DECISION NO. 2011-HPA-133(e); 2011-HPA-134(e)

In the matter of an application for review under section 50.54 of the Health Professions Act, R.S.B.C. 1996, c. 183, as amended, (the “Act”) of a Registration decision

BETWEEN: The Applicant

APPLICANT 1

AND: The Applicant

APPLICANT 2

AND: The College of Opticians of British Columbia

COLLEGE

BEFORE: A Panel of the Health Professions Review Board

REVIEW BOARD

J. Thomas English, Q.C., Chair

David A. Hobbs, Panel Member

Maurice Mourton, Panel Member

DATE: Conducted by way of oral hearing concluding on April 19, 2013

PLACE: Vancouver BC

APPEARING: For Applicant 1: Ted Morse, Agent

For Applicant 2: Ted Morse, Agent

For the College: Maureen E. Baird, Q.C., Counsel

I INTRODUCTION

[1] The Applicants made application for membership in the College. Applicant 1 wanted to be registered as a dispensing optician and new contact lens fitter. Applicant 2 sought registration as a contact lens fitter. The Registration Committee of the College decided both Applicants needed to complete bridging educational requirements before the College would approve the Applicants’ challenge of the mandatory national examination (the “Decisions”). The Applicants have applied to the Review Board for review of the Decisions.
II BACKGROUND

[2] The Applicants are graduates of B.C. College of Optics which provides education to prepare students for a career as a dispensing opticians and/or contact lens fitters. Applicant 1 graduated from both programs on March 25, 2011 and Applicant 2 graduated from the contact lens fitter program on March 5, 2011.

[3] Applicant 1 submitted his registration package to the College on March 30, 2011 and Applicant 2 submitted her registration package on March 17, 2011. The registration package includes: an application form setting out personal and educational background; official transcript; information regarding any previous application for registration; covering letter; letters of reference; and a dispensing experience and fitting form.

[4] To obtain registration as a registered optician as set forth in s. 35 of the Bylaws of the College an Applicant must:
   (a) graduate from an education program listed in Schedule A;
   (b) complete an eyeglasses examination conducted by the National Association of Canadian Optician Regulators (“NACOR”);
   (c) produce evidence of good character; and
   (d) provide other standard items.

[5] To obtain registration as a registered contact lens fitter as set forth in s. 36 of the Bylaws of the College an applicant must:
   (a) have current registration as an optician under section 35;
   (b) graduate from an education program listed in Schedule A;
   (c) complete a contact lenses examination conducted by NACOR; and
   (d) provide other standard items.

[6] Both section 35 and 36 of the Bylaws provide in effect that if an applicant did not graduate from a program listed in Schedule A the Registration Committee has the discretion to determine that the applicant may qualify if the applicant displays substantial equivalent knowledge, skills and abilities which meet the appropriate standard.

[7] BC College of Optics is not listed in Schedule A.

[8] As the Applicants had not graduated from a recognized optician education program listed in Schedule “A” they did not meet this aspect of the requirements for registration as a dispensing optician or contact lens fitter. Accordingly, the Applicants had to satisfy the Registration Committee that they had the substantially equivalent knowledge, skills and abilities.
The process adopted by the College is that an applicant must first be processed by an interview committee which makes a recommendation to the Registration Committee which then has the ultimate authority to determine whether the applicant is successful or requires additional bridging education.

To determine whether substantial equivalency was met the College enrolled the Applicants in a prior learning and assessment recognition ("PLAR") process established under the College’s Bylaws.

The PLAR process required the Applicants to undergo: a competency gap analysis ("CGA"); practical assessment; and an interview by a three member interview committee.


Applicant 1 had an overall CGA score of 82% for eyeglasses and 72% for contact lens. Applicant 1 was graded as either satisfactory, good or excellent in all topics mentioned in his PLAR. Regarding insertion and removal of a rigid and soft contact lens, Applicant 1 was able to insert and remove a soft contact lens and insert a rigid contact lens but was unable to remove a rigid contact lens. The interviewers’ recommendation notes indicated Applicant 1 was initially either “unsatisfactory” or a “bare pass” but after “thoroughly exploring” each area the interviewers were satisfied Applicant 1 had “adequate knowledge” and therefore, “theoretical bridging” was not recommended.

The Registration Committee met and considered Applicant 1’s application and PLAR results on June 27, 2011. Contrary to the three member interview team recommendation, the Registration Committee required Applicant 1 to complete three additional bridging matters including a contact lens program at a Schedule “A” recognized institution before being approved to challenge the NACOR exam for contact lenses. Applicant 1 was approved to challenge the NACOR exam for eyeglasses without further bridging.

Applicant 2 scored 54% overall on her contact lens CGA. Applicant 2 was graded satisfactory or bare pass on her recommendation report. Applicant 2’s insertion and removal of a soft and rigid contact lens took two or three attempts to successfully complete. The interview committee moved Applicant 2 up from “unsatisfactory” to “satisfactory” in respect of ocular pathology image identification while in the case of rigid lens fitting and rigid/soft follow up care they recommended theoretical bridging.

The interview committee stated Applicant 2 lacked practical experience and required both theoretical and practical bridging before challenging the NACOR exam.

The Registration Committee considered Applicant 2’s application and PLAR results on June 27, 2011 deciding that Applicant 2 needed to complete five additional
bridging matters including a contact lens program at a Schedule “A” recognized institution before being approved to challenge the NACOR exam for contact lenses.

[18] The College communicated the Decisions to the Applicants by letters dated July 28, 2011 enclosing the written decision setting out the decision, background application information, PLAR process and analysis. The Applicants did not receive their CGA marks or a copy of the interviewers’ recommendation report.

[19] In the case of Applicant 1, the Decision stated Applicant 1 did not have practical experience outside his school environment and was unable to remove a rigid gap permeable contact lens. In the case of Applicant 2, the Decision stated the CGA and interview results reflected weaknesses.


[21] The agent acting for the Applicants (the “Agent”) has a material interest in B.C. College of Optics.

[22] By decision No. 2011-HPA-0104(b); 2011-HPA-0133(a); 2011-HPA-0134(a) dated March 7, 2012 the Review Board:

(a) reiterated an earlier decision 2011-HPA-0104(a) that the Applicants could act via the Agent;
(b) granted a summary dismissal application of applicant 0104 as being moot;
(c) held, subject to hearing further evidence, the Review Board had no jurisdiction to grant the relief sought by the Applicants in paragraphs 1, 2 or 3 of their application; and
(d) held, that applications 0133 and 0134 would be heard one immediately after the other.


[24] By letter dated August 3, 2012 the Review Board submitted that it had no jurisdiction to override or substitute its judgment for the College’s decision under s.19(m)(i) in which the College stated that BC College of Optics where the Applicant’s received their education from was not accredited by the NACOR and not recognized by the College. The Review Board also pointed out to the parties the strict and onerous requirements of s.50.54(10) and (11) that had to be satisfied in order for the Review Board to find the Applicants met the substantially equivalent standards, including a finding of bad faith or improper purpose. The Review Board stated that absent persuasive evidence this part of the application was bound to fail.

[25] By letter dated October 29, 2012 the Review Board directed that these matters proceed to a hearing on the merits and set dates for exchange of written submissions by the parties.
[26] On January 30, 2013 the Review Board conducted a pre-hearing conference and directed an oral hearing under s. 50.54 be held.

[27] By Decision No. 2011-HPA-133(d); 2011-HPA-134(d) dated February 28, 2013 the Review Board clarified its jurisdiction prior to the oral hearing by holding in para. [21] of the decision that the extent of the Review Board’s jurisdiction was a consideration of whether the Decisions, in the circumstances presented by the applications for registration, constituted reasonable dispositions. This decision of the Review Board was not challenged by judicial review and the time for such challenge has expired.

III ANALYSIS AND LEGISLATIVE FRAMEWORK


[29] Under s. 50.54(7) the review is on the record though the Review Board may hear evidence that is not part of the record, as reasonably required for a full and fair disclosure of all matters related to the issues under review as set out in s.50.54(8). At the oral hearing no documents, other than the record, were considered.

[30] On completion of the review the Review Board may make orders under s.50.54(9) confirming the registration decisions; directing a decision be made that could have been made; or sending the matter back for reconsideration.

[31] If the Review Board directed that a decision be made that the Registration Committee could have made, such as permitting the Complainants to challenge the NACOR exams directly with no theoretical or practical bridging, such a decision may only be reached by the Review Board if it is satisfied all the strict and onerous requirements of s.50.54(10) are met. These requirements include, but are not limited to, that the Registration Committee: failed to act fairly and made the Decisions arbitrarily or in bad faith; made the Decisions for an improper purpose; based the Decisions on entirely or predominantly on irrelevant factors, or failed to take the requirements of the Act into account.

[32] As there was no evidence provided by the Agent to satisfy s.50.54(10) the Review Board was left to consider confirming the Decisions or remitting the matters back for reconsideration with directions.

[33] The issue for the Review Board is whether the Decisions are reasonable. Many decisions of the Review Board have held that in assessing the reasonableness of a decision the Review Board will consider whether the decision is justifiable, transparent and intelligible so as to justify the Registration Committee’s exercise of its discretion (for example: Decision No. 2009-HPA-0039 (b)).

[34] The Agent submitted that the Review Board should have resorted to its power and duty under s.50.53(1)(d) to publish guidelines and recommendations for the purpose of assisting Colleges to establish and employ registration, inquiry and discipline procedures that are transparent, objective, impartial and fair. We do not see how this
power of publishing guidelines and recommendation assists us in dealing with the issue at hand as to whether the Decisions are reasonable.

[35] The Agent argues with respect to Applicant 1:

(a) It is unfair that the findings of the interview committee and CGA scores were not made available to him with an opportunity to make submissions to the Registration Committee before the decision was made;

(b) The testing protocol lacks validity and is flawed;

(c) The reasons expressed in the Decision were not convincing;

(d) The NACOR examination is more rigorous than the PLAR process; and

(e) Applicant 1 was close to being successful in the PLAR process, and therefore, should not have been required to complete bridging education,

[36] The Agent argued with respect to Applicant 2:

(a) As Applicant 2 passed the CGA she should not be required to complete bridging education; and

(b) Her Decision was not sufficiently transparent and justified.

[37] It is important to note that the Applicants were not graduates of a school listed in Schedule A of the College’s Bylaws and therefore, were required to participate in a process to assess knowledge, skills, and abilities as to substantial equivalency. This process included a personal interview.

[38] Applicant 1 demonstrated a lack of practical experience in fitting contact lens and specifically failed in an attempt to remove a rigid lens. These shortcomings were explained in his Decision and were the analytical basis for the requirement to perform further bridging education. The Registration Committee was not bound to follow the recommendations of the interview committee and did note that the interview committee explored areas of weakness with Applicant 1. We find the Decision with respect to Applicant 1 was reasonable in the sense that it was transparent, justified and intelligible. It is not the role of the Review Board to substitute its opinion for that of the Registration Committee.

[39] Applicant 2 demonstrated various weaknesses. Both the interview committee and Registration Committee concluded bridging education was necessary. This Decision was transparent, justified and intelligible.

[40] We do not agree with the Agent that the Decisions were not reasonable for the reasons submitted above. The issue was not the general validity of PLAR or the CGA. The issue was not that a more rigorous examination would occur at the NACOR examination level. The issue simply was the reasonableness of the Decisions. The Registration Committee expressed in the Decisions logical and supportable reasons for requiring the Applicants to undergo further bridging education. The Review Board is not in a position to second guess such a conclusion. It is the College that has been granted
the power under s.20 to grant registration in accordance with its bylaws, which bylaws include applicants satisfying conditions or requirements for registration established by the College.

IV CONCLUSION

[41] We confirm the Decisions of the Registration Committee.

[42] We have considered the relevant exchange of correspondence between the Review Board and the parties, the record and the prior decisions of the Review Board though not referred to in their entirety herein.

“J. Thomas English”

J. Thomas English, Q.C., Chair
Health Professions Review Board

“David A. Hobbs”

David A. Hobbs, Panel Member
Health Professions Review Board

“Maurice Mourton”

Maurice Mourton, Panel Member
Health Professions Review Board

June 10, 2013