DECISION NO. 2013-HPA-175(a); 2013-HPA-176(a); 2013-HPA-177(a); 2013-HPA-178(a); 2013-HPA-179(a); 2013-HPA-180(a); 2013-HPA-181(a); 2013-HPA-182(a); 2013-HPA-183(a); 2013-HPA-209(a)

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

AND: The College of Traditional Chinese Medicine Practitioners and Acupuncturists of British Columbia

BEFORE: David A. Hobbs, Panel Chair

DATE: Conducted by way of written submissions concluding on November 7, 2014

APPEARING: For the Applicant: Doug S. Cheng, Representative

For the College: Angela R. Westmacott, QC, Counsel

I INTRODUCTION

[1] The Applicants are ten applicants for registration who apply for review of decisions by the Registration Committee which declared each of them not eligible to write the Pan-Canadian competency examination required by the examination committee (the “Examination”).

[2] Section 37 of the Administrative Tribunals Act (“ATA”) allows the Review Board, when two or more applications involve the same or similar questions, to:

(a) combine the applications or any part of them,

(b) hear the applications at the same time,

(c) hear the applications one immediately after the other, or

(d) stay one or more of the applications until after the determination of another one of them

Here the ten applications all involve the same or similar questions and therefore have been considered at the same time.
II BACKGROUND

[3] The Applicants are students accepted for enrollment in a traditional Chinese medicine and/or acupuncture education program recognized by the College.

[4] Section 51 of the College’s Bylaws (the “Bylaws”) requires that students such as the Applicants must be registered as student registrants before undertaking practical training involving direct patient care. The College granted student registration to each of the Applicants.

[5] Section 51 of the Bylaws outlines the preconditions to student registration as follows:

51 (1) Section 51 of the Bylaws outlines the preconditions to student registration as follows:

(a) is enrolled, or was enrolled during the 6 months previous to making an application under paragraph (c) below, as a student in a training program approved by the registration committee,

(b) satisfies the registration committee of the good character of the person consistent with the responsibilities of a registrant and the standards expected of a registrant, and

(c) has delivered to the registrar

(i) a signed application for registration in a form approved by the registration committee,

(ii) the application fee specified in Schedule “F”,

(iii) a notarized statement, or other evidence satisfactory to the registration committee, of the applicant’s name, date of birth and educational standing,

(iv) a statutory declaration in Form 1, and

(v) a signed criminal record check authorization form.

(2) A person to whom subsection (1) applies must be registered under this section before undertaking a period of practical training involving direct patient care.

(3) A student registrant may only provide services while under the general supervision of a full, grand parented, or temporary registrant in good standing.”

[6] In the Application for Student Registration form, after the Applicants’ signatures, there are the following statements:
IMPORTANT CHANGE TO REGISTRATION REQUIREMENTS TWO YEAR UNIVERSITY REQUIREMENT

Prior to December 28, 2009, applicants for student registration were required to show completion of two years of university education (or equivalent). This requirement was contained in Schedule E to the Bylaws – as an entrance pre-requisite for TCM/A schools.

CTCMA Bylaws were amended effective December 28, 2009. This requirement is now under Bylaw 48 with other requirements to be met before an individual is granted registration.

CTCMA Bylaw Section 48 (1)(a.1)

successful completion of not less than two (2) years of liberal arts or sciences study (comprised of at least 60 credits) in an accredited college or chartered/approved university acceptable to the registration committee,

An individual no longer has to complete 2 years university education before becoming a student registrant, BUT all applicants for registration must complete 2 years of university education before applying for registration. [emphasis added]

[7] As just noted, the College’s decision to move the two year undergraduate rule into Bylaw s. 48(1)(a.1) (quoted in full below) meant that the two year undergraduate rule was now a precondition to full registration rather than a precondition to student registration, subject to discretion as set out in s. 48(4) of the Bylaws.

[8] However, the following additional statement also appeared in the Application for Student Registration Form:

No one will be accepted to write the CTCMA competency examinations if they have not met this requirement.

[9] For reasons explained below, there is a significant difference between telling an applicant that he or she has not met a condition to full registration (the two year undergraduate rule), and telling an applicant that the failure to meet that condition precludes the right to attempt to fulfill another important condition (successfully writing the professional competency examination (“Examination”).


[11] Despite the above accomplishments at a professional school, each of the Applicants was denied the opportunity to write the Examination because the College found they did not meet the two year undergraduate rule.

[12] Prior to the denial by the Registration Committee to permit the Applicants to write the Examination, with the exception of one Applicant, the College received Credential
Evaluation Reports ("CE Reports") sent at the request of the Applicants to the College by an organization which performs this type of service. All of the Applicants have educational backgrounds from foreign institutions of varying types. In each CE Report the service provider reported to the College either:

The completion of...is considered generally comparable to completion of the first two years of post-secondary study (two year Diploma) at a recognized post-secondary institution in British Columbia and elsewhere in Canada.

or

The completion of ... is considered generally comparable to the completion of the first three years of post-secondary study (three year advanced Diploma) at a recognized post-secondary institution in British Columbia and elsewhere in Canada.

[13] In each case, the service provider’s reference to “Diploma” raised the issue as to whether this met the language in s. 48(1)(a.1) as to the successful completion of “not less than two (2) years of liberal arts or sciences study (comprised of at least 60 credits) in an accredited college or chartered/approved university acceptable to the registration committee.”

[14] The Registration Committee wrote each of the Applicants in response to their applications to write the registration examination informing them as follows:

To be eligible to write the CTCMA examinations, candidates are required to have:

Not less than (2) years of liberal arts or sciences study (comprised of at least 60 credits) in an accredited college or chartered/approved university acceptable to the registration committee (CTCMA Bylaw 48(1)(a.1))

Sufficient educational background of TCM as per Schedule E.”

The Registration Committee concluded from the CE Report that the Applicants’ educational credentials were not considered generally comparable to the completion of the first two years of undergraduate study. In the case of one Applicant the same conclusion was reached with no CE Report.

[15] In the denial letters sent to the Applicants the College stated it was closing the files and a refund of the Examination fee would be sent shortly.

[16] In some instances the Applicants had been enrolled as student registrants for approximately two years and had expended thousands of dollars on their educational requirements at the accredited professional schools in British Columbia.

[17] The Applicants took issue with the College’s position. The College remained steadfast in its position. The College advised the Applicants of their right to apply to the Review Board for review of the College’s decision to deny the Complainant’s eligibility to write the Examination.
[18] On October 26, 2011, the Registration Committee had approved a policy interpretation of s. 48(1)(a.1) of its Bylaws as follows:

(a) Acceptable: academic courses in liberal arts or sciences study which are considered generally comparable to the completion of the first two years of undergraduate study; and

(b) Not acceptable: applied trade or non-academic courses which are “considered generally comparable to the completion of the first two years of post-secondary study (two year advanced diploma)”.

In the October 26, 2011 Policy, the Registration Committee gave a sample list of training programs that it did not consider acceptable under Bylaw 48(1)(a.1) which included the institutions in Taiwan, China and Japan attended by the Applicants, along with other applied trade or schools not recognized.

[19] The Record in this matter contains notices, memos, and a meeting agenda addressed to “TCM/A Training Programs in British Columbia” dated in 2009, 2010, 2012, and a press release in 2013 discussing the Bylaw amendment process, the coming into effect of Bylaw s. 48(1)(a.1) and the College’s comment that some educational institutions may not have advised students of the requirement under Bylaw s. 48(1)(a.1). In view of the basis for my decision, set out below, it is not necessary that I make any findings as to what occurred or did not occur on the issue of “notice” as between the College, educational institutions in British Columbia and the Applicants and I make no findings in this regard.

[20] On September 21, 2013 the Review Board received a request for review by the ten Applicants. The College produced ten distinct records, one for each Applicant. In my view, given the basis on which I have disposed of this matter, it is not necessary to review in detail the unique factual circumstances of each Applicant as the Registration Committee’s denial of their eligibility to write the Examination has a common theme, namely the Registration Committee’s interpretation and application of Bylaw s. 48(1)(a.1) to each Applicant’s educational background as evaluated in the CE Reports or otherwise.

[21] Notwithstanding the submissions received, by letter dated October 21, 2013, I asked the Applicants and the College to address by further submission the following questions:

(a) Was the decision refusing to allow the Applicants to write the examination supported by a specific bylaw pursuant to s. 19 (1)(m.3) of the Act, and if so, specify that bylaw;

(b) If no bylaw was enacted pursuant to s. 19 (1)(m.3) of the Act prior to the decisions refusing to allow the Applicants to write the examination, is there any other lawful basis on which the registration committee could refuse to do so such as to preclude the Registration Committee exercising the discretion in s. 48(4) of its Bylaws; and
(c) What is the proper remedy if the Review Board finds that the Registration Committee lacked authority to refuse to allow the Applicants to write the examination.

[22] The Applicants and College provided further submissions regarding the above questions wherein the College conceded there is no bylaw which authorized the Registration Committee to refuse to allow the Applicants to write the examination, and further, that such a bylaw was required by virtue of s. 19(1.1) of the Act. The College advised it had met on an expedited basis to pass such a bylaw but, the new bylaw amendments will be prospective in nature and do not affect the Applicants in this matter.

III DISCUSSION AND ANALYSIS

[23] The role of the Review Board on an application for review of a registration decision is set out in s. 50.54 of the Act. Section 50.54 states that only the Applicant and the College may be parties to a review, and that a review is to be a review on the record, subject to the Review Board’s authority to hear evidence that is not part of the record as reasonably required by the Review Board for a full and fair disclosure of all matters related to the issues under review: s. 50.54(1)-(8).

[24] The Review Board’s remedial jurisdiction is set out in s. 50.54(9):

50.54 (9) On completion of its review under this section, the review board may make an order

(a) confirming the registration decision,

(b) directing the registration committee to make a decision that could have been made by the registration committee in the matter, or

(c) sending the matter back to the registration committee for reconsideration with directions.

[25] I note that in sharp contrast to the statutory review provisions in s. 50.6 of the Act governing complaint disposition reviews, there is no legislated standard of review that governs registration reviews generally. Instead, the legislature has imposed certain legal strictures as a precondition to the Review Board actually directing the registration committee to grant registration or certification: s. 50.54(10) and (11).

[26] The legislature’s silence on the standard of review that otherwise applies on registration reviews makes clear in my view that the standard of review in this regard is a matter for the Review Board to determine within its exclusive jurisdiction. Since the review is a review on the record, there is good reason for the Review Board to accord the Registration Committee deference on matters of fact and discretion. However, the Review Board is not obliged to grant the Registration Committee deference on questions of law. In the absence of a legislative direction to the contrary, and given the Review Board’s specialized function and expertise, which includes legal expertise, the Review Board will of course give respectful attention to the College’s position on questions of law, but in the end Applicants are in my view entitled to expect that the
Review Board will be the body that finally determines whether the Registration Committee has correctly interpreted the Act and the Bylaws.

[27] Having made these points, I also emphasize that my decision in this case would not differ even if I were to apply the “reasonableness” standard to questions of law.

[28] Clearly no issue arises or could realistically arise in these cases as to granting registration, as none of the Applicants have written the registration examination successfully, or at all. Indeed, a key point in the analysis that follows is precisely that, in the absence of an examination result in cases like these, there would be no factually complete basis for the Registration Committee to exercise its discretion to consider “whether the applicant’s knowledge, skills and abilities are substantially equivalent to the standards of academic or technical achievement and the competencies or other qualifications established in s.s. (1)(a) and (a.1)....”

[29] As to the College’s legislated authority and given their importance to my analysis, I set out sections 19(1)(m)-(m.4) and 20(2) of the Act as follows:

19 (1) A board may make bylaws, consistent with the duties and objects of a college under section 16, that it considers necessary or advisable, including bylaws to do the following:

(m) establish conditions or requirements for the registration of a person as a member of the college, including the following:
   (i) standards of academic or technical achievement;
   (ii) competencies or other qualifications;
   (iii) requirements for providing evidence of good character;

(m1) specify academic or technical programs that are recognized by the college as meeting a standard established under paragraph (m)(i);

(m2) provide for the examinations that may be required, used or relied on by the registration committee in satisfying itself under section 20 that a person meets the conditions or requirements for registration as a member of the college;

(m3) establish conditions or requirements for eligibility to take examinations referred to in paragraph (m.2) and procedures respecting the conduct of examinations, and authorize a committee established under paragraph (t) or the registrar to establish additional examination procedures consistent with the bylaws;

(m4) confer discretion on the registration committee, in satisfying itself under section 20 that a person meets the conditions or requirements for registration as a member of the college, to
consider whether the person’s knowledge, skills and abilities are substantially equivalent to the standards of academic or technical achievement and the competencies or other qualifications established under paragraph (m), and to grant registration on that basis;

20 (2) The registration committee must grant registration as a member of its college to every person who, in accordance with the bylaws,

(a) applies to the college for registration,

(b) satisfies the registration committee that he or she meets the conditions or requirements for registration in a class of registrants, and

(c) pays the required fees, if any.

[30] Having reviewed the College’s Bylaws I note there is no Bylaw created by the College under s. 19(1)(m.3) of the Act establishing a condition or requirement for eligibility to write the Examination and this fact is conceded by the College in its submissions.

[31] Applicants for full registration must meet the requirements of s. 48 (1)(a)-(d) and receipt by the Registrar of those items listed in s. 48(2)(a)-(f). These are not requirements for eligibility to write the Examination, they are requirements for registration.

[32] Given its importance to this discussion, I set out s. 48 of the Bylaws:

48 (1) For the purposes of section 19(2) of the Act, the requirements for full registration are:

(a) graduation from a traditional Chinese medicine education program recognized by the board for the purpose of registration and specified in Schedule H,

(a.1) successful completion of not less than two (2) years of liberal arts or sciences study (comprised of at least 60 credits) in an accredited college or chartered/approved university acceptable to the registration committee,

(b) successful completion of the examinations required by the examination committee,

(c) evidence satisfactory to the registration committee of the good character of the person consistent with the responsibilities of a registrant and the standards expected of a registrant, and

(d) evidence satisfactory to the registration committee that the applicant be a Canadian citizen or a permanent resident of Canada or be otherwise authorized under the laws of Canada to work in Canada.
(2) receipt by the registrar of:

(a) a signed application for full registration in a form approved by the registration committee,

(b) the application fee specified in Schedule “F”,

(c) an original certificate, notarized copy, or other evidence satisfactory to the registration committee of graduation from a program referred to in subsection (1)(a), and evidence satisfactory to the registration committee that the applicant is the person named therein,

(c.1) an original diploma, notarized copy, or other evidence satisfactory to the registration committee, confirming successful completion of a program referred to in subsection (1)(a.1), and evidence satisfactory to the registration committee that the applicant is the person named therein,

(d) a statutory declaration as specified in Form 1,

(e) the examination fee set by the College, and

(f) a signed criminal record check authorization form.

(3) Despite subsections (1)(a), (a.1) and (b), an applicant may be granted full registration by the registration committee if the applicant:

(a) holds registration or licensure in another Canadian jurisdiction as the equivalent of a full registrant, which is not subject to any practice limitations, restrictions or conditions in that jurisdiction that do not apply generally to registrants in British Columbia, and provides evidence satisfactory to the registration committee of the applicant’s registration or licensure, and that the applicant is the person named therein,

(b) provides evidence satisfactory to the registration committee that the applicant meets any applicable continuing competence and quality assurance requirements established by the applicable regulatory or licensing authority in the jurisdiction referred to in paragraph (a), and

(c) meets the requirements established in subsection (1)(c) and (d) and 2(a), (b), (d), (e) and (f)

(4) Despite subsection 1(a) and (a.1), the registration committee has discretion, in satisfying itself under section 20 of the Act that the applicant meets the conditions or requirements for registration as a member of the College, to consider whether the applicant’s knowledge, skills and abilities are substantially equivalent to the standards of academic or technical achievement and the competencies or other qualifications established in subsection 1(a) and (a.1), and to grant registration on that basis provided the applicant

(a) provides evidence satisfactory to the registration committee, of such knowledge, skill and abilities, and
[33] It is a condition of exercising the discretion existing under Bylaw s. 48(4), namely meeting s. 48(1)(b) (see s. 48(4)(b), which excludes s. 48(1)(a.1)), that the applicant has successfully written the Examination. It follows that successful completion of the Examination would, especially in cases where Applicants have completed professional school and do not have licensure in other jurisdictions, be a key factor to be weighed in a full and proper exercise of the discretion afforded by s. 48(4) of the Bylaws in the context of all other relevant factors, as part of assessing the applicant's knowledge, skills and abilities.

[34] It is one thing for the College to interpret s. 48(1)(a.1) to exclude diploma programs and recognize only university-type undergraduate courses as meeting the “two years of liberal arts or sciences study” requirement, an issue whose resolution I believe should be left to another day as it may or may not arise on given facts, given the remedy I am ordering on this review. It is, however, quite another thing for the College, in the absence of a proper bylaw passed under s. 19(1)(m.3) of the Act, to interpret s. 48(1)(a.1) as depriving an applicant of the ability to comply with another independent condition (the Examination, s. 48(1)(b)), thereby depriving them of any realistic opportunity to apply for a favourable exercise of discretion under s. 48(4). In s. 19(1)(m.3), the Legislature has made clear that if a College wants to place preconditions on writing a professional examination, it may pass a bylaw for that purpose. The College has not done so. In my view, it is neither lawful nor reasonable for the College, vis a vis these Applicants, to achieve that result indirectly through the policy interpretation or administration of a different Bylaw condition.

[35] The College was well aware of the policy argument that it makes little sense to register someone as a student, and charge them a student fee, if it is a foregone conclusion that, even if they were to succeed with flying colours at a professional school, they would never be allowed to write the examination because their educational background was insufficient. It is not my role to enter into the policy debate. It will suffice to make clear that for the College to properly place a precondition on the Examination in this context, it was required to do so in accordance with the Act and its Bylaws.

[36] I conclude the Registration Committee has acted unlawfully and unreasonably in its interpretation of Bylaw s. 48 and, in particular, its application of s. 48(1)(a.1) to deny eligibility to write the Examination, and further, in light of the requirements for a proper and full exercise of discretion required under s. 48(4), including the Applicant having successfully written the Examination, as a prerequisite to the exercise of the discretion to conclude substantial equivalency exists or does not exist. By depriving the Applicants of the opportunity to sit the Examination, the College imposed a condition that was extraneous to the condition it was interpreting (s. 48(1)(a.1)), and which should have been supported by a specific Bylaw pertaining to examinations (s. 48(1)(b)), the result of which ignored s. 19(1)(m.3) of the Act and deprived the Applicants of the opportunity to make a realistic or meaningful application under s. 48(4) of the Bylaws.
To be clear, I am not in this decision ruling that the College is required to grant full registration to any of the Applicants who successfully writes the Examination and is considered under s. 48(4). That is a separate issue which must be addressed at first instance by the Registration Committee on a case by case basis, subject to review by the Review Board, if applied for.

I would add two final points.

First, with respect to the Applicants' application to introduce the decisions of another administrative body as part of the evidence in this matter, I find that there is a significant difference between the purposes, processes and stakeholder interests of the matters before me and the matters before the other body, and therefore conclude it would be unfair to admit this additional evidence. If I had decided to admit this evidence it would have not changed my decision for reconsideration.

Second, I have not considered the Applicants' arguments based on the *Charter of Rights and Freedoms* as the Review Board has no jurisdiction over constitutional questions: Act s. 50.64 and Schedule; ATA s. 44.

**IV CONCLUSION**

For the reasons outlined above, I order that this matter be sent back to the Registration Committee to reconsider its decision to close the Applicants' files on the basis that it would not permit the Examination to be written, and direct that each Applicant, if otherwise qualified, be advised that he or she will be permitted to write the Examination if he or she chooses to do so, the timing of which will be for the College to determine in its discretion.

I have considered the Record and submissions of the parties though not referred to in their entirety herein.

"David A. Hobbs"

David A. Hobbs, Panel Chair
Health Professions Review Board

December 02, 2014