely to make a mistake

because now you are thinking about it. He agreed that the level of risk of exposure in the health profession is higher. Dr. Bursey indicated that some people choose to leave the profession in order to avoid the risk. Some surgeons even stop operating. He is aware that he exposes himself to a risk every time he sees a patient and performs a procedure. He was asked if he was aware of any medical ethical requirements for a physician with hepatitis c. He indicated his understanding that the courts were still trying to sort this out. He said in some senses it was similar to the army's behavior with respect to homosexuality i.e. do not ask, do not tell. He is aware that there has been one case of a physician whose license was suspended for putting patients at risk. It was put to him that hepatitis c was only understood fairly recently and he indicated that the starting point would really be in the 1989 to 1991 range.

111. A number of questions were asked by the adjudicator. Dr. Bursey was asked when was his first appointment with Ms. Harvey. He indicated that it was July 19, 2007. He was asked what the treatment for this disease was and he said there were two basic protocols. In one of them you took two types of drugs for 48 weeks and in the other one you get two types of drugs for 24 weeks. There is an injection of interferon and an oral medication taken. The dosage varies depending upon the type of virus. The side effects of interferon include flu like symptoms. This is a natural response to the presence of interferon. This can include stomach upset, fever, aches and pains, and chills. This drug is given in a high dose. For most patients if they take gravol and Tylenol by the third day most of the symptoms are gone. Some people do not get any symptoms. Some people get to the point where they consider ending treatment. Those are the major side effects but they are considered by the medical practice to be a nuisance. There can be some other side effects and as a result of this the treatment is generally not given to people with uncontrolled autoimmune disease. Depression is a side effect. Having been depressed is not contraindicated but if there is any issue with respect to active depression the treatment is generally not given. Standard protocol is to involve the psychiatrist. The oral medication can cause anemia. White blood cell count will go down leading to an increased risk of infection and platelets which are involved in clotting also go down. The general protocol is to ensure that liver enzymes are in an appropriate range prior to commencing treatment. This treatment has been the same for about five years. The result of the treatment can be that the viral level is undetectable but nobody is viewed to be free of the virus. He was asked if he could issue a certificate stating that somebody was free of communicable disease. He indicated that he did not think he could do that without a battery of tests. He was not aware of anybody who had been infected with hepatitis c while administering needles. He was asked if there were any differences in the treatments for hepatitis c since 2004. He indicated that around 2004 injections would have occurred approximately three times a week. A person receiving three injections of interferon a week would be sicker and the current treatment has fewer side effects. He currently has about 15 patients receiving treatment in the range of 24-48 weeks. Nobody is treated for more than a year. He stated that while this is similar to the old protocol the current system is better tolerated and more efficacious.

Charmaine Furneaux

112. Charmaine Furneaux testified that in November of 2004 she was employed by Woodford as a lab demonstrator for the esthetics program. She started this work on a part time basis in September of 2004. On the day Ms. Harvey was terminated from Woodford she was working in the lab with students. She went into the office to obtain some products for class and saw Ms. Harvey with Ms. Banfield. She asked if something was the matter as Ms. Harvey was crying. Ms. Harvey advised her that she was not going to be able to stay in school. She said she had a letter from the doctor, she was sick and she had to go for treatment. To the best of her recollection the only people present were herself, Ms. Harvey, and Ms. Banfield. When asked if she knew Maureen Harvey she indicated that she thought she had seen her at the school but she cannot picture her. She believes she came in for either a manicure or pedicure but she does not recall for certain. To the best of her recollection that is the only time that she saw Maureen Harvey.

113. In cross-examination she clarified that she was in the office on the esthetics side of the Woodford's facility which is essentially Ms. Banfield's office. This is just off the lab. In questioning on cross examination she clarified that she seemed to recall that she met Maureen Harvey on the day that some media came in, either CBC or the Evening Telegram, to interview Ms. Harvey. To the best of her recollection she was only in the office with Ms. Banfield and Ms. Harvey for approximately four to five minutes. She indicated that the tools used in esthetics included cuticle nippers which are used for manicures and pedicures, cuticle pushers which have a sharp end and a curved end, ingrown toe nail files which are used to lift the toenail, nail files, some of which are disposable and eye brow tweezers which are pointed. In addition in the waxing procedures there is the possibility of skin being torn. Finally they used scissors and disposable lancets. The disposable lancets are put in a biohazard sharp container. Cuticle nippers and eyebrow tweezers are placed in barbicide between use. Reusable items are washed in antibacterial soap. Antibacterial spray is used on items afterwards. When asked what procedures people wore gloves for she indicated they were used in pedicures, facials when the lancets were used and waxing.

**THE POSITIONS OF THE PARTIES**

114. Ms. Harvey and the commission take the position that upon advising Woodford of her diagnosis she was told she had the option of withdrawing from the esthetics program voluntarily or be terminated. Her decision to accept the option of "voluntary withdrawal" was not truly a voluntary one and she was actually terminated against her will. This constitutes a discriminatory act by Woodford as it denied her a service which members of the public have access to on the basis of her having hepatitis c. They take the position it would have been possible to accommodate Ms. Harvey's disease with relatively simple precautions and it would not involve any undue hardship for Woodford.

115. Woodford takes the position that Ms. Harvey voluntarily withdrew from the school and did so on her doctor's advice. There was no discrimination. There was no attempt to accommodate her disability as she was voluntarily withdrawing on the advice of her doctor. The requirement that she be free from communicable disease was a condition imposed by the Department of Education. Disregarding this requirement could result in the program being shut down by the Department of Education. The risk of transmission of disease could not be eliminated so there would always be a risk to staff, students, and clients. Allowing Ms. Harvey to continue as a student would also expose Woodford to potential liability. In short no reasonable accommodation was possible. Finally, Ms. Harvey could not be relied upon to implement routine precautions. Even if accommodation of the disease was possible it was not possible to accommodate Ms. Harvey in particular.

### **APPLICABLE LAW**

116. Section 2(1) of the *Code* defines "physical disability" as follows:

"physical disability" means any degree of infirmity, malformation or disfigurement of the body suffered by a person as a result of injury, illness or birth defect, and includes a handicap resulting from epilepsy, paralysis, lack of co-ordination, amputation, blindness, deafness, muteness or reliance upon a dog guide, a wheelchair, a cane or crutch or other remedial appliance or device".

117. The prohibition on discriminating on the basis of physical disability is contained in sections 6(1) and 6(2) of the *Code* which state:

"(1) A person shall not deny to or discriminate against a person or class of persons with respect to accommodation, services, facilities or goods to which members of the public customarily have access or which are customarily offered to the public because of the race, religion, religious creed, political opinion, colour or ethnic, national or social origin, sex, sexual orientation, marital status, family status, age, physical disability or mental disability of that person or class of persons.

(2) Notwithstanding subsection (1), a limitation, specification, exclusion, denial or preference because of physical disability or mental disability shall be permitted if that limitation, specification, exclusion, denial or preference is based upon a good faith qualification."

118. These sections essentially parallel the wording of section 9 of the *Code* which prohibits discrimination in employment and reads as follows:

**9.** (1) An employer, or a person acting on behalf of an employer, shall not refuse to employ or to continue to employ or otherwise discriminate against a person in regard to employment or a term or condition of employment because of

(a) that person's race, religion, religious creed, political opinion, colour or ethnic, national or social origin, sex, sexual orientation, marital status, family status, physical disability or mental disability; or

(b) that person's age, if that person has reached the age of 19 years,

but this subsection does not apply to the expression of a limitation, specification or preference based on a good faith occupational qualification.

119. The test for determining if there has been prohibited discrimination in employment was stated by the Supreme Court of Canada in *British Columbia (Public Service Employees Relations Commission) v. British Columbia Government and Services Employee's Union (Meiorin grievance)* [1999] 3 S.C.R. 3. First, the complainant must establish a prima facie case that an impugned standard is discriminatory. Once this is established the onus shifts to the respondent to establish on the balance of probabilities that the standard is a bona fide occupational requirement.

120. The test as outlined in *Meiorin* was applied to discrimination in the context of employment. This test was applied by the Supreme Court of Canada in the context of the provision of services in *Council of Canadians with Disabilities v. Via Rail Canada Inc.* [2007] 1 S.C.R. 650. In that case the Court stated:

**119** When assessing the scope of an applicant's right not to be confronted with undue obstacles to mobility, the Agency is bound by this Court's decision in *Meiorin*. *Meiorin* defines the balancing required to determine whether a workplace obstacle or standard unjustifiably infringes human rights principles. An impugned standard may be justified "by establishing on a balance of probabilities":

- (1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;
- (2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
- (3) that the standard is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer. [para. 54]

**120** The same analysis applies in the case of physical barriers. A physical barrier denying access to goods, services, facilities or accommodation customarily available to the public can only be justified if it is "impossible to accommodate" the individual "without imposing undue hardship" on the person responsible for the barrier. There is, in other words, a duty to accommodate persons with disabilities unless there is a *bona fide* justification for not being able to do so.

**121** The concept of reasonable accommodation recognizes the right of persons with disabilities to the same access as those without disabilities, and imposes a duty on others to do whatever is reasonably possible to accommodate this right. The discriminatory barrier must be removed unless there is a *bona fide* justification for its retention, which is proven by establishing that accommodation imposes undue hardship on the service provider: *Commission scolaire régionale de Chambly v. Bergevin*, [1994] 2 S.C.R. 525 ("*Chambly*"), at p. 546.

**122** In *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at para. 79, this Court noted that it is "a cornerstone of human rights jurisprudence that the duty to take positive action to ensure that members of disadvantaged groups benefit equally from services offered to the general public is subject to the principle of reasonable accommodation", which means "to the point of 'undue hardship'". Undue hardship implies that there may necessarily be some hardship in accommodating someone's disability, but unless that hardship imposes an undue or unreasonable burden, it yields to the need to accommodate.

**123** What constitutes undue hardship depends on the factors relevant to the circumstances and legislation governing each case: *Chambly*, at p. 546; *Meiorin*, at para. 63. The factors informing a respondent's duty to accommodate "are not entrenched, except to the extent that they are expressly included or excluded by statute": *Meiorin*, at para. 63.

**124** In all cases, as Cory J. noted in *Chambly*, at p. 546, such considerations "should be applied with common sense and flexibility in the context of the factual situation presented in each case".

121. The test to be applied in cases where there is an allegation that services have been denied in violation of section 6(1) of the *Code* is in essence the same as that for discrimination in the context of employment. First the complainant bears the onus of establishing a prima facie case that the complainant was denied a service on the basis of a standard that is discriminatory. Having established this, the onus then shifts to the respondent to establish that the impugned standard is a *bona fide* requirement, or, as it is expressed in section 6(2) of the *Code*, a good faith qualification. To determine if an impugned standard is a good faith qualification, the respondent must show:

- (1) that the service provider adopted the standard for a purpose rationally connected to the provision of the service;

- (2) that the service provider adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate purpose related to the provision of the service; and
- (3) that the standard is reasonably necessary to the accomplishment of that legitimate purpose related to the provision of the service. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individuals sharing the characteristics of the claimant without imposing undue hardship upon the service provider.

### **FINDINGS OF FACT AND ANALYSIS**

122. Having carefully considered all of the testimony, the exhibits filed and the submissions made and case law filed by counsel, I make the following findings.

#### *Issue 1*

123. The first issue to be resolved is one of fact. Did the Complainant voluntarily leave the program on her doctor's advice or was she forced from the Respondent's esthetics program because she suffered from Hepatitis C?

124. On this issue there is a marked difference in the facts as alleged by each side. The Complainant states that after her diagnosis she met with Ms. Woodford. Ms. Harvey recalls that her mother and possibly Ms. Banfield were present at the meeting. When asked what Ms. Woodford told her at that time she replied "I could either terminate myself or be terminated." She then testified, "I voluntarily withdrew to save myself the humiliation."

125. The Complainant's mother thought that her daughter had a meeting with an instructor and maybe with Ms. Woodford. She attended the school the following day on her daughter's behalf. She recalled that on that following day herself and her daughter met with Ms. Woodford and Ms. Banfield. She was somewhat familiar with the concept of reasonable accommodation as she had worked with a health board as a research analysis. They talked about what accommodations could be made for Ms. Harvey to continue. They discussed transferring her to another program at the school such as hairstyling. Maureen Harvey's objective was to see if anything could be done to keep Ms. Harvey in esthetics or another program. She was told this was not possible. Her recollection was that her daughter was told something similar to resign or we will fire you.

126. Ms. Woodford denies that there was any such meeting. She states that Ms. Harvey was not accompanied by her mother. Ms. Harvey told her that she was going to receive treatment which would make her very sick. Ms. Woodford repeated this several times in direct and cross. She understood the treatment would make Ms. Harvey very sick, but it would cure her. When Ms. Harvey was cured she could return.

127. She is supported in this recollection by Ms. Banfield who did not recall meeting with Maureen Harvey. Ms. Woodford recalls that the only time she would have seen the document with respect to the withdrawal was when it was shown to her, probably by Ms. Banfield.

128. Sonya Harvey testified in a generally straightforward manner. Her answers were not defensive or evasive, however, she did state in direct that her history of drug use left her with problems with long and short-term memory. She recalled meeting with Ms. Woodford after her meeting with Ms. Banfield. She recalled that her mother and possibly Ms. Banfield were present at the meeting. She could not recall if her mother was present when she signed the withdrawal form but believed that Ms. Woodford and Ms. Banfield were there. Given her stated memory problems it would be difficult to accept Ms. Harvey's evidence uncorroborated. Her evidence is corroborated to some extent by the testimony of Maureen Harvey.

129. Maureen Harvey testified in a straight forward and non-evasive fashion. Ms. Harvey stated that she recalls being contacted by her daughter on a Monday evening. She remembers this because she is a member of the MADD Board of Directors and they meet on Monday nights. Her testimony was that she was most concerned about whether her daughter could stay in school. She indicated she did not go to the school initially. She went the following day. She recalled that she, her daughter, Sandra Woodford, and Debbie Banfield were present at the meeting and at the meeting they discussed what accommodations could be made. They discussed transferring her to another program and she stated her objective was to see if anything could be done to keep Sonya in esthetics or to place her in another program.

130. While Debbie Banfield testified in a straight forward and un-evasive manner Sharon Woodford did not. She had to be directed to answer questions on more than one occasion and answered questions by discussing where counsel for the commission "was going" with her questions. This is not fatal to her credibility as it is clear she takes personal affront to being accused of discriminatory actions. This behavior does not, however, assist her credibility. Given her statements about Ms. Harvey being sick and staff having to clean it up and the events of October 28, 2004 I find it difficult to believe she would not have felt some relief in Ms. Harvey withdrawing from the school.

131. In this case the issue of credibility must ultimately be resolved by examining uncontested evidence which corroborates one version of events in order to determine on the balance of probabilities what occurred. Both Ms. Woodford and Maureen Harvey agree that Maureen Harvey attended the initial meeting when Sonya Harvey wished to apply for a position at Woodford Training Academy. The testimony of Maureen Harvey indicates that she attended on her daughter's first day of school to take pictures. She attended her daughter's first "client day." Her daughter testified that she was uncertain whether her mother attended the initial meeting with Sandra Woodford when she was applying to school but stated that her mother does that a lot. Each day of the hearing either Maureen Harvey or (when she was excluded from the hearing room) her husband attended. Finally Maureen Harvey's uncontradicted and unchallenged evidence was that

she was aware of the duty to accommodate due to her past work with a health board as a research analyst. In all of the circumstances I find it difficult to believe that upon discovering Ms. Harvey was hepatitis c positive and would have to withdraw from school Maureen Harvey would remain completely uninvolved and to make no attempts to intervene and assist her daughter. It is clear from the testimony of all parties that at every step in which it was possible and appropriate for her to become involved she did so.

132. Also of assistance is the testimony of Dr. Acevedo. Dr. Acevedo testified that he met with Ms. Harvey on November 1, 2004 to discuss her test results. He recommended to her that she stop her studies until she got treatment for the disease and that she not attend school. He gave her a note for the period of November 1, 2004 until December 31, 2004 excusing her from school. The note was not retained in his file. Presumably it was given to Ms. Harvey. He advised that she attended again on November 3, 2004 to get a different note explaining about the disease to give to her school. From Dr. Acevedo's perspective this disease would not allow her to continue school until it was treated and she was very upset. Dr. Acevedo stated that he would refer her to a gastroenterologist for treatment. He did not perform the treatment himself but understands that it completely eliminates the virus. He does not know the duration of treatment but understands the treatment produces flu like symptoms. He did not say that the treatment would render her incapable of attending school. In fact he initially provided her with a note excusing her from school for the period prior to when he expected her treatment to occur. There is nothing in his evidence to suggest that he would have told Ms. Harvey the treatment would render her unable to attend school. Looking at the investigation report and exhibits filed it appears that this concern with treatment was not mentioned until Ms. Harvey testified. Ms. Woodford certainly made no mention of this in her written responses. She placed a great deal of emphasis on this factor, however, in her oral testimony which occurred after that of Ms. Harvey.

133. The testimony of Dr. Burse shows that Dr. Acevedo was mistaken as to the efficacy, effects and duration of treatment, however, I have no doubt that Dr. Acevedo advised Ms. Harvey she must leave school. To that extent this is consistent with the statement contained in Exhibit SH-4 that "upon advice from Dr. Acevedo I am withdrawing from the esthetics program due to medical reasons (I will be treated for communicable disease)," and consistent with the evidence of Ms. Banfield.

134. I note, however, that the termination report goes on to read "after I have undergone treatment and is [sic] cleared by my doctor I wish to return to this program." The first note which excused her until December 31, 2004 was never provided to the school. If Ms. Harvey's intentions were to simply withdraw as advised by her doctor the first note would have been sufficient. The timing of the two notes is also interesting. A review of the calendar shows that November 1, 2004 is in fact a Monday. This is consistent with the recollections of Maureen Harvey. In addition the note of November 3, 2004 was sought two days after Sonya Harvey spoke with her mother and fits with the time line that her mother recalled seeking and receiving a meeting with Ms. Woodford and Ms. Banfield. Seeking a note with a better description of the disease together with the statement that she wishes to return to the program upon receiving treatment is more

consistent with seeking reasonable accommodation than merely withdrawing from school, especially when a note clarifying the risk of transmission had previously been successful for Ms. Harvey.

135. I also note that Ms. Woodford clearly stated in Exhibit SH-6 that Ms. Harvey understood she was disentitled from carrying on in the program and if she had not withdrawn Woodford would have terminated her attendance. These statements tend to corroborate Ms. Harvey's version of events.

136. I find on the balance of probabilities that the independently verifiable information corroborates the versions of events provided by Ms. Harvey and more importantly that provided by her mother. Accordingly I find that sometime on November 3, 2004 the termination report was signed by Ms. Harvey and that at some point that day she and her mother met with at least Sharon Woodford to seek some accommodation of her disease. Given Ms. Woodford's testimony that she understood the requirement was mandatory and imposed by the Department of Education I have no trouble concluding that Ms. Woodford advised that accommodation was not possible and that Ms. Harvey would either have to withdraw voluntarily or be terminated. While in real terms there is probably little difference between the two options I have no hesitation in concluding that Ms. Harvey would have viewed it as more desirable to withdraw from the program than to be terminated. I find that the requirement that she be free of communicable disease was again brought to Ms. Harvey's attention at the time she disclosed that she had hepatitis c and that it was explained to her that as a result of the requirement she would have to withdraw voluntarily or be terminated from the program. When she (or more likely her mother on her behalf) sought some accommodation she was told that there could be none. In these circumstances Ms. Harvey filled out and signed the termination report, but she did not do so of her own volition.

### *Issue 2*

137. Having concluded that the Complainant was forced from the Respondent's esthetics program as a result of her diagnosis of hepatitis c I must consider whether this was a breach of section 6(1) of the *Code*.

138. In some cases the question of whether or not there is a disability present is in issue. In this case the Respondent correctly conceded that the presence of hepatitis c is a degree of infirmity as a result of illness and is a physical disability within the meaning of section 6(1) the *Code*. As Ms. Harvey was forced from the Respondents program as a result of her physical disability, it follows that this is prima facie a breach of section 6(1) of the *Code*.

*Issue 3*

139. This does not, of course, end the analysis. Upon the finding of a prima-facie case for discrimination the onus shifts to the Respondent to show that the discriminatory standard is a good faith qualification.

140. To determine if an impugned standard is a good faith qualification, the respondent must show:

- (1) that the service provider adopted the standard for a purpose rationally connected to the provision of the service;
- (2) that the service provider adopted the particular standard in an honest and good faith belief that it was necessary to the fulfillment of that legitimate purpose related to the provision of the service; and
- (3) that the standard is reasonably necessary to the accomplishment of that legitimate purpose related to the provision of the service. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individuals sharing the characteristics of the claimant without imposing undue hardship upon the service provider.

141. As Chief Justice McLachlin explained in *Meiorin* the first step in assessing whether the Respondent has successfully established a good faith qualification is to identify the general purpose of the impugned standard and determine whether it is rationally connected to the performance of the service. The initial task is to determine what the impugned standard is generally designed to achieve. The focus at the first step is not on the validity of the particular standard that is at issue, but rather on the validity of its more general purpose.

142. In this case it is not clear that the Respondent actually considered what the general purpose of the impugned standard was, as the specific standard was subsumed in a larger document and there is no evidence that this standard and its general purpose were considered by the Respondent in any meaningful way, or at all. Keeping in mind the Chief Justice's comments about the second branch of the test, which I will discuss in detail below, I conclude that the general purpose of this standard is to prevent exposing students and the public to the risk of catching communicable diseases from students enrolled in the esthetics program. As a physically safe learning environment is obviously necessary for the students, and as members of the public are used as practice clients by students and are also entitled to a service rendered in a safe fashion, I conclude that there is a rational connection between the performance of the service and the general purpose of the standard that has been selected.

143. Whether this standard was adopted by the Respondent to fulfill the legitimate purpose is another question. On the wording of the first step I believe there is a strong argument that the Respondent has to show not only that there is a rational connection between the purpose of the standard and the provision of the service, but that the service

provider considered the rational connection between the general purpose of the standard and the service provided and adopted it for this reason. I note however that the second step in the analysis explicitly examines the subjective intent of the service provider, making it the more appropriate step at which to analyze the Respondent's consideration of whether the standard fulfills the legitimate purpose identified in the first step.

144. At paragraph 60 of the Supreme Court's decision in *Meiorin* the Chief Justice states:

Once the legitimacy of the employer's more general purpose is established, the employer must take the second step of demonstrating that it adopted the particular standard with an honest and good faith belief that it was necessary to the accomplishment of its purpose, with no intention of discriminating against the claimant. This addresses the subjective element of the test which, although not essential to a finding that the standard is not a BFOR, is one basis on which the standard may be struck down. (Emphasis added)

145. In this case, and as I noted above, it is questionable whether Woodford adopted the standard to fulfill a legitimate purpose connected to the performance of the service. This is questionable because it appears the only reason this particular standard was included was because it was a part of standards provided by the NAAC.

146. There was no evidence of any discussion with respect to this particular standard as between Woodford and the Department of Education. In the correspondence filed as exhibit SW-1, SW-2, SW-3 and SW-4 it appears this is but one of a number of requirements included in a package and there is nothing to suggest any thought was given by the Respondent to the scope, necessity or potential discriminatory effect of this requirement. It does not appear that the Respondent engaged in any consideration of this particular standard at all. Communicable disease is not defined directly or by referentially incorporating the statutory definition. According to Exhibit SW-3 a Ms. Sherry Docherty developed the curriculum for the NAAC. The document filed does not identify Ms. Docherty's training or experience. She is not identified as a medical doctor. No evidence was lead as to why the NAAC or Ms. Docherty included this requirement in the standard. In the circumstances I am not satisfied on the balance of probabilities that the Respondent put any thought into adopting this particular standard and accordingly could not be said to have held any belief as to its fulfillment of a legitimate purpose. The most that could be said at this stage is that the Respondent did not act in bad faith in selecting the NAAC standard. There is no evidence that the Respondent adopted the NAAC standard with an intent to discriminate against the Complainant or anyone. Not having considered the particular standard at all, however, it is difficult to conclude that Woodford, through its representatives Ms. Banfield and Ms. Woodford, adopted this particular standard with an honest and good faith belief that it was necessary to the accomplishment of the legitimate purpose. I conclude that the Respondent did not adopt the particular standard in an honest and good faith belief that it was necessary to fulfill the legitimate purpose related to the provision of the service of esthetics training.

147. While failing on the second step is sufficient to determine this matter I will consider the third step out of an abundance of caution, and as it may be of some assistance to the Respondent in fulfilling its obligations going forward.

148. The third step in the analysis is to consider whether the standard is reasonably necessary to the accomplishment of that legitimate purpose related to the provision of the service. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individuals sharing the characteristics of the claimant without imposing undue hardship upon the service provider. It is important to bear in mind who bears the onus and to what standard. The Respondent bears the onus of establishing this on the balance of probabilities. The standard under review in this case is the requirement that each student provide “a medical certificate stating freedom from communicable and contagious disease.” This is the standard stated in Woodford’s pamphlet found at Exhibit SH-5, page 21, although this appears to be a paraphrasing of the entrance requirements as stated at page 57 of Exhibit SH-5 and on the last page of Exhibit SW 1.

149. It is at this stage of the analysis that evidence given by Dr. Bursey with respect to the treatment of hepatitis c and transmission of the hepatitis c virus must be considered. A review of the case law makes it clear that such evidence is usually given by witnesses qualified as experts. See for instance *A. v. Natural Progress Inc.* [2005] M.H.R.B.A.D. No. 2 and *S.T.E. v. Bertelsen (1989)*, 10 C.H.R.R. D/6294 Alta. Bd. Inq. I note that the *Code* does not contain a provision like section 15 of the Labour Relations Act R.S.N.L. 1990 c. L-1 which give the Labour Relations Board broad authority to accept evidence not admissible in a court of law. Dr. Bursey was not qualified as an expert witness, despite the issue being explicitly addressed with counsel. This evidence is relevant to the third issue in this case, it is necessary to assist in this stage of analysis of the case as it is information outside of my experience and knowledge and there is no suggestion that it violates any exclusionary rule. Dr. Bursey is a medical doctor trained and practicing for almost twenty years in a specialty that includes infectious diseases. He treats patients with hepatitis c. If asked to do so, and in the absence of further evidence elicited in cross examination or compelling submissions to the contrary, I would have found him qualified him to give evidence with respect to the treatment of hepatitis c and transmission of the hepatitis c virus. No such qualification was sought, no cross examination on qualifications was performed and no submissions were made. I do not make any finding as to his expertise. This raises the issue of what use can be made of this evidence.

150. No objection was made to the evidence given by Dr. Bursey with respect to the treatment of hepatitis c and transmission of the hepatitis c virus. Indeed, such evidence was elicited in cross examination. The Respondent in this case lead no evidence from any medical practitioner. There is nothing improper in this. The Respondent can certainly rely upon medical evidence led by the Complainant and upon evidence elicited in cross examination of the Complainant’s witness. In the circumstances in which the parties have raised no objection to the evidence being lead in direct or cross examination, where the evidence is the best information available to the board of inquiry and where, as I shall explain below, the alternative choice of rejecting it entirely leads to the same conclusion,

I will consider the evidence given by Dr. Bursey on these two issues and give weight to his evidence.

151. Considering the evidence of Dr. Bursey I do not believe that a responsible doctor would produce an unqualified certificate such as the one required without performing a battery of tests. I note that Dr. Acevedo never did provide such a certificate, rather he provided certificates describing the diseases that Ms. Harvey did have. The most a responsible doctor could do is identify the diseases a person has been tested and examined for, state the results of those tests and examinations and state that he or she is not aware of any other conditions.

152. Dr. Bursey indicated that the usual way to transmit hepatitis c would be contact with bodily fluids. Near skin contact with bodily fluids is not high risk as generally there must be a mixing of fluids. The precaution he takes in dealing with hepatitis c positive patients is the barrier method. He indicates that he wears gloves all the time regardless of whether or not he knows that somebody is infected. He regards it as a universal precaution to be taken with all people as there are people with hepatitis c or other infectious diseases who are not known. He indicated that no matter how many pairs of gloves you wear there is always the possibility of a needle stick. He has no recollections of a patient that was ever exposed to hepatitis c in the workplace. For the most part his patients had participated in high-risk activity. He indicated that it is a condition that with appropriate precautions is a low risk for transmission. It is not zero risk. There is always the possibility of an accidental exposure and most medical practitioners take universal precautions on a routine basis. It was put to him in cross-examination that estheticians regularly use cuticle nippers and lancets as well as scissors. He indicated that standard precautions for somebody with hepatitis c included not sharing nail clippers and razors however it is not suggested that one give up behaviors like kissing.

153. The questioning of the various estheticians established that there were a number of procedures performed in which there was a risk of blood exposure. These included 1) waxing, 2) cuticle work, 3) use of lancets and 4) anything involving scissors.

154. Nobody testified that they have ever pierced themselves and another person simultaneously. Certainly such a possibility exists. The mere existence of a theoretical possibility of exposure, however, is insufficient to satisfy the onus on a Respondent.

155. It is important to examine the risk which the Respondent relies upon. The Respondent in essence relies upon the risk that Ms. Harvey's blood would be exposed, and that this blood would come into contact with the blood of a client or fellow student. Ms. Harvey's blood could be exposed in the following ways 1) being cut with scissors, 2) being pierced by a lancet, 3) being cut by cuticle nippers, 4) in waxing.

156. It would obviously be easy to eliminate the majority of the risk simply by directing that none of these procedures be performed on Ms. Harvey. The vast majority of the risk of Ms. Harvey's blood being exposed would be eliminated if she was not the subject of waxing, cuticle nipping, use of lancets, or hair cutting or use of any sharp

objects. This would not adversely impact her education or the education of her fellow students. With fourteen or fifteen students it is possible to permit everyone to practice without using Ms. Harvey as a subject.

157. While blood exposure may occur in waxing, it is the recipient of the waxing that is at risk for blood exposure. The operator providing the waxing is not at risk. This means that Ms. Harvey, as the operator, would be at risk for cutting herself with nail clippers, a lancet or scissors. None of the professionals who testified indicated they have ever cut themselves in this fashion. Ms. Harvey had never cut herself in this fashion in the time she was at Woodford. There is simply no evidence of any operator injuring themselves and causing themselves to bleed. This is certainly a possibility. This “possible” event would have to be followed by Ms. Harvey shortly thereafter injuring a fellow student or client using the same instrument with which she has pierced herself without any intervening sterilization of the instruments.

158. The testimony given was that lancets are disposed of when used. The balance of the cutting instruments, the clippers, nippers, lifters and scissors would, or should, be subject to some form of sterilization between uses on clients in any event. As Dr. Bursey testified, there are estimated to be two hundred and fifty thousand Canadians with hepatitis c who are not diagnosed. With a Canadian population of some thirty three million people this means roughly seven of every one thousand Canadians is an undiagnosed carrier of hepatitis c. Taking this into account instruments such as nail clippers, nippers, scissors and cuticle pushers used on the general public should be subject to proper sterilization and the use of gloves by esthetic practitioners (universal precautions) should be standard in any event.

159. As no responsible esthetician would use an instrument that they had just cut themselves with without proper sterilization, the incident would have to occur almost immediately or occur unnoticed. While again both events are possible they are extremely unlikely. There is no evidence of them ever having occurred. One can simply examine the cases involving HIV positive patients where there are always theoretically possible routes of infection, however they are extremely unlikely.

160. While there was no evidence led as to the probability of exposure through these various methods it is important to note that the onus is on the Respondent to show that this was a real risk. In the absence of such evidence I am not prepared to conclude the mere possibility of accidental injury is sufficient to exclude all persons with hepatitis c from studying and practicing in the field of esthetics. There is no evidence that the profession has considered or adopted such a standard or any standard with respect to infectious diseases at all.

161. Finally there is the possibility that Ms. Harvey may have an open cut or sore which goes unnoticed. As indicated by Dr. Bursey standard practice would be to use a barrier method. The use of a latex glove would render it extremely unlikely that an unnoticed wound on Ms. Harvey’s hand could be exposed to the blood of an injured client. If the onus were on Ms. Harvey to show that there was zero chance of infection in

these circumstances I would say that she has not met it. The onus, however, is on the Respondent to show on the balance of probabilities that it is not possible for Ms. Harvey to safely study and practice esthetics or that creating a safe environment for Ms. Harvey to study and practice esthetics would be an undue hardship upon the Respondent. The Respondent has not shown on the balance of probabilities that it is not possible for Ms. Harvey to study and practice esthetics safely.

162. On the evidence before me, including the evidence of Dr. Bursey on the treatment and transmission of hepatitis c, I find that the two precautions of not subjecting Ms. Harvey to practice procedures and requiring Ms. Harvey to use a barrier method when she was practicing, together with normal disinfection and sterilization procedures, would be sufficient to render the chance of infection a mere theoretical possibility.

163. It is clear from the evidence of Dr. Acevedo and the evidence of Dr. Bursey that no responsible medical practitioner will ever say it is impossible for transmission of a communicable disease to occur. If you accept the submissions of the Respondent, this standard amounts to an absolute prohibition on persons with communicable diseases from becoming estheticians and attending Woodford or any other training institution for this purpose. They would require evidence of a real, not theoretical or possible, risk to support such a prohibition. This evidence is not before me.

164. If I disregard all of the evidence of Dr. Bursey with respect to the transmission and treatment of hepatitis c I reach the same conclusion. Taking the stated standard at face value no person with hepatitis c (or any communicable disease) can ever enter the school of esthetics. An absolute prohibition such as this, which prima facie is a violation of the *Code*, would require a foundation in medical science and not merely a lay persons belief, however sincere, that hepatitis c is an infectious disease with an unknown but potential risk of transmission. Bearing in mind the onus and standard of proof, it is for the Respondent to demonstrate on the balance of probabilities that it is impossible to accommodate individuals with hepatitis c without suffering undue hardship. In the absence of medical evidence on the treatment and transmission of hepatitis c I would find the Respondent has not discharged this onus and in particular had not established on the balance of probabilities that a person with hepatitis c could not safely study and practice esthetics.

165. With respect to the issue of undue hardship the Respondent states that if it disregarded the requirement it could have lost its license with respect to the esthetics program. It is worth noting, however, that Mrs. Woodford applied common sense and disregarded that requirement with respect to Ms. Harvey's genital herpes. It is also worth noting that when Mrs. Hanarahan testified she was careful to state on a number of occasions that they would look at the particular situation, and upon request consider if they could modify the requirement. The Department of Education would consider if accommodation was possible. I do not think the Department would have responded to a request from Woodford to modify the requirement with a flat refusal to consider a change, but would have carefully explained and considered the issue of accommodation.

166. In *Newfoundland (Human Rights Commission) v. Newfoundland (Workplace Health and Safety Compensation Commission)* [2005] NJ296 the Newfoundland Court of Appeal held that board of inquiry could determine that, by operation of section 5 of the *Code*, provisions of another statute could not operate to justify what was otherwise conduct contrary to the *Code*. Given the quasi-constitutional nature of human rights legislation, in the absence of the specific exemption, statutes or regulations that are contrary to the *Code* can result in direction from the board of inquiry to stop the offending behavior and refrain from committing a contravention in the future or take other actions as specified by section 28 of the *Code*. In short, the Workers Compensation Commission could be directed to follow the *Code* instead of its governing legislation when there was a conflict between the two.

167. I do not accept that Workers Compensation Commission could be directed to disregard their governing legislation when it violated the *Code*, however, the terms of Woodford's license could be exempted from the *Code*. Had there been any attempt to contact the Department of Education which ended in the Department refusing to consider accommodation and modification of the standard and giving the Woodford the ultimatum to obey or lose its license I would have no hesitation in concluding accommodation would result in a undue hardship for Woodford. In those circumstances Ms. Harvey would have a potential complaint against the Department of Education. That did not occur here. What occurred was that Woodford determined that in this instance it was not prepared to take any steps to accommodate Ms. Harvey and it would rely upon the requirement in its license to direct her to withdraw or have her enrollment in the program terminated. There was no attempt whatsoever to accommodate her.

168. The Respondent argued that Ms. Harvey could not be relied upon to follow the necessary precautions. The answer to this argument is that it was raised only after Ms. Harvey was forced from the school. If there was any real concern with Ms. Harvey's ability to follow safety protocols prior to her diagnosis it would (or should) have been raised by Woodford at that time. No such concern was brought forth, although issues about her behavior in openly discussing her history with her classmates were. If Woodford had any real concerns with her ability or willingness to follow safety procedures it would have been raised prior to her diagnosis. There is insufficient evidence to suggest there was a real concern at the time of Ms. Harvey's termination to suggest she could not or would not follow universal precautions.

169. Finally there is the argument that Ms. Harvey's presence exposed the school to liability in the event that she infected a student or client. Had Woodford not precipitously terminated Ms. Harvey but obtained medical advice on universal precautions and other accommodations and employed them appropriately I see little risk to them, beyond the theoretical risk outlined above.

170. There is insufficient evidence to discharge the onus on the Respondent to establish that there would be undue hardship in accommodating Ms. Harvey.

171. I find that Ms. Harvey was discriminated against as a result of having been diagnosed with hepatitis c and that Woodford has not established that this discrimination was based on a good faith qualification.

*Issue 4*

172. Having made the above noted findings I must now consider the appropriate remedy. In its submissions the Commission, and by adoption, Ms. Harvey stated she was seeking general damages in the amount of five thousand dollars. I have no doubt Ms. Harvey went through a difficult time after this matter and I am certain that the decision of Woodford to terminate her schooling was as painful an experience as Ms. Harvey testified. I note, however that Ms. Harvey's addiction problem certainly predated the decision of Woodford and that the difficulties which she encountered after this decision arose from her addictions. Ms. Harvey had multiple addictions, had failed in previous attempts to quit substance abuse and had only been "clean" for a short time when she was terminated from Woodford. She testified she was suffering from bulimia while she attended Woodford. Her previous lifestyle also presented challenges to her in reintegrating into society. On the evidence provided I am not prepared to accept that this incident was a "trigger" that caused her addictions to resurface. The difficult time which she suffered after her termination was primarily a result of her addictions and the challenges she faced in dealing with them.

173. I have no doubt the humiliation she felt were very real and difficult to endure. While I certainly do not suggest that the effect of this discrimination on Ms. Harvey was minor or trifling I do not conclude that it was at the most severe end of the spectrum. According I find general damages in the amount of twenty five hundred dollars would be sufficient in this case.

174. Ms. Harvey does not wish to return to Woodford to become an esthetician at this time. Accordingly there will be no direction that she be permitted to enter the program. I do, however direct that Woodford contact the Department of Education, provide a copy of this decision, and seek a change in this entry requirement to bring it in compliance with the *Code*. This direction applies only to Woodford. As the Department is not before this board of inquiry what the Department does is within its control.

175. With respect to the portion of Ms. Harvey's tuition which was not refunded I order the same be refunded to Ms. Harvey. As no evidence was lead to establish the rate of interest which she paid on this amount from the date of her termination, I direct that interest on this amount be paid in accordance with rates established under the *Judgment Interest Act* R.S.N.L.1990 c. J-2 from November 3, 2004 to the date of receipt.

176. The commission asked that it be compensated for fees paid to the doctors for their testimony. As there is no indication that an expert report was prepared I direct the Commission be compensated by the respondent for whatever it was charged by the doctors for the time they appeared before the tribunal only, plus preparation for testimony to a maximum of two hours per doctor. There will be no additional order as to costs.

**CONCLUSION**

177. Ms. Harvey was terminated from her enrollment at Woodford as a result of her advising that she had been diagnosed with hepatitis c. This constituted a breach of section 6(1) of the *Code* and this breach is not saved by section 6(2) of the *Code*. Pursuant to section 28 of the *Code* Woodford is directed to pay Ms. Harvey the amount of \$2500.00 in compensation and to refund tuition in the amount of \$2816.39, with interest on this last amount to be paid in accordance with the *Judgment Interest Act*. Woodford is directed contact the Department of Education, provide a copy of this decision, and seek a change in this entry requirement to bring it into compliance with the *Code*. The Commission is to be compensated by the Respondent for whatever it was charged by the doctors for the time they appeared before the board of inquiry only, plus the amount charged for preparation for testimony to a maximum of two hours per doctor. There will be no additional order as to costs.

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Chief Adjudicator