DECISION NO. 2014-HPA-053(a)

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

BETWEEN: The Applicant APPLICANT

AND: The College of Physicians and Surgeons of BC COLLEGE

BEFORE: Fazal Bhimji, Panel Chair REVIEW BOARD

DATE: Conducted by way of written submissions concluding on February 10, 2015

APPEARING: For the Complainant: Self-represented

For the College: Shaleen Kanji, Counsel

I STAGE 1 OR STAGE 2

[1] This complaint had been referred to a Stage 1 hearing where the following results are possible:

(a) I may confirm the Registration Committee decision under s. 50.54(9)(a) of the Act if the application for review can be fairly, properly and finally adjudicated on the merits based only on the College Record and submissions of the Applicant without the need for a submission from the College; or

(b) I may determine that the application requires adjudication in a Stage 2 hearing, in which case no decision will be made until after requesting submissions from the College and a final reply from the Applicant.

[2] I decided it was appropriate to proceed by way of a Stage 2 hearing in order to fairly, properly and finally adjudicate this matter on the merits. Accordingly, this review of the Registration Committee’s decision was based on the record before the Registration Committee, various emails and correspondence between the College and the Applicant and submissions by the College’s legal counsel. The Applicant was invited to provide a final reply but none was received.
II INTRODUCTION AND BACKGROUND

[3] The Applicant is a former Registrant of the College. He obtained his M.D. medical degree from the Medical Faculty, Shanghai First Medical College in 1962. After practicing in China as an attending gynecologist, obstetrician and lecturer between 1967 and 1979 he was a visiting scholar at Maternity Hospital, University of Zagreb, Croatia where he obtained a PhD in obstetrics related research.

[4] He resumed his practice in China in 1982. In 1996 he was accepted into the two year postgraduate family practice residency training program with the University of Manitoba which he completed in 1998 and in addition obtained the LMCC on January 12, 1998. He is a Canadian Citizen. The Applicant has a total of 44 years of experience as a physician.

[5] The Applicant was first registered and licensed with the College on July 1, 1998 with a Full class of registration as a general/family practitioner. On June 1, 2009, his registration status was changed to that of Full; General/Family Practice under the provisions of the Act.

[6] The Applicant first notified the College that he was considering retiring by letter dated July 28, 2011. He cited his age and general health conditions as his reasons and stated he would retire on October 1, 2011 but did not rule out the possibility of working part time after December 2011. The College responded acknowledging his desire to retire and informed him that should he decide to resume practice he would have to reapply under a new application.

[7] On September 12, 2011 he recanted that statement and informed the College he intended to work only part-time after October 1, 2011 until the end of the year and then decide if he would fully retire. The College acknowledged the new status and sent the Applicant a reminder about Continuing Professional Development requirements to maintain his license.

[8] After selling his Richmond clinic in October 2011 he worked sporadically in a walk-in clinic in Surrey until December 31, 2012 when he voluntarily retired and became a Former Member. At the time of his retirement he was advised by the College that should he wish to re-register he would have to re-apply and meet the requirements under s. 2-6 and s. 2-8 of the bylaws. These bylaws deal with issues of continuing competency (s. 2-6) and re-entry (s. 2-8) into practice. There is no mention of language requirements in those sections of the bylaws.

[9] Just prior to his retirement at the end of 2012, the College adopted new rules for English language proficiency (ELP) which went into effect on July 1, 2012 and were communicated to Registrants in its September 2012, issue of the College Quarterly. There was a special feature in that issue regarding the impact on new registrants and also re-registrants. Physicians who were already practicing and who did not meet the new language requirements were grandfathered. Grandfathering was adopted partly because of the administrative burden involved and partly over potential public safety concerns in the event communities across the province suddenly found themselves without a bona fide licensed physician. This risk was deemed by the College to be greater than the risk being addressed by requiring proficiency in English.

[10] The Applicant stated he was under a lot of pressure from former patients to return to practice to alleviate the high demand for doctors from his community and many of his former
patients would benefit from his return to practice. He also had been feeling lost since his retirement and felt he was in sufficient good health to be able to return.

[11] In September 2013, he contacted the College to enquire what would be necessary for him to return to practice in early 2014. The College requested that he fill out an application for registration form, provide references and Certificates of Professional Conduct from jurisdictions where he had trained or practiced during his absence. As his reapplication proceeded he was also asked to undergo the ELP testing which he resisted. In December 2013, the Applicant requested that the ELP requirement be waived in his case because he was not a new applicant and had worked for a number of years in Canada serving English speaking patients and therefore his ability to serve his patients in English he felt was proven. He was informed that the ELP requirement could not be waived to which he responded that he would not comply with the ELP requirements even though he believed he could pass the evaluations.

[12] At a meeting between the College and the Applicant on January 7, 2014, the College acknowledged his desire to return but brought up studies which allegedly demonstrate degrading core knowledge and clinical skills for physicians over the age of 65 and enquired as to his reasons for wanting to return to practice at the age of 75. The Applicant was told the Registration Committee could recommend a competency based assessment be completed prior to recommending him for re-registration and licensure given that he had worked only about 53 days in total in 2012. The Applicant was asked to reconsider his request and to consider the increased likelihood of a complaint due to a degradation of his abilities which was described to him as a shame given his almost entirely unblemished track record to date.

[13] The Applicant explained when he decided to retire he had referred to the state of his general health as a way of addressing his tendency to tire more easily. The College noted the Applicant was adamant he would not sit for an English language proficiency exam and felt this requirement was both unfair and “discriminatory”.

[14] Subsequently on January 21, 2014, the Registration Committee met and considered the matter. They determined that the Applicant had submitted billings up to December 2012 indicating that he was practicing within a year of his reapplication. The Committee was provided with several letters written by the Registrant and a letter in support of his request on behalf of 24 of his former patients who supported his bid to be relicensed.

[15] The Committee concluded that the Applicant was considered current for the purposes of By-Law 2-8 which specifies requirements for re-entry to practice but would be required to demonstrate his ability to speak, read and write English to the satisfaction of the registration committee in accordance with the general registration and licensure requirements under By-Law 2-3(2)(d). This requirement could effectively be met by demonstrating proficiency via either the TOEFL – iBT, or IELTS (academic) examinations satisfactory to the Registration Committee as well as meeting the requirements for the Act for application and continuing to abide by undertakings which the Applicant had signed to date.

[16] The Applicant was informed of the Committee decision by letter dated January 29, 2014.
The Applicant refuses to undergo the ELP testing and maintains he was not informed he would have to undergo this testing in the event that he returned to practice.

III JURISDICTIONAL ISSUES

Pursuant to s. 50.54(9) of the Act, the Review Board is limited to making one of three decisions:

(a) It can confirm the Registration Decision of the College;

(b) It can direct the Registration committee to make a decision that could have been made by the Registration Committee in the matter; or

(c) It can send the matter back to the Registration Committee for reconsideration with directions.

While the Review Board has the power to direct the Registration Committee to grant registration, with or without limit or conditions, or certification as the case may be, s. 50.54(10)(a) of the Act directs that to make such a direction the Review Board must be satisfied that all of the following apply:

(1) The registration Committee failed to act fairly in considering the application for registration or certification;

(2) The registration decision
   (a) Was made arbitrarily or in bad faith,
   (b) Was made for an improper purpose,
   (c) Was based entirely or predominantly on irrelevant factors, or
   (d) Failed to take requirements under the Act into account

(3) The conditions described in ss. (11)(a) or (b) of s. 50.54 are met.

IV ANALYSIS

The College has determined that in the interest of patient care, any candidate for licensure in British Columbia must have the ability to speak, read and write English to the satisfaction of the committee determined by achieving stipulated scores on either the TOEFL-iBT or IELTS (academic) exams. They have established bylaws to determine when a candidate needs to demonstrate proficiency in English. Physicians are considered to have met the proficiency requirements if:

(a) The language of instruction at medical school was English; and

(b) The primary language of patient care was English; and

(c) The first and native language of the country where the physician was trained is English.

It is within the College’s mandate to set requirements for Registrants. In this case I have no evidence to suggest that the requirement to meet the ELP standard set by the
College was made in bad faith, for an improper purpose, is based entirely or predominantly on irrelevant factors or that they failed to take requirements under the Act into account. The Applicant has not demonstrated to me that the College’s requirements are being applied inconsistently or in a discriminatory way.

[22] The College is applying the requirements in the bylaws as they would to any new registrant or re-registrant. In fact they have adopted standards for English proficiency which are internationally recognized and accepted as objective ways to measure that proficiency. As counsel for the College pointed out it is a more objective way to determine proficiency than a statement from an individual Applicant that a lack of complaints about their abilities in English translates to a certain acceptable proficiency.

[23] The College determined that the Applicant met the requirements for currency. The only thing preventing the Applicant from being re-registered is his refusal to take and pass an English language proficiency test. The College refuses to waive the requirement for any individual and this is consistently applied to all applicants. Perhaps the College could have considered maintaining the grandfathering of applicants who cease practice for a period of less than three years to align with the requirements for currency, however, that is not something the Review Board can direct nor does it indicate any bad faith, arbitrariness or improper purpose on the part of the College not to have made that decision.

[24] The College’s decision is sufficiently justified, transparent and intelligible and their reasons withstand scrutiny.

[25] The only thing standing in the way of the Applicant’s relicensing is his own refusal to sit for the ELP exam, something only he can control.

V DECISION

[26] I conclude that the Applicant has not demonstrated that the conduct of the College meets the criteria set forth in s. 50.54(10) of the Act and accordingly pursuant to s. 50.54 (9)(a) of the Act I confirm the registration decision of the College.

[27] In making this decision, I have considered all of the information and submissions before me, whether or not they are specifically referred to in these reasons.

“Fazal Bhimji”
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Fazal Bhimji, Panel Chair
Health Professions Review Board

March 31, 2015