I. INTRODUCTION

[1] The Applicant is a medical doctor who received his training outside of Canada and is seeking to obtain registration from the College to practice medicine in British Columbia. The Application for Review under the Health Professions Act, R.S.B.C. 1996, c. 183, as amended, (the “HPA”) was made to the Review Board in response to the Registration Committee decision of February 19, 2015, communicated to the Applicant in the Deputy Registrar’s letter dated March 5, 2015 (“2015 Eligibility Letter”).

[2] The 2015 Eligibility Letter granted the Applicant provisional licensure subject to 5 conditions:

The Committee remains prepared to grant [the Applicant] registration in the Provisional; General/Family (Practice) class under the sponsorship of either the Ministry of Health or its designate (a health authority), or the Faculty of Medicine,
UBC, and under the supervision of a physician yet to be determined, for a period of one year from a date to be determined subject to [the Applicant]:

1. providing evidence of English language proficiency via either the TOEFL-iBT, or the IELTS (academic) examinations satisfactory to the Registration Committee;

2. providing letters of attestation from his employers or university/hospital affiliated training programs, outlining [the Applicant’s] specific professional activities, with dates during 2012, 2013 and 2014, in accordance with College bylaw 2-8;

3. providing evidence that he is current member in good standing of the Irish College of General Practitioners (ICGP);

4. providing an original letter from the College of Family Physicians of Canada stating that his credentials appear to meet the criteria for the award by CFPC\(^1\) of certification without examination, and

5. obtaining verification of the academic credentials provided and to his compliance with the provisions of the Health Professions Act and bylaws under the Health Professions Act with respect to registration and submission of a current application satisfactory to the Registration Committee. (emphasis added)

[3] The principal focus of the Application for Review is the English Language Proficiency (“ELP”) requirement set out in the first underlined condition above (“Condition 1”). The Application also challenges the way the College of Family Physicians of Canada, (“CFPC”) certification is to be obtained as set out in the fourth condition above (“Condition 4”).

[4] Regarding Condition 1, the Applicant submits that the Registration Committee fettered its discretion by applying inflexible criteria as the method of assessing ELP, thereby precluding consideration of other compelling evidence of the Applicant’s command of English in a medical context.

[5] Regarding Condition 4, the Applicant submits that the condition is unreasonable as it is virtually impossible to satisfy since the CFPC certification in question normally requires at least two years working experience in family practice in Canada.

[6] By way of remedy, the Applicant seeks a direction requiring the Registration Committee to grant registration to the Applicant, which registration would grant him more time to meet the CFPC requirements.

\(^1\) Several different acronyms to describe the College of Family Physicians of Canada appear in evidence. For simplicity, all references herein use CFPC, regardless of how it is described in the evidence.
II BRIEF OVERVIEW

[7] The interaction between the Applicant and the College, which began in 2009, is marked by significant confusion.

[8] One significant source of that confusion stems from various representations and decisions made by College staff and the Registration Committee between 2012 and 2015 about the College’s ELP requirements. In 2012 the Registration Committee established a policy regarding ELP which was made effective July 2012 (the “ELP Policy”). Confusion created by the implementation of the ELP Policy created concerns which speak to the Applicant’s challenge to Condition 1 above.

[9] Another significant source of confusion arises from the fact that, on April 28, 2010, the Registration Committee issued an Eligibility Letter [the “2010 Eligibility Letter”], which contained a condition regarding CFPC certification which differs significantly from Condition 4 of the 2015 Eligibility Letter. The 2010 Eligibility Letter required the Applicant to obtain certification with the CFPC “within five years of commencing practice in British Columbia.”

[10] The confusion here stems from the fact the College took the position that the 2010 Eligibility Letter was only valid for three years, and that the Applicant was informed of this fact. As identified in this decision, the 2010 Eligibility Letter contains no expiry date, and there is no evidence before me that the College informed the Applicant in April 2010 (or at any time prior to his moving to Canada) that the 2010 Decision had a three-year expiry date.

[11] The Applicant accepted a job offer in August 2012 for employment in BC. The Applicant and his family moved from Ireland to a remote and isolated community in BC (the “Community”) in October 2012. The record of investigation provided by the College (the “Record”) shows that the College first informed the Applicant that he would be required to take ELP examinations in November 2012 after he and his family had already relocated.

[12] In the period between November 2012 and February 19, 2015, the Record shows numerous errors and unfounded assumptions were made by College staff regarding the Applicant’s application and circumstances, which combined to delay and confound the Applicant’s application for licensure.

[13] For the reasons that follow, I have concluded that Condition 1 of the 2015 Eligibility Letter was informed by numerous serious errors on the part of College staff and the Registration Committee. For that reason, an order is made directing the Registration Committee to reconsider its decision regarding Condition 1. With regard to Condition 4, I have decided, for the reasons that follow, to recommend that the College consider whether to “grandparent” or otherwise modify this condition respecting the Applicant based on the combined effect of its errors in addressing the ELP Policy, which delayed his application, and the confusion that has arisen with regard to the expiry date of the 2010 Eligibility Letter.
As I must review the evidence and determine the reasonableness of the Registration Committee’s 2015 decision which resulted in the 2015 Eligibility Letter, I must review the history of the Applicant’s interaction with the College (“Background”). I find that the 2015 Eligibility Letter cannot be considered in isolation from the history of the Applicant’s involvement with the College.

Due to the complexity of this matter, I have found it necessary, in the course of setting out the detailed background, to pause from time to time and make various findings regarding the matters being discussed.

III EVIDENCE

The Review Board utilizes a two-stage hearing process as set out in Rule 44 of the Rules of Practice and Procedure for Reviews under the Health Professions Act, R.S.B.C. 1996, c. 183 (the “Rules”). This hearing was concluded in accordance with Stage 2 as set out in Rule 44.

Therefore, this review is based on the Record, the Applicant’s Application for Review, the Statement of Points received from each of the Applicant and the College, New Evidence submitted by the College and admitted, and the Applicant’s response, which together constitutes the evidence before this hearing.

IV THE REVIEW BOARD’S MANDATE

The Review Board exists in part to provide, upon an application for review by an applicant, impartial and objective reviews of registration decisions of Registration Committees of the health profession colleges of British Columbia.

There is some uncertainty in prior Review Board decisions regarding the standard to be applied in registration reviews. While I reference those decisions herein, I will state here that I have decided to review the Registration Committee’s decision in this case on a standard of reasonableness as is more fully set out below.

Should I find a decision not reasonable, the HPA provides me with the authority to, among other actions, direct the Registration Committee to either make a decision that it could have made or (more typically) to send the matter back to the Registration Committee for reconsideration with directions.

V STATUTORY PROVISIONS GOVERNING THE REVIEW BOARD

The Review Board and the College are governed by the HPA. For the convenience of the reader, I set out here the sections of the HPA which establish the framework for my decision.

Section 50.54 of the HPA allows an applicant in receipt of a registration decision, the right to request a review by the Review Board. The review is a review on the Record, subject to any additional evidence the Review Board determines is reasonably required for a full and fair disclosure of all matters related to the issues under review.
Section 50.54(9) sets out the options available to me:

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.

Section 50.54(9)(b) provides me the authority to direct “...the registration committee to make a decision that could have been made...” One of the decisions a registration committee may make is to grant registration. If I was to consider granting registration, Section 50.54(10) and (11) impose specific conditions that must be met prior to my issuing such an order:

50.54 (10) The review board may make an order under subsection (9) directing the registration committee to grant registration with or without limits or conditions, or certification, as the case may be, only if the review board is satisfied that

(a) all of the following apply:

   (i) the registration committee failed to act fairly in considering the application for registration or certification;

   (ii) 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 this Act into account;

   (iii) the conditions described in subsection (11) (a) or (b) are met, or

   (b) the person is a person to whom the registration committee is obliged under the Labour Mobility Act to grant registration or certification.
50.54 (11) The following conditions apply for the purposes of subsection (10)(a)(iii):

(a) in the case of a person applying for registration as a member of the college,

(i) the person's knowledge, skills and abilities must be substantially equivalent to the standards of academic or technical achievement and the competencies or other qualifications required for registration in a class of registrants, and

(ii) the applicant must meet any other conditions or requirements for registration in the class of registrants...

[25] In s.16(1) and 16(2)(c) of the HPA the College is charged with its overarching duty and key responsibilities. For the convenience of the reader, I set out these sections here:

16 (1) It is the duty of a college at all times
    (a) to serve and protect the public, and
    (b) to exercise its powers and discharge its responsibilities under all enactments in the public interest.

(2) A college has the following objects:

......

(c) to establish the conditions or requirements for registration of a person as a member of the college;

[26] In s.19 the HPA sets out that the College may make bylaws “...consistent with the duties and objects...” of the College.

VI  BYLAW PROVISIONS GOVERNING REGISTRATION

[27] One of the specific objects of the College is to “establish the conditions or requirements for registration of a person as a member of the college” as set out in s. 16(2)(c). To that end, the College has under its bylaws (Bylaw 1-15) established the Registration Committee:

(1) The registration committee is established consisting of at least six persons appointed by the board, at least one-third of whom must be public representatives.

(2) The committee must include at least four registrants, two of whom must be elected board members.
(3) The committee has discretion to consider whether a person’s knowledge, skills and abilities are substantially equivalent to the standards of academic achievement, competencies or other qualifications established in Part 2 of the Bylaws and to grant registration on that basis.

(4) The duties and powers of the board under section 25.3(2) of the Act are delegated to the registration committee.

[28] The Registration Committee is governed by the HPA and the Bylaws. Of note, the HPA sets out in Sections 20(1), (2), (4.3) and (4.4) that:

20 (1) The registration committee is responsible for granting registration, including reinstatement of registration, of a person as a member of its college.

(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.

(4.3) If a bylaw under section 19(1)(i) establishes a class of provisional registrants for the purposes of this subsection, the registration committee may

(a) grant registration in the class for a limited period specified for the registrant by the registration committee,

(b) require the registrant to complete, within the period specified under paragraph (a), any examinations or upgrading of knowledge, skills or abilities the registration committee considers necessary for the registrant, and

(c) impose limits or conditions on the practice of the designated health profession by the registrant.

(4.4) Limits or conditions imposed in accordance with subsection (2.1), (3), (4.2) or (4.3) may be different for different registrants within a class of registrants.

[29] The Bylaws regarding registration establish “standards of academic achievement, competencies or other qualification.” Some standards are specific and prescriptive. Others are more generally worded, and invite the exercise of judgment and discretion. Bylaw 1-15(3) sets out that “[the] committee has discretion to consider whether a person’s knowledge, skills and abilities are substantially equivalent…and to grant registration on that basis.” (emphasis added).
With respect to the issue of English language proficiency (Condition 1), the bylaw, at all times relevant to this matter, was:

2-3 (2) An applicant for any class of registration, except for emergency registration, must

(d) have the ability to speak, read and write English to the satisfaction of the registration committee.

It is evident that s. 2-3(2)(d) of the Bylaws does not prescribe a particular examination or numerical standard that each applicant must satisfy before he or she is granted registration. The Bylaw, instead, speaks of the “satisfaction” of the Registration Committee of a particular applicant’s ability to speak, read and write English.

There are several issues in this case which arise from the need for the Registration Committee to be satisfied with an applicant’s ability to speak, read and write English. These issues revolve around the ELP Policy that the Registration Committee applied when it decided this issue.

As described in more detail below, the ELP Policy can be seen as having two branches. The first branch (referred to herein as the “Exempt Branch”) deems an applicant to be proficient in English if he or she meets certain criteria. If the applicant does not meet these criteria, then the second branch (referred to herein as the “Examination Branch”) speaks to the examination standard to be achieved in order to demonstrate ELP to the satisfaction of the Registration Committee.

On the Exempt Branch, an issue arises as to whether Registration Committee applied the Policy that was approved by the College in 2012. Another issue regarding the Exempt Branch involves the College’s inconsistent expression of this branch of the Policy, as well as the conflict between how it was stated and then applied by the Registration Committee. On the Examination Branch of the Policy, an issue is whether the Registration Committee improperly “fettered” its discretion by applying the Examination Branch of the ELP Policy as if it were a binding rule.

Lastly of note is a change in the Bylaws in January 2012 with respect to the issue of CFPC certification (Condition 4). The relevant bylaw after January 2012 includes Bylaw 2-15(1)(b)(ii), which is more onerous than the requirement that was set out in the 2010 Eligibility Letter:

2-15 (1) For the purposes of section 20(2) of the Act, to be granted provisional registration for general/family practice, an applicant must

(b) meet one of the following requirements:

(i) have completed a general/family medicine program in Canada after July 1, 2010, but has not passed the CFPC examinations, provide a recommendation from the applicant’s Program Director and Chairperson of the
Department of Family Medicine, attesting to competence and successful completion of all program requirements, acceptable to the registration committee,

(ii) have successfully completed a minimum of two years of accredited postgraduate training in a foreign jurisdiction recognized by the CFPC for the award of certification without examination, with a basic core of 44 weeks, consisting of eight weeks in each of medicine, surgery, obstetrics/gynecology, and paediatrics, and four weeks in each of psychiatry, emergency medicine, and general/family practice.

(iii) have undergone an assessment of competency acceptable to the registration committee in a Canadian province or territory.

[36] The requirement set out above for CFPC certification did not exist when the 2010 Eligibility Letter was issued.

[37] As already noted, the 2010 Eligibility Letter set out no expiry date. It was not until December 2014 that the College’s Deputy Registrar first advised the Applicant that he must complete a new application form with reference to the 2010 Eligibility Letter having expired. Also, as noted below, there are strong grounds to believe that based on the 2010 Eligibility Letter which specifically set out its own CFPC condition, the College would not have imposed the 2012 CPFC requirement on the Applicant had all other issues been resolved within the asserted “three year” window relied on by the College.

VII APPLICATION UNDER SECTION 42 OF THE ADMINISTRATIVE TRIBUNALS ACT (ATA)

[38] The College applied for a s.42 order to withhold from the Record provided to the Applicant seven completed reference forms obtained during consideration of the Applicant’s application for registration. In support of their application, the College referred to Straka v. Humber River Regional Hospital, 2000 CanLII 16979 (ON CA) in which the Ontario Court of Appeal, with reference to the conditions set out in Wigmore on Evidence, upheld the hospital’s privilege in similar circumstances to the present matter. The College also referred to Order F09-16, [2009] B.C.I.P.C.D. No. 22 in which the B.C. Information and Privacy Commissioner concluded that the Vancouver Health Authority was correct in withholding reference information.

[39] The Applicant provided his consent to the s.42 request and received a copy of the Record redacted in accordance with the request.
VIII   NEW EVIDENCE

[40] Pursuant to Rule 50 of the Rules, the College submitted new evidence to this hearing. The Rules provide the Review Board with wide latitude in which to consider new evidence. If the evidence is reasonably required “…for a full and fair disclosure of all matters related to the issues under review” then I may admit and consider it.

[41] The new evidence is an affidavit (the “Affidavit”) of the Executive Director of Registration for the College [the “Executive Director”]. The Affidavit contains information directly relevant to the matters at issue. The Applicant raised no objection to the new evidence.

[42] The Affidavit corrects errors in the Record and provides documents utilized by the College at various times which are relevant to this matter and which were not otherwise provided.

[43] The Affidavit describes two parts to the application process for registration and licensure with the College: a preliminary assessment of eligibility (Part 1) and an assessment of compliance with the conditions set out in the eligibility decision and any other application registration and licensure requirements (Part 2).

[44] The Affidavit attests that an applicant must meet the requirements for registration in effect at the time they submit their application, as opposed to the rules in effect at the time of the eligibility ruling. However, it also states that “An eligibility ruling is valid for three years after which it expires.”

[45] The Affidavit does not state whether this three-year period derives from the College’s bylaws, policies or particular eligibility decision letters. The Affidavit is also silent on the question of whether, where there was a three-year window, the College’s practice or policy was to grandparent a person whose eligibility letter imposed a specific condition, even if the bylaws passed, after the eligibility letter was issued, conveyed a more onerous requirement on that issue, if the person applied for registration during the eligibility period.

[46] The Affidavit attests that the Application Package (defined in the Affidavit) is provided to the applicant after he/she has completed all the listed subjects in the eligibility ruling. The Affidavit states that the package is usually sent after the verification of academic credentials process has been initiated but before its completion.

[47] The Affidavit attests that, prior to 2011, the College did not consistently advise applicants of the ELP requirements in Part 1 of the process, prior to delivery of the Application Package. The Affidavit confirms that there was no reference to the ELP requirement in the 2010 Eligibility Letter provided to the Applicant.

[48] The Affidavit refers to a consensus developed by the Federation of Medical Regulatory Authorities of Canada on the Canadian standard for English language proficiency. The Affidavit describes the Registration Committee decision in 2012 to adopt a standard policy for assessing ELP, discussed further below.
I find the Affidavit to be reasonably required for full and fair disclosure of the matters under review and have admitted and considered it as new evidence.

IX COLLEGE SUBMISSION

The College submits that it advised the applicable Health Authority (the “Health Authority”) by email on August 28, 2012, that the Applicant would be required to demonstrate ELP. I note that there is no evidence if or when Health Authority communicated this information to the Applicant.

In an exchange of emails between the Health Authority and the College on November 6, 2012, the Health Authority raised the possibility that the Applicant was not advised by Health Match BC to connect directly with the College prior to arriving in BC to ensure everything was in order. There is no evidence of Health Match BC providing this advice to the Applicant.

The College concedes that the Deputy Registrar’s assumption regarding the language of instruction at the medical school where the applicant received his medical degree was in error. The College now acknowledges that the principal language of instruction at the medical school was English.

The College provided a review of the history of the Applicant with the College, reviewed the requirements for registration as provided to the Applicant and the relevant sections of the HPA and the Bylaws of the College. “The College submits that in the circumstances of this matter, the Review Board must consider, not whether it agrees with the Registration Committee’s Decision (as represented in the 2015 Eligibility Letter), but whether the Decision is justified, transparent and intelligible.”

The College submits that the Applicant “…does not in fact meet the three-part test for ELP and is therefore required to meet the minimum scores required for either the TOEFL-iBT or the IELTS.”

The College submits that the Registration Committee is justified in requiring that applicants demonstrate proficiency by specific standardized testing as this testing is an objective means of evaluation. The “…College asserts that the ELP requirements are a bona fide occupational requirement for registration as a physician in British Columbia.”

The College submits that ten periods of time, representing approximately eighty-eight months of the Applicant’s career, remain as self-reported. Based on the portion of the Applicant’s career for which the College has supporting documentation, the College submits that there is no evidence that the Applicant has met the post-graduate training required for entry into the Practice Ready Assessment-BC Program (“PRA-BC”) nor has he met the requirements for registration in the Provisional; General/Family (Practice) class of registration.

The College submits that the Review Board may not order the Registration Committee to grant registration, as under s.50.49(10)(a) of the HPA, all of the conditions
identified must be satisfied and the facts, in this matter, do not support such a conclusion.

[58] The College submits that the remaining issue for the Review Board to determine is whether the decision of the Registration Committee is reasonable under s.50.54(9) of the HPA. The College submits that the Review Board owes deference to the Registration Committee and the facts in this matter support the conclusion that the decision was reasonable as it is justifiable, transparent and intelligible.

X APPLICANT’S RESPONSE

[59] In response to the College, the Applicant submits that the Registration Committee was unable to understand the basis of his Application. He submits that he has equivalent training required by the College to work as a family physician. He submits that the College did not communicate the requirement for him to demonstrate ELP in a timely manner but did issue documents essential for his move to BC. He submits that the College is twisting its words to rationalize that he must demonstrate ELP. The Applicant submits that there was a failure of the various authorities involved in his moving to BC to communicate and that the College has treated him in an unjustified manner while trying to cover its own mistakes.

XI BACKGROUND

The Applicant

[60] It is common ground that the Applicant earned his Bachelor of Medicine and Bachelor of Surgery degrees in a country (“Home Country”) that is not on the College list of English speaking countries. While the native language of the Home Country where the medical school is located is not English, the Record, at all material times, contains official certification from the university where he obtained his medical degrees that all lectures, teaching and examinations were conducted entirely in English and 75% of the complete clinical interaction which occurred as part of the course of study was in English. The Applicant graduated in 1990 and practiced in his Home Country until mid-1995.

[61] From the fall of 1995 until the end of 2009, the Applicant practiced medicine in Ireland or the United Kingdom, countries which are on the official list of English speaking countries used by the College. During this time, he took his post medical school physician training, received a certificate of basic training (“BST”) and a postgraduate examination-based diploma (“MRCS”) from the Royal College of Surgeons in Ireland.

[62] The College wrote a letter to Health Match BC\(^2\) dated June 15, 2009, denying the Applicant’s request for licensure as a family practitioner while expressing a willingness to revisit an application were he to acquire the requisite postgraduate training. In a letter

\(^2\) Health Match BC is described in the Affidavit as “a provincially funded healthcare recruitment agency, it assists Canadian and internationally educated physicians to relocate and practice in British Columbia.”
dated July 3, 2009, the College advised Health Match BC, copied to Applicant, that if the Applicant obtained certain postgraduate training “…the Registration Committee would be prepared to consider an application again.”

[63] In a follow-up letter, dated September 10, 2009, the College advised Health Match BC, copied to Applicant, that the July 3, 2009, letter had been sent in error, and that based on the information in the pre-screening assessment provided by Health Match BC, the Applicant did not meet the basic eligibility criteria of any of the registration classes of the College.

2010 Eligibility Letter

[64] Following a Registration Committee meeting on April 15, 2010, the Deputy Registrar of the College issued the 2010 Eligibility Letter, addressed to Health Match BC, copied to Applicant. The 2010 Eligibility Letter advised the parties that the Registration Committee “would be prepared to grant” (the Applicant) registration in the Provisional-General/Family (Practice) class for the practice of Family Medicine restricted to an underserviced area of need in the province, under the sponsorship of a Health Authority and under the supervision of a physician yet to be determined, for a period of one year from a date to be determined subject to (the Applicant):

- obtaining the Medical Council of Canada Evaluating Examination (the "MCCEE") prior to commencement of practice in British Columbia unless specifically exempted by the Medical Council of Canada, and

- verification of the academic credentials provided and to [sic] compliance with the provisions of the Health Professions Act and the Bylaws under the Health Professions Act with respect to registration and submission of a current application satisfactory to the Registration Committee.

[65] The 2010 Eligibility Letter further stipulated that the Applicant must:

- Attend a new physician orientation program within the first year of practice in British Columbia;

- Become a Licentiate of the Medical Council of Canada within three years of commencement of practice in British Columbia; and,

- …within five years of commencing practice in British Columbia, obtain certification with the College of Family Physicians of Canada [CFPC], failing which registration may be cancelled.

[66] This letter stipulated that the Applicant must comply with the Bylaws of the College (the “Bylaws”). In submissions, the College provided the Bylaws dated June 1, 2009 and all subsequent revisions up to and including January 1, 2015. At all times the requirement for ELP is, as was set out in the June 1, 2009 Bylaws at s. 2-3(2)(c):

2-3(2)(c) have the ability to speak, read and write English to the satisfaction of the registration committee
In consideration of positions the College subsequently took, it is important to pause here to emphasize again certain facts about the 2010 Eligibility Letter:

(a) The 2010 Eligibility Letter and accompanying Resolution make no reference whatsoever to the decision having an expiry date, let alone a three-year expiry date, which is subsequently assumed to exist and factors into subsequent decisions made by the Registration Committee;

(b) The College has not pointed to any external statutory authority, Bylaw or Policy stating that its registration decisions expire after three years, though the Affidavit submitted by the College as new evidence makes the general statement that “an eligibility ruling is valid for three years after which it expires”;

(c) The Registration Committee’s 2015 Eligibility Letter was written based on the assumption that the Applicant “was informed in April 2010, that his initial resolution granted, effective April 15, 2010 has an expiry date of three years from the date of issue.” (emphasis added) However, there is no evidence that the College informed the Applicant in 2010, or at any time prior to December 2014, that the 2010 Eligibility letter had a three year expiry date;

(d) There is no evidence that Health Match BC was aware of or in any manner advised the Applicant of a three-year expiry condition;

(e) The Deputy Registrar’s December 15, 2014, letter to the Applicant’s counsel requested, for the first time, a new application: “As it is now more than two years since you submitted your original Application for Registration”;

(f) There is no evidence that in or about April 2013 (the date when the 2010 Eligibility Letter would have expired had it contained an expiry date) the College advised the Applicant that it took the view that the 2010 Eligibility Letter had expired or was about to expire, which is obviously significant given that the Applicant had submitted his application in October 2012;

(g) There is no text in the 2010 Eligibility Letter addressing the requirement to demonstrate ELP. Subsequent decisions of the Deputy Registrar and the Registration Committee are informed by the assumption that the 2010 Eligibility Letter contained “…our standard section regarding our requirements for English language proficiency…” when there was clearly no such wording in any form;

(h) The 2010 Eligibility Letter references “submission of a current application satisfactory to the Registration Committee,” but subsequently contains the following:

The College will proceed with the licensure process upon the receipt of a formal request for (the Applicant’s) services and registration, provided that source verification of credentials has been initiated by (the Applicant) at PCRC [Physician Credentials Registry of Canada], and confirmed to CPSBC and
Once he has obtained a valid Labour Market Opinion he may proceed with the Immigration process. (underlining in original)

(i) The significance of the conditions set out in point (h) becomes clear in 2012 when the Applicant, upon receipt of a job offer, moves his family to BC. After booking his travel and arranging his affairs to immigrate to Canada, the Applicant received the Application Package. In that package, for the first time, there is reference to the ELP requirement, described in more detail below. As will be seen the Applicant reasonably took the view that he satisfied the College’s ELP requirements.

[68] The 2010 Eligibility Letter contained other requirements of significance for the Applicant which are not directly relevant to this decision.

2011 Job Offer

[69] In an email dated November 19, 2010, Health Match BC wrote the College on behalf of the Applicant who was then inquiring about vacancies in southeastern BC for a “GP/Surgeon.” After a follow-up email on December 8, 2010, the College responded by email on December 17, 2010, that the Applicant “…would only be eligible to perform minor surgery as recognized in Family Medicine.”

[70] In a letter dated April 18, 2011, the BC Ministry of Health wrote to the medical director of a southern BC health authority supporting the need to recruit the Applicant for a position starting July 1, 2011. This letter was copied to the College and Health Match BC.

[71] In a letter dated April 19, 2011, the health authority in southern BC wrote the College to formally start the process to bring the Applicant to BC to begin practice July 1, 2011.

[72] On June 28, 2011, the College wrote the Applicant an email which advised him that, prior to proceeding with his application for licensure, the College required confirmation that he had successfully completed the MCCEE.

[73] On July 5, 2011, the Deputy Registrar of the College provided a letter to Service Canada in support of a work permit for the Applicant. This letter confirmed that the College “…would be prepared to grant [the Applicant] registration…for a period of three years commencing July 15, 2011…subject to compliance with the Act and the Bylaws of the College” (the “Bylaws”) and “…submission of a current application satisfactory to the Registration Committee.” There is no evidence that this letter was provided to the Applicant.

[74] By email on December 20, 2011, the Applicant advised the College that he was scheduled to sit the MCCEE on March 19, 2012.

[75] There is no evidence that an Application Package was provided to the Applicant prior to the end of 2011.
2012 Job Offer and Immigration

[76] The Applicant did not sit the MCCEE on March 19, 2012, and the job offer from 2011 was withdrawn on March 21, 2012.

[77] The Applicant subsequently wrote the MCCEE on May 21, 2012, and was notified on July 19, 2012, that he passed.

[78] The Applicant received a new job offer from the Health Authority in a letter dated August 14, 2012 with a tentative start date of October 1, 2012. The Applicant accepted the terms and conditions of the offer on August 14, 2012.

[79] On August 22, 2012, the Health Authority advised the College that it had offered the Applicant a position with the tentative start date of October 1, 2012.

[80] In an email on August 28, 2012, a staff member in the registration department of the College wrote the Health Authority. This email contains the first reference in the College’s communication related to the Applicant that he would have to complete an ELP examination:

Please note that we will release the application package for [the Applicant]. However, as per our English Language Proficiency Requirements [the Applicant] will need to complete an English Language Proficiency exam (TOEFL or IELTS) prior to his registration appointment and licensure with the College as his medical degree was obtained in [a non-English speaking country]. He can refer to our website .... or his application package upon receiving it, for more information regarding these requirements.

[81] The College email to the Health Authority was not copied to the Applicant and there is no evidence that the Health Authority provided a copy of this email to him. There is also no evidence that the Health Authority considered the condition regarding ELP to be a concern and it is noteworthy that it already had an accepted job offer from the Applicant prior to receipt of this email from the College.

[82] The College wrote Service Canada on August 29, 2012, seeking a work permit on the same terms as it had previously used in the July 5, 2011, letter.

[83] There is no evidence as to precisely when an application package was provided to the Applicant. However, the wording of the August 28, 2012, email makes clear that it was on or after August 28, 2012.

[84] The Record contains the Applicant’s completed Application which he signed on September 25, 2012, and the College received on October 23, 2012. The Record discloses that the Applicant and his family arrived in the Community during October 2012.

[85] As noted above, the College’s Affidavit in this matter states that physicians seeking registration must meet the requirements for registration in effect at the time they
submit their application, as opposed to those that are in effect at the time of the eligibility ruling.

[86] If this had been the policy in October 2012, one would have expected to see some timely communication from the College to the Applicant that the January 2012 bylaw amendment set out in College Bylaw 2-15 was now applicable to him. However, that communication did not materialize until the College issued its 2015 Eligibility Letter. This may suggest that the College was prepared (at least for the three-year period it says that decision was valid) to honour the CFPC condition set out in the 2010 Eligibility Letter and grandparent the Applicant on this issue. If that is so, then the errors and delays that followed in the College's handling of the ELP issue take on particular significance. On the other hand, if the Registration Committee did not intend to honour the CFPC condition in the 2010 Eligibility Letter, then its failure to notify the Applicant of the significance of this change in a timely fashion is inexcusable.

[87] The actual application package which was sent to the Applicant is not in evidence. However, in the Affidavit there is a copy of the standard application package which, the College submits, was used in 2012.

[88] The standard application package (the “Application Package”) included the:

- Application form (the “Application”);
- Instructions for Completion of the Application (the “Instructions”); and
- English Language Proficiency Requirements (the “ELP Requirements”).

[89] The application signed by the Applicant, the Application and the Instructions, use identical wording to describe the ELP requirement. As the ELP requirement is one of the central issues in this case, I pause here to review the ELP evidence before me.

**ELP (English Language Proficiency) Policy and Evidence**

[90] In the 2010 Eligibility Letter the Applicant was advised that he must comply with the HPA and the Bylaws, by inference the Bylaws of the College. This letter does not refer to the College website and there is no evidence that the Bylaws were independently provided to the Applicant. Nor does the 2010 Eligibility Letter refer to any other content on the website.

[91] The College, in its Statement of Points, submitted four versions of the Bylaws as they read between June 2009 to January 1, 2015, and submitted that the then current version was available on the College website at each point in time. In each revision, the description of the ELP requirement is as found in the Bylaws dated June 1, 2009, on page 31:
An applicant for any class of registration, except for emergency registration, must (c) have the ability to speak, read and write English to the satisfaction of the Registration Committee.

This is the only information on ELP the College submits was provided or available to the Applicant prior to his receipt of the Application Package in 2012. It is, therefore, instructive to examine the contents of the Application Package but not before understanding the changes made to the ELP policy by the Registration Committee in April 2012.

In her Affidavit, the Executive Director (of Registration of the College) submits that the Registration Committee met on April 19, 2012, to determine a new policy for ELP. The Executive Director joined the College in May 2012 as Director of Registration and moved to her current position on January 1, 2016. The Executive Director did not attend the Registration Committee meeting on April 19, 2012, and the College did not submit the minutes of that meeting or evidence from anyone who was in attendance.

Based on her reading of the minutes of the Registration Committee meeting of April 19, 2012, the Executive Director swore as follows:

(a) As of October 2011, the Federation of Medical Regulatory Authorities of Canada (FMRAC) developed consensus on the Canadian standard for English language proficiency. FMRAC determined that candidates are exempt from ELP testing if their medical education and patient care experience were in one of a select list of countries that have English as a first and native language. All other candidates would be required to take the IELTS or TOEFL within the last 24 months at the time of application and achieved the following minimum score:

a. IELTS academic version: minimum score of 7.0 in each of the four components and a total minimum band score of 7.0; or
b. TOEFL-iBT (internet based test) academic version: minimum score of 24 in each of the four components and an overall total minimum score of 96.

(b) The Registration Committee passed a resolution that the College’s ELP requirements be adopted in the following summary, effective July 1, 2012:

Any candidate for licensure in British Columbia must have the ability to speak, read, write and understand spoken English to the satisfaction of the Registration Committee. Physicians are considered to have met the proficiency requirements if the language of instruction at medical school and the primary language of patient care were conducted in English. Physicians who have not met all of these requirements will require the TOEFL-iBT (internet based test) with a total minimum score of 96 and minimum score of 24 on each of the test’s four components. [emphasis added]
This requirement will be applicable to applications for licensure that are received.

I observe that the language in paragraphs (a) and (b) are worded differently. The “consensus” in (a) (which does not quote an official document but is the affiant’s description) refers to candidates being exempt if their “medical education” and “patient care” experience were in countries that have English as a first and native language. However, the Resolution passed by the Registration Committee, set out in the Affidavit, states that the requirement is met “if the language of instruction at medical school and the primary language of patient care” were conducted in English.

This is an important distinction in this case, particularly as it is the Resolution adopted by the Registration Committee and approved by the College Board that governs the College and its staff.

The Executive Director confirmed in her Affidavit that the “…above noted summary of the revised ELP requirements was presented to and approved by the College’s Board in a closed meeting held on April 20, 2012.” Within the context of the Affidavit, I conclude that the Executive Director is referring to the Resolution set out in para. [94](b) when she refers to the “above noted summary.”

As the College did not submit a copy of the actual Resolution, I rely on the information contained in para. [94](b) above to set out the ELP Policy of the College as of April 20, 2012. I will add here as well that since the 2010 Eligibility Letter did not, in contrast to its CFPC condition, contain an express condition on ELP, I accept the new policy was properly applied when the applicant submitted his application in October 2012.

The Application Package which the College submits is the same as the one which was provided to the Applicant in 2012 articulates certain conditions for ELP.

The three documents in the Application Package are consistent in articulating a two-branch policy.

However, one highly problematic feature of these documents is that two of the documents articulate the conditions for the Exempt Branch in one way (which is more favourable to the Applicant), while the other articulates it in a different way (less favourable to the Applicant).

In two of the documents - the Application and the Instructions documents - the College’s English Language Proficiency Policy is written as follows (with the exception that “requirements” is misspelled in the Application):

NOTE: 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. [emphasis added]

Physicians who do not meet these requirements must have either TOEFL IBT or Academic IELTS examination results as follows: an overall score of 96 with 24 in each of the four sections (TOEFL) or 7.0 in all bands (Academic IELTS).

[103] By contrast, in the ELP Requirements document, the ELP policy is written as follows:

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 granted their medical degree is English. [emphasis added]

Physicians who do not meet these requirements must have either TOEFL IBT or Academic IELTS examination results as follows: an overall score of 96 with 24 in each of the four sections (TOEFL) or 7.0 in all bands (Academic IELTS).

[104] The first problem with the description of the Exempt Branch in these documents, irrespective of the wording, is that the College Resolution described in the Affidavit makes no reference to a third criterion, at all. The Resolution itself refers only to the first two criteria:

Physicians are considered to have met the proficiency requirements if the language of instruction at medical school and the primary language of patient care were conducted in English.

[105] There is no evidence that the Registration Committee or the College subsequently added a third criterion. Had such been added, I would have expected to have seen it referenced in the Affidavit for accuracy and completeness.

[106] This is very significant because the College now submits to this hearing that the Applicant in fact met the first two criteria at the time he submitted his application in October 2012. The implications of this are serious given the years of delay that were subsequently occasioned based on College staff’s position that he failed to satisfy the ELP Policy, and then based on the College’s view, due to the passage of time, that the 2010 Eligibility Letter had “expired” and that the Applicant was now bound by the updated CFPC requirements.

[107] I take it as obvious that absent evidence that the Registration Committee or College Board added the third criterion, College staff could not on their own motion, without permission, amend the Policy and generate documents or web pages purporting
to “add” a third criterion. College staff cannot dictate policy to the Registration Committee, or revise the policy of the Registration Committee at their own motion.

[108] The absence of any reference in the Policy to a third criterion obviously makes the conflicting versions of that criterion even more confusing and problematic in their application to a person who the College only now concedes met the first two criteria, and who has a strong argument to make as well on one version of the third criterion, as discussed next.

[109] In the Application, which was filled in and signed by the Applicant and in the Instructions provided for completing the Application, there is a clear distinction between criterion a) and criterion c). By choosing to use different language in these two criteria the author of the document is making it very clear that there is a difference between the “language of instruction at medical school” and “the language of the country where the physician was trained.” Clearly, the author of the document sees “medical school” and physician “training” as different parts of a physician’s background. Why else would the language be different and separated between a) and c)?

[110] In this case, the Applicant received his medical degree in a country which is not recognized as predominantly English speaking though the College now agrees that the language of instruction for his medical degree was English. Hence, he at all times satisfied criterion a). It is also common ground that the primary language of patient care was English. Hence, he satisfied criterion b).

[111] It is also common ground that the Applicant practiced medicine for 15 years in two countries recognized as English speaking by the College, primarily Ireland. As becomes evident below, he completed his post-graduate degree training in medicine in an English-speaking country. It was thus entirely reasonable for the Applicant to have represented on his Application that he satisfied the criterion set out as item c) in both the Application document and the Instructions for completing the Application.

[112] But now consider the subtle difference in the wording of criterion c) in the ELP Requirements document that was included as the third document in the Application Package. There, criterion c) requires that English is the first and native language of the country where the physician “was granted their medical degree” as opposed to “where the physician was trained” as found in the Application and Instructions documents that were part of the package.

[113] The College cannot be arbitrary in its dealings with applicants for registration. Applicants would and should reasonably expect the College to represent and express its key policies clearly and consistently. Applicants would also reasonably give primacy to the documents they are being asked to sign. Where, as here, all three documents have what, on first reading, appears to be identical text, in near identical format, it is not reasonable to think that an applicant would even notice that the third version of the criterion contains a substitution of one word with four words that materially alters the meaning.
While there is no evidence of what the College website contained in explanation of the ELP policy in 2012, there is evidence that as late as July 2013 the website contained the ELP wording that is set out in the Application and the Instructions documents referred to above. I find it to be a reasonable assumption that the website in August 2012 contained this same wording, if it contained any reference to the Policy. I find it unreasonable to think that the wording in 2012 would have reflected the wording in the ELP Requirements document which would have necessitated changing it sometime prior to 2013.

The different wording of the third criterion (if that criterion was validly in place) becomes significant in the context of the actions taken by the College staff and the Registration Committee in their interactions with the Applicant. In the period following August 2012, the College staff and Registration Committee made decisions consistent with the text of the ELP Requirements document to support the view that the Applicant must undertake and satisfy examinations. This, as I have set out herein, is not reasonable given the preponderance of other documents with the alternate wording, and given that criterion c) is not even part of the Resolution and ELP Policy approved by the Registration Committee and the College Board.

Now consider the Examination Branch of the ELP Policy. The Policy, as approved in the Resolution, provides for evaluation using the TOEFL-iBT internet based exam. The Policy makes no mention of the IELTS test as a means for satisfying the ELP standard of the Registration Committee:

Physicians who have not met all of these requirements will require the TOEFL-iBT (internet based test) with a total minimum score of 96 and minimum score of 24 on each of the test's four components.

In the wording of the criteria as set out in paras. [102] and [103] College staff have included the IELTS test as one of the options available to physicians who do not meet the Exempt Branch standards for ELP. The Resolution makes no reference to the IELTS testing, except with regard to applicants “who attended a French speaking medical school or whose primary language of interaction with patients is in French.”

In review of the ELP Policy, I find a situation in the fall of 2012 in which:

- The Application Package contained conflicting versions of the criterion to determine ELP;
- The dominant version of the ELP criterion is as set out in the Application and Instructions documents, except that:
  - The third criteria set out as c) in each instance, in either form, is not included in the Resolution and subsequent Policy of the Registration Committee or College Board; and
  - The IELTS testing protocol set out in the Application Package documents is not included in the Resolution or Policy.
Conclusions on ELP Policy

[119] Based on the Record, it is apparent that neither version of criterion c) of the Exempt Branch of the ELP Policy is part of the College’s official Resolution and Policy on ELP as set out in the Affidavit.

[120] In the absence of evidence that the Registration Committee or the College validly appended criterion c), the only conclusion that can reasonably be drawn is that criterion c) was, in its various inconsistent iterations, asserted by College staff without proper authority. Indeed, the very inconsistency in the expression of criterion c) by College staff, and the absence of any reference to criterion c) in the Affidavit (which one would expect to be complete) support the conclusion that the criterion did not flow from a resolution of the Registration Committee or the College Board. This inconsistent and confusing state of affairs shows just why such formal resolutions are necessary so that College Policy is clearly articulated and expressed, rather than being altered or added to by Staff.

[121] Where, as here, the College now admits that it erred in concluding that the Applicant had not satisfied criteria a) and b) in 2012, the harm occasioned by the confusion and inconsistency concerning criterion c) is particularly significant. Had the College recognized in 2012 that, based on records already submitted to the College, the Applicant satisfied the Exempt Branch of the Policy as approved in the Resolution, his registration would have proceeded without the delays that ensued on this issue. Further, based on the subsequently handling of the application by the College, I find it reasonable to conclude that the Applicant would likely have been grandparented in the CPFC condition as set out in the 2010 Eligibility Letter.

[122] I have also concluded that even if criterion c) has been authorized by way of some formal Resolution that was never made part of the Record in this case or included in the Affidavit, it was unreasonable for the Registration Committee to fail to conclude that the Applicant was entitled to rely on the wording in the Application and the Instructions in considering the ELP requirements of the College in 2012. To set out the basis for these findings, I return to the Applicant and the College in the second half of 2012.

The Applicant in 2012

[123] The Applicant received his job offer in an email dated August 14, 2012, and signed his acceptance the same day. A staff member of the College wrote the Health Authority on August 28, 2012, and set out a requirement that the Applicant would have to proceed via the Examination Branch of the ELP Policy as his medical degree was received in a non-English speaking country. There is no evidence this message was conveyed to the Applicant, nor, as we have seen, is the reasoning by the staff member supported by the Resolution.

[124] Nevertheless, it is instructive to examine the brief explanation set out in the August 28, 2012, email which was given in support of the testing requirement:
However, as per our English Language Proficiency Requirements [the applicant] will need to complete an English Language Proficiency exam (TOEFL or IELTS) prior to his registration appointment and licensure with the College as his medical degree was obtained in [a non-English speaking country]. [emphasis added]

[125] As discussed above the Resolutions of the Registration Committee and the College Board which set out the ELP Policy, do not refer to the IELTS testing protocol or the requirement for testing based on his medical degree being obtained in a non-English speaking country.

[126] The completed Application was signed by the Applicant on September 25, 2012. The Applicant and his family arrived in the Community during October 2012 and the College received the signed Application on October 23, 2012.

[127] On October 30, 2012, a staff member of the College Registration Department sent the Applicant an email requesting that the Applicant provide the College with IELTS test score results. There is no explanation in the letter for why the test results were required.

[128] By email on November 2, 2012, the Applicant responded to the staff member providing IELTS results of an exam which the Record subsequently shows he took on October 13, 2012. As noted above, the only prior evidence of this requirement being set out by the College is the email sent to the Health Authority on August 28, 2012. The Record does not provide evidence of whether this email was provided to the Applicant and if it was then when he received it.

[129] In an email on November 2, 2012, the College staff member responded to the Applicant:

Thank you for providing your recent IELTS results. Unfortunately they do not meet our current requirements (see: https://www.cpsbc.ca/physicians-area/registration a minimum score of 6 is required in each component).

You will be required to re-sit the IELTS-academic test prior to being able to get an interview for registration. I wish I could be the bearer of more favorable news.

[130] The College submits that the reference to the minimum score of “6” in the November 2, 2012, email is an error, and it should not offset the other documents which set out that the required score is “7” in all bands.

[131] Had the basis for even requiring the exam and the form of exam been clearly authorized, I would be more sympathetic to the College’s submission. From the perspective of the Applicant, however, this will prove to be the second time in short succession he has been told one thing in official College documents and satisfied its requirements, only to be told that the goalposts had shifted.

[132] In an email on November 6, 2012, a physician with the Health Authority wrote the Deputy Registrar of the College:
[The Applicant] obtained his first CPSBC assessment in April 2010, when the English proficiency at the present level was not a mandatory requirement. The CPSBC Registration Committee resolution letters are valid for 3 years.3 [The Applicant] obtained his letter in April 2010, therefore he is still within the timeframe. Perhaps the fact that at the time of his original assessment English at the present level was not required, therefore, he would not have been aware until advised in late August 2012, that he would have to write an English exam.

[The Applicant] was a Health Match BC referral to [the Health Authority] on July 30, 2012.

On August 24th, 2012, Health Match BC made an inquiry to the College and was advised [the Applicant] would be required to write this exam. The English Proficiency test became a mandatory requirement of the CPSBC on July 1, 2012.

Health BC advises all physicians to connect directly with the College prior to arriving in BC to ensure that everything is in order. They must do this themselves, because the Executive Assistants at the College go through every document with the physicians to ensure everything is in order. It would appear that this was not done?

[133] Within the hour, the Deputy Registrar responded to the Health Authority inquiry. Noting that he was responding while out of the office, and would check what information the Applicant was provided, the Deputy Registrar stated:

i. The College’s ELP requirements had been posted on the College website “since 2010 or earlier.”

ii. I am certain that our initial post-Registration committee letter ... contained our standard section regarding our requirements for English language proficiency which were in effect at the time, and that therefore it is not correct to state that [the Applicant] was “blind-sided” in August 2012. He knew or ought to have known, on the basis of our letter sent to him in 2010 that he would be required to demonstrate ELP. I'll check his file. (emphasis added)

iii. “Because of issues regarding fraudulent submission of TOEFL scores to our College, and after consultation with TOEFL offices, we changed our minimum requirements for TOEFL test scores, effective July 1, 2012. WE DID NOT FIRST MANDATE ENGLISH LANGUAGE PROFICIENCY REQUIREMENTS ON JULY 1, 2012.”

iv. If he submitted a TOEFL test score prior to September 2012 which would have met our minimum requirements in effect prior to July 1, 2012, we may have some leeway to “grandparent” him. However, if he did not sit

3 I have noted the Health Authority’s reference to Registration Committee resolution letters being “valid for 3 years.” This letter shows a belief by the Health Authority. Unfortunately, it does not set out the source or foundation for that view, or whether this was ever communicated to the Applicant.
the exam for the first time until after July 1, 2012, then he must meet our current TOEFL requirements.

[134] In submissions to this hearing, the College fairly concedes that the Deputy Registrar was incorrect when he wrote that the Registration Committee’s 2010 Eligibility Letter set out the requirements for ELP.

[135] Furthermore, it is apparent that when the Deputy Registrar wrote that the College did not “first” mandate ELP requirements in 2012, he was missing the point of the question. The requester knew that there were ELP requirements. Her question was as to what ELP standard should be applied.

[136] It is apparent that the Deputy Registrar was in no position to state that the Applicant even had to write an ELP examination without looking at the Applicant’s application and considering the ELP Policy. As noted, he wrote that he would “check the information” the Applicant provided. There is no evidence of subsequent action by the Deputy Registrar which corrected the errors in his November 6, 2012, email; indeed, the evidence is that he maintained his unfounded beliefs throughout the term of his dealings with the Applicant’s file.

[137] Finally, I have taken particular note of the Deputy Registrar’s reference to “the fraudulent submission of TOEFL scores.” I do not take that as speaking to the Exempt Branch of the Policy, or that anything in the Applicant’s case raises that concern.

The Applicant in 2013

[138] There is no indication in the Record that the College followed up on the Health Authority’s inquiry until February 5, 2013, when the Health Authority again contacted the College about the Applicant’s ELP status. In response to the inquiry, the Deputy Registrar’s memorandum to file from that date states, in part:

The Deputy Registrar outlined the College’s history with the English Language Proficiency requirements, noting that in 2010, if an applicant had provided evidence of having obtained a pass on the USMLE Step 2 CS examination, we would have considered that as an acceptable alternate. Further, candidates prior to 2004, who had passed an English Language Test, as verified by ECFMG, would also have been exempted from the TOEFL or IELTS.

Because of an inconsistent application of the English Language Proficiency Policy, the College Board, at its meetings of March and May 2012, directed that as of July 1, 2012, the College’s current English Language Proficiency would be applied uniformly, consistently and fairly to all applicants for registration and licensure with the College.

Unfortunately, [the Applicant], therefore, will not be eligible to proceed to the final stages
of registration and licensure... until he submits a satisfactory English Language Proficiency test score.4

[139] The Deputy Registrar’s memorandum to file is silent as to whether or why in his view the Applicant had not satisfied the Exempt Branch of the Policy as stated in the Resolution or the Application form. It also discloses no recognition of any factors that might properly be considered by or put before the Registration Committee, beyond raw test scores, given the Applicant’s circumstances and training and the statements that were made on his Application form.

[140] In March 2013, the Mayor of the Community wrote to the College Registrar asking how the College might facilitate the Applicant’s licensure given that the Applicant and his family of six had relocated to the Community in October 2012 and the Community was desperate for his services. The Deputy Registrar responded that while he appreciated the difficulties experienced by [remote] communities, the College has a “rigorous and robust” process to ensure that every physician is appropriately registered. While he could not discuss the Applicant’s case, he pointed the Mayor to the College’s “open, fair and consistent policy concerning English language proficiency requirements.”

[141] On April 24, 2013, the Director of Registration Services wrote a memorandum to file arising from her interaction with the Applicant. This memorandum, I note, was written four days short of the three-year anniversary of the 2010 Eligibility Letter.

[142] The memorandum states that while the Applicant has taken the exam monthly, and has improved his scores, he was still below the number required by the College policy:

I advised [the Applicant] of the following:

He is required to meet the current ELP requirements and there are no exceptions;

He should consider taking a preparatory course to assist him in being able to meet the ELP requirements. [emphasis added]

[143] On May 30, 2013, Health Match BC forwarded to the College a letter from the Applicant, who was concerned that he had been unable to practice since his arrival in the Community in October 2012.

[144] The Applicant’s letter stated that:

- He was only told of the ELP requirement after the contract, work permit and travel arrangements had been made;

- He in fact satisfied the 3 criteria set out on the Application form and in the Instructions; and

4 For the reader’s convenience, I note that USMLE is the abbreviation for United States Medical Licensing Exam and ECFMG is for Educational Commissions for Foreign Medical Graduates.
He had, via his various exams, previously achieved 7.5 (speaking), 7 (writing), 6.5 (reading) and 6.5 (listening).

In support of his assertion that he complied with the three Exempt Branch criteria, he wrote:

- The language of instruction at medical school was English and he had previously provided a letter certifying this fact, which thereby satisfies the first criteria;

- The primary language of patient care during medical school and for his 15 years of practice in the Ireland and the UK was English, and he had previously provided this information to the College, which thereby satisfies the second criteria; and

- He had received medical training in Ireland (the College already had evidence in his Application of extensive post-graduate medical degree training in Ireland) and Ireland is recognized as English speaking, which thereby satisfies the third criteria. (In submitting this to the College, the Applicant was evidently relying on the wording in the Application, the Instructions and as discussed above, most likely the college website.)

It was not until May 6, 2016, on this review, three years later, that the College agreed that the Applicant indeed met the first two criteria - based, I conclude, on the evidence that was submitted to the College in 2012. Nor has any meaningful explanation ever been provided by the College or Registration Committee that the Applicant did not also satisfy requirement c) set out in the Application and Instructions.

Unfortunately, in response to the Applicant’s letter of May 30, 2013, staff of the Registration Department of the College responded on June 3, 2013, with no comment on any aspect of the Applicant’s letter other than to assert again that the Applicant must demonstrate ELP. The College response focused on the Applicant’s test scores, reasserted that he “…must continue steps to pass the English language exam, otherwise he is not eligible for registration…”

On July 16, 2013, the Mayor of the Community again wrote the College, noting that due to the Applicant’s family’s financial crisis, the Applicant, whose new baby was born in the Community in 2013, had no choice but to leave his family and travel to Ireland to conduct locums.

The Mayor, in this letter, wrote:

While we can appreciate that the policy the CPSBC has instituted for entry is open, transparent, fair and consistent, I fail to understand how in-person, spoken and written communication with [the Applicant] can be extremely comprehensive and concise while his determined effort to achieve required scores on required exams remains fruitless. It also begs the question – why when [the Applicant] has met the proficiency requirements
as described on your website (www.cpsbc.ca) is he unduly required to examine through the IESTL or TOEFL frameworks?

Candidates are considered to have met the proficiency requirements if:

i. The language of instruction at medical school was English, and

ii. The primary language of patient care was English, and

iii. The first and native language of the country where the candidate was trained is English.

[150] The Mayor’s July 16, 2013, letter gave rise to two letters in response from the Deputy Registrar.

[151] The Deputy Registrar’s first letter, dated July 22, 2013, emphasized the College’s duty to protect the public interest and stated that “our organization must apply our policies uniformly to all physicians wishing to obtain licensure and registration, regardless of other factors, such as geographic location.” In this letter, the Deputy Registrar quoted the third criterion of the Exempt Branch of the policy differently from how the Mayor articulated it based on the College’s website. In his July 22, 2013, letter, the Deputy Registrar described the third criterion as:

3. the first and native language of the country where the physician was trained at medical school was English. [emphasis added]

[152] The Deputy Registrar’s July 22, 2013, letter reiterated that he could not discuss the Applicant’s case, but stated:

In keeping with these requirements and its mandate to serve and protect the public interest, the College implemented a policy effective July 1, 2012 wherein physicians who have not met the ELP requirements above would be required to undertake a TOEFL iBT test (internet-based test) or the IELTS academic examination, and obtain the required scores. The College Board has subsequently confirmed the necessity of the ELP policy due to the public safety rationale that supports it.

[153] The Deputy Registrar’s second letter is dated July 30, 2013. This second letter is written in response to the same July 16, 2013 letter from the Mayor. It stands out for several reasons, separate and apart from the odd fact that the Deputy Registrar issued two letters 8 days apart in response to the same letter from the Mayor.

[154] First, the Deputy Registrar in this second letter agreed that the Mayor’s July 16, 2013, letter accurately set out the requirements for demonstrating ELP from the College website. Specifically, the Deputy Registrar agreed that the College website set out the third criterion of the Exempt Policy as “the first and native language of the country where the candidate was trained is English.”

[155] Second, the Deputy Registrar made no reference to why he had set out the third criterion differently in his July 22, 2013 letter. The two letters from the Deputy Registrar
clearly state two different wordings of the same criterion, yet do not explain the source of or the rationale for the difference.

[156] Third, one sees for the first time in the Record, a statement by the Deputy Registrar that post-graduate training is irrelevant in assessing a physician’s ELP: “Our focal point is where a physician attended medical school, not where they completed their post-graduate training.”

[157] This statement of “focus” stands in sharp contrast to the clear language the Deputy Registrar admitted that the Mayor had correctly quoted – that the Policy distinguishes between medical school, and physician training.

[158] This statement of focus also fails to recognize the obvious rationale for using the term “physician training” rather than “medical school” in c). One need not be a physician to recognize that “physician training” involves much more than simply medical school and that success in physician training in an English-speaking country would reasonably be regarded as being relevant to a College developing an ELP Policy. In this regard, I note that the Deputy Registrar would himself 17 months later prepare a file memorandum, dated December 16, 2014, summarizing the extensive medical physician training the Applicant had received in Ireland, all of which he apparently saw as irrelevant to this issue:

Commencing January 1999, [the Applicant] entered into an extensive basic surgical training program in Ireland, under the sponsorship of the Royal College of Surgeons in Ireland (RCSI). He completed his basic surgical training in Ireland and was awarded a Certificate of Completion of Basic Surgical Training by the RCSI on January 17, 2008. In addition, [the Applicant] had previously been admitted as a Member of the Royal College of Surgeons in Ireland on July 20, 2006 after passing his basic Fundamentals of Surgery and Related Sciences examinations.

…It was noted that [the Applicant] then undertook further postgraduate training in Pediatrics, Obstetrics and Gynecology, and Internal Medicine as a Senior House Officer between February 2009 and January 2010.

[159] A fourth and critical point arising from the Deputy Registrar’s letter of July 30, 2013, is that he stated, inaccurately, that the Applicant had not satisfied the first two conditions of the policy. The Deputy Registrar set out that:

It is also likely that the principle [sic] language of instruction at the [institution] in [the home country] was not conducted [sic] in English, nor was the primary language of patient care in English. Thus, [the Applicant] like many of his colleagues, must demonstrate his English language proficiency to the satisfaction of the College’s Registration Committee (emphasis added).

[160] This critical error raises serious questions apart from what was the authorized ELP policy of the Registration Committee. It shows that senior staff of the College did not know what was in the Applicant’s files from 2012 and was proceeding based on clearly false assumptions. As noted above, it was not until May 6, 2016, that the College agreed that the institution where the Applicant received his medical degree taught in
English and the primary language of patient care was English, thus satisfying the first two criteria, the only criteria authorized by the Resolution and Policy. The evidence is that the College staff were proceeding on false assumptions from 2012 until 2016 and imposing requirements on the Applicant which, based on the Record, have no foundation in any Resolution or approved Policy of the Registration Committee or the College Board.

[161] I must also comment briefly on a worrisome phrase in the Deputy Registrar’s letter. When he wrote “…like many of his colleagues…” and proceeded with clearly erroneous assumptions, the Deputy Registrar, in the circumstances here, might be perceived to have gone to the very edge of displaying decision-making based on ethnicity rather than facts found in the files of the College. This is but one phrase among thousands of words but I do caution the College that when foreign trained applicants apply for admission, College officials should avoid making generalizations and instead govern themselves in accordance with the absolute requirement for diligence and accuracy in reviewing the documents as provided.

[162] In a memorandum to file dated July 30, 2013, the Deputy Registrar reported on a phone call from a “…senior and well respected family physician who…performs peer assessments for the College…” (the “Physician”). The Physician called the College to discuss the possibility for a special exception for the Applicant regarding the English language criteria.

[163] The Deputy Registrar’s response was that the Applicant “…was made aware, prior to immigrating…(that) he would be required to demonstrate ELP to the current standards…” As is now clear, that statement glossed over both the timing of the “advice” to the Applicant and the content of the Application and Instructions documents.

[164] The Physician asked if the College would consider having the Applicant “…assessed by an expert in English language communication.” This was not an option the College was open to considering, as made clear in a memorandum to file the Deputy Registrar wrote describing what he communicated to the Physician:

…the College is acutely aware of communities in the interior and the north who are in desperate need of additional physicians…it is not the responsibility of the College …to determine supply, mix and distribution of physicians. Our responsibility, as a medical regulator, is to ensure that our mandate is fulfilled. Public protection is our primary concern.

[165] This memorandum reflects the same issues as the Deputy Registrar’s letters of the same time.

[166] There is no indication at any point up to this July 30, 2013, interaction that the Deputy Registrar noted or set out to communicate to the Applicant or anyone else involved with this case that the 2010 Eligibility Letter had expired.
The Applicant in 2014

[167] Following the Deputy Registrar’s correspondence of July 30, 2013, there is a 15-month gap in the Record relative to the Applicant’s registration. The Record suggests that during this period the Applicant was seeking to work abroad.

[168] On October 21, 2014, the Applicant emailed the College to advise that he had achieved scores of “7” on all four components of the IELTS with an overall score of 7. On October 22, 2014, the College responded, advising:

The College requirements with respect to English language proficiency are that acceptable scores are achieved on a single test result. We cannot accept an “accumulative” scoring spread with more than one test result. In other words, for IELTS, we must receive a minimum of 7 in each band as well as 7 overall.

[169] On December 10, 2014, the Mayor wrote to the Registrar, pointing out that the Applicant “consistently achieves an average score of 7 in the IELTS exams.” The Mayor stated:

It defies reason that the solution [the Applicant’s contribution as a GP surgeon] is within one half of a point, and there can be no concession.

[170] On December 11, 2014, legal counsel retained by the local government wrote to the Deputy Registrar “to explore with you any possible prospect of accommodating the longstanding and urgent efforts of both [the Applicant] and the Municipality to obtain his registration with the College.”

[171] Counsel pointed out that following medical school, the Applicant had practiced in Ireland for 15 years, where he completed his post graduate qualifications and surgical training CBST and obtained membership in surgery MRCS. Counsel stated:

In order to satisfy Ireland’s MRCS requirements, he was also required to pass an assessment of communication skills in a clinical setting. Within this country, he passed the Evaluating Examination of the Medical Council of Canada (EEMCC), and did so on his first attempt.

English is obviously the language of communication with patients, other doctors and the general public in Ireland. A recent letter attesting to [the Applicant’s] ability in communicating in a clinical setting is enclosed from Dr. [X] of Ireland.

[172] In respect of the College’s previous approach, Counsel stated:

... you have emphasized the transparency and consistency of the College’s approach to ESL proficiency for all potential registrants. As with most challenges confronting professional regulators, however, there is always a balancing of interests to be addressed in order to determine which should prevail in any situation. The circumstances of this particular case place into opposition a seemingly inflexible standard for assessing English proficiency against an acute public need for [the Applicant’s] medical competence.
We ask you to consider that the proficiency test, as it is currently administered, is not a realistic reflection of the demands placed upon a Canadian physician. The test is a concentrated one, conducted over an extended period of time in one day. The sections are timed – something that appears to be the source of [the Applicant’s] difficulty. It is appropriate to consider whether the ability to complete timed tests on such an examination is truly reflective of the circumstances in which a doctor functions. Certainly, any shortcomings in [the Applicant’s] command of English, have not been exposed in the course of English language qualifications in Canada or in Ireland, nor in his even more extensive experience in actual practice.

The overriding duty of the College imposed under Section 16 of the Health Professions Act is to serve and protect the public, and to exercise its powers and discharge its responsibilities in the public interest. Where they conflict, an emphasis upon a uniform application of approach must yield to public interest if the public interest is ill-served by the consequence.

Section 2-3(2)(d) of the College Bylaws also does not impose a requirement of any particular English proficiency test score. Rather, it invests the registration committee with the responsibility to assess what amounts to a satisfactory command of English. It would not be an abdication of that responsibility to recognize that the contextual circumstances of a particular doctor and/or needs of a particular community warrant some flexibility in the exercise of that particular assessment.

In my respectful submission, there is an overwhelming public interest favouring some accommodation of (the Applicant), even if it is deemed appropriate to restrict that accommodation to the (Municipality) for the time being.

[173] On December 15 and 16, 2014, the Deputy Registrar wrote to Counsel and to the Applicant.

[174] The Deputy Registrar advised Counsel on December 16, 2014, that “in order to conduct a fulsome review of this matter, we will be communicating with [the Applicant] in order to obtain any and all information relevant to his application for registration which would assist in the College’s review of this request.”

[175] However, when the Deputy Registrar wrote to the Applicant on December 15, 2014, his letter extended beyond a follow up on the English language proficiency question.

[176] In addition to requesting that the Applicant provide “copies of each and every English language proficiency examination, including their test score results which you have completed since...November 2, 2012,” the Deputy Registrar imposed additional requirements on the Applicant:

(1) Since it had now been “more than two years” since he submitted his original application, the College now required “a new Application by filled out”; and

(2) The College also required: “A detailed description of your professional work as a physician from January 1, 2012 to the present date.... This information is necessary for the College to review your currency of practice for
general/family medicine during the immediate three years as outlined in College bylaw 2-8.”

[177] The Deputy Registrar advised that “Once we have received all of the above information, I will be prepared to present your application for registration and licensure ... to the College’s Registration Committee at its meeting to be held in either January or February 2015.”

[178] The Deputy Registrar’s letter of December 15, 2014, to the Applicant gives rise to several observations.

[179] First, it is not clear on what authority the Deputy Registrar required the Applicant to submit a new application. The Applicant filed his original application in October 2012, pursuant to the 2010 Eligibility Letter, which set out no time limit and had never been revoked by the College. The primary outstanding issue in the letter from Counsel had been the ELP issue. It was this requirement alone that Counsel asked be reconsidered. While I appreciate that the College’s Affidavit in this matter states eligibility decisions are valid for three years, one would have expected, had this been the understanding that the College would have provided the Applicant with some notification of this well before December 2014.

[180] Second, it cannot go without notice that the Deputy Registrar’s requirement for “a detailed description of your professional work since 2012” might be perceived, by the Applicant, as somewhat problematic given the College’s refusal to register him meant he could not practice in BC since he had moved here with his family in October 2012.

[181] Third, had the College agreed in 2012 and early 2013 that the Applicant satisfied the Exempt Branch of the Policy, it is not at all apparent that the College would have required a new application, or purported to impose the new CFPC condition upon him. The Deputy Registrar’s letter certainly does not read as if the College would have insisted on applying the January 2012 bylaw amendment to the Applicant if the ELP issue had not been a stumbling block.

[182] Finally, and having made this point, and whatever the cause, it was reasonable, as of December 2014 as a matter of public interest for the College to require the Applicant to update his recent work experience, even if it is the case (as I find below) that this new issue only arose because of the College’s unreasonable position on the ELP requirement. The only point I would make here is that pursuant to College Bylaw 2-8(4), upon which the Deputy Registrar relied, the Registration Committee has discretion to require an applicant to undergo retraining following a review and assessment of his skill, knowledge and competency.

[183] The Deputy Registrar concluded his letter by noting that the Applicant’s application would be presented to the Registration Committee once the documentation was complete.

[184] On December 18, 2014, the College sent the Applicant a new application form, which included a statement of ELP requirement which differed regarding criterion c) of
the Exempt Branch from the one that was on the College’s September 2012 Application and Information documents, and which differed from the one that the Deputy Registrar had in July 2013 conceded had been accurately stated by the Mayor. The 2014 Application form articulated criterion (c) as follows:

(a) The language of instruction at medical school was English,
(b) The primary language of patient care was English, and
(c) The first and native language of the country where the candidate was granted their medical degree is English.

[185] This is, of course, not an insignificant change.

**The Registration Committee Makes a New Eligibility Ruling February 2015**

[186] The Applicant completed the new application and submitted it along with his IELTS and TOEFL test results and his recent practice experience.

[187] The Registration Committee considered the Applicant’s application in a meeting on February 19, 2015.

[188] In this meeting the Registration Committee was deprived of significant information on ELP test results submitted by the Applicant. Notably, in a February 5, 2015, email, the College confirmed that it had copies of nine different IELTS and TOEFL scores for tests that the Applicant took between 2012 and 2014. These results were provided to the Registration Committee except for two which are listed in the February 5 email (in reaching this conclusion I note that the reference in the minutes to test results from December 12, 2012 are the results from the test taken on December 1, 2012). The test scores which are listed in the February 5 email but which appear as “test results not provided” in the minutes are from January 5, 2013 and September 6, 2014.

[189] There is no test result dated January 5, 2013, in evidence. However, the September 6, 2014, result is in the Record and is the most successful result the Applicant has obtained. It is notable that the most successful result was not presented to the Registration Committee, albeit it is an IELTS result which is not referenced in the Resolution or ELP Policy as a method of determining ELP.

[190] While still not satisfying the strict standard set out in various emails and letters issued by College staff, the significance of the Registration Committee not having the September 6, 2014, test result is evident in the following table which shows the best results they did see in comparison to what was not before them:
<table>
<thead>
<tr>
<th>Date</th>
<th>Listening</th>
<th>Reading</th>
<th>Writing</th>
<th>Speaking</th>
<th>Overall</th>
<th>Minutes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jan 12, 2013</td>
<td>6.0</td>
<td>5.5</td>
<td>6.5</td>
<td>7.0</td>
<td>6.5</td>
<td>In minutes</td>
</tr>
<tr>
<td>April 13, 2013</td>
<td>6.5</td>
<td>6.0</td>
<td>6.0</td>
<td>7.5</td>
<td>6.5</td>
<td>In minutes</td>
</tr>
<tr>
<td>April 18, 2013</td>
<td>6.5</td>
<td>6.5</td>
<td>6.0</td>
<td>6.5</td>
<td>6.5</td>
<td>In minutes</td>
</tr>
<tr>
<td>Sept 6, 2014</td>
<td>7.5</td>
<td>7.0</td>
<td>6.0</td>
<td>6.5</td>
<td>7.0</td>
<td>missing</td>
</tr>
</tbody>
</table>

[191] For a statutory body that must exercise judgment and discretion, which body chose to consider IELTS scores, the absence of the September 6, 2014 test results would obviously be very significant. In this case however, it is apparent that providing those results to the Registration Committee might well have made no difference, as reflected in this statement from its Minutes:

> The Deputy Registrar for Registration along with the Director for Registration Services have explained to [the Applicant] that meeting the College’s ELP requirements remains a requirement to be eligible to practice in any class of registration and any subsequent licensure in British Columbia, and that there are no exceptions to the College’s ELP policy and its requirements. [emphasis added]

[192] It would be difficult to find a clearer statement that the Registration Committee was, on the Examination Branch of the ELP issue, concerned solely with whether the Applicant had achieved “7s” on every aspect of the test at one sitting, without regard to any other factor, including the Applicant’s overall scores, his credentials, his practice experience and his training and references concerning his facility in English in the actual practice of medicine.

[193] After citing College Bylaw 2-3(2)(d), the Minutes describe the policy as follows:

> Physicians are considered to have met the proficiency requirements if:

  i. the language of instruction at medical school was English, and

  ii. the primary language of patient care was English, and

  iii. the first and native language of the country where the physician was trained is English. [emphasis added]

[194] Remarkably, the Minutes reproduce precisely the same policy test as set out in the 2012 Application (and most other documents) even though the 2014 Application form used different language for point c): “the first and native language of the country where the candidate was granted their medical degree is English.” (emphasis added).
Then, after quoting the above policy test, the Registration Committee reasoned:

Given that the first and native language of the country where [the Applicant] completed his medical school ... is not English [the Applicant], as a condition of registering with the College is required to demonstrate English, language proficiency (ELP) in accordance with the standard set out above. (emphasis added)

Based on the wording of the very policy for ELP it was purporting to apply, the Registration Committee’s focus on the language of the country where the Applicant attended medical school asked the wrong question. With regard to the “native language of the country” the policy set out in criterion c) requires consideration of the language of the country where the physician was trained. The Registration Committee unreasonably, and without explanation, conflated “medical school” and “physician training.” Clearly, this was not just a slip. The 2015 Eligibility Letter makes no reference to the Applicant’s extensive physician training in Ireland and it does not explain why, as a matter of policy, these years of training were not deemed relevant if the test is, as quoted by the Registration Committee, focused on the language of the country of physician training.

Perhaps the Registration Committee intentionally “interpreted” criterion c) such that “physician training” means only “medical school.” If so, the Registration Committee decision is unreasonable because it does not explain why, when condition a) refers to “medical school” explicitly, condition c) must, implicitly, be limited to medical school alone, or why physician training post medical school is irrelevant for ELP purposes. If the country “where the physician was trained” in c) refers to where the applicant went to medical school, it would have been easy to say so. It is self-evident that something more was being expressed in c). That “something more” is the reality that physician training involves considerably more than medical school. None of this is reflected or acknowledged by the Registration Committee. Thus, even if condition c) of the ELP Policy, as expressed by the Registration Committee, was in fact part of the Policy, the Registration Committee’s application of condition c) was unreasonable.

I note again that, in setting out the ELP Policy, the 2015 Eligibility Letter makes no reference to the 2012 Resolution and it contains no indication as to when the third criterion was added or by what resolution it is authorized. The Registration Committee, as it is entitled to do, appears to have relied on the advice of staff concerning what the Policy said.

For the reasons just stated it is, in my opinion, unreasonable for the Registration Committee to have concluded, without any supporting reasons, that the Applicant failed to comply with the Exempt Branch of its ELP Policy. For reasons that will be discussed in more detail below, I have also found that it was unreasonable for the Registration Committee to have adopted an uncompromisingly rigid approach to the Examination Branch of the Policy.

The Minutes express sympathy with the Applicant. However, they state that “…the Committee remains in accordance with its bylaws and in the interests of public
safety and patient care that [the Applicant] must meet the College’s ELP requirements....”

[201] I note that this ELP finding was not the only unreasonable finding made by the Registration Committee. Further on, it made this finding:

…upon review and discussion of all of the documentation presented determined that [the Applicant] was informed in April 2010 that his initial resolution granted effective April 15, 2010 will expire within three years of the date of issue.” (emphasis added)

[202] As already noted, it is unreasonable for the Registration Committee to conclude that the Applicant had been informed in April 2010 that the initial resolution would expire within three years of the date of issue. There is no evidence of that in the Record before the Registration Committee.

[203] Based on its view that it had a new registration decision to make, the Registration Committee issued a new decision granting provisional registration and imposed Condition 4 at issue on this review:

As [the Applicant’s] initial resolution, #10-22, granted April 15, 2010 has surpassed its expiry date of three years (April 15, 2013), the Committee, at its meeting on February 19, 2015, under its current bylaws granted a new eligibility ruling with respect to [the Applicant’s] application for registration and licensure with the College. (emphasis added)

[204] The Minutes and 2015 Eligibility Letter include the requirement that the Applicant “…must apply to the (CFPC) to be awarded their Certification without examination immediately upon registration…” and that the CFPC certification be provided to the College within 12 months of registration, failing which his registration will be rescinded unless the Registration Committee extends the period “in exceptional circumstances.”

[205] As noted, this requirement is materially different from the CFPC requirement that is set out in the 2010 Eligibility Letter. Condition 4 could not have been imposed in the 2010 Eligibility Letter in the manner set out in the 2015 Eligibility Letter because it did not exist at the time. As already noted, there is strong case to be made that Condition 4 would not have been imposed any time before April 15, 2013 had the application been processed without the delays occasioned by the ELP testing requirements.

[206] The requirement for award of the CFPC certification without examination was first set out in s.2-15 (1)(b)(ii) of the Bylaws revised January 1, 2012. It is acknowledged that this requirement was created prior to October 2012, when the Applicant submitted his Application, and that the College’s Affidavit in this matter states that physicians must meet the requirements for registration in effect at the time they submit their application. However, it is apparent from the Registration Committee’s decision, that the expiry of the 2010 Eligibility Letter was the basis for imposing this new requirement. This supports an argument in favour of grandparenting having been a reasonably foreseeable outcome in this case regarding the CFPC condition were it not for delays created by the College’s application of the ELP Policy.
In contrast to the 2010 Eligibility Letter, the 2015 Eligibility Letter does set out a three-year expiry date.

**Deputy Registrar’s March 5, 2015 letter to the Applicant’s counsel**

In the 2015 Eligibility Letter dated March 5, 2015, the Deputy Registrar communicated the Registration Committee’s decision to the Applicant’s legal counsel. The letter largely repeats the substance of the Minutes.

The letter sets out the ELP requirement, just as set out in the Minutes and in the 2012 Application form, even though the 2014 Application form had used different language for the third condition used to determine if the Applicant met the ELP requirement.

The Deputy Registrar’s March 5, 2015 letter on behalf of the Registration Committee only reinforces the manifest confusion and inconsistency within the College with respect to precisely what policy test it is applying for the Exempt Branch of the Policy.

I find it may be instructive here to pause and summarize the situation at March 5, 2015. The Registration Committee had at that time:

- Proceeded, based on the assumption that the 2010 Eligibility Letter contained an expiry date, to issue a new eligibility letter to replace the 2010 letter that, at least by its own terms, had never expired;

- Inserted a new requirement for CFPC certification without examination when the condition in the 2010 Eligibility Letter provided the Applicant with five years following commencement of practice to obtain CFPC certification rather than the new requirement for immediate certification without examination;

- Applied criterion c) to the Exempt Branch of the ELP Policy which was not, as described in the Affidavit, referenced in the Resolution or approved by the College Board as the ELP Policy in either form used in this case;

- Demonstrated no consideration of how the Applicant’s physician training in Ireland was irrelevant to or failed to meet criterion c) set out in the minutes of the meeting;

- Based its 2015 Eligibility Letter on wording for the third criterion of the Exempt Branch of the ELP Policy, which was consistent with the 2012 Application Form for an Applicant who had applied to the College in 2012, but which appeared to apply the test based on a material change to the wording, which had been used in the recently issued application form;
- Used the number "7" for the IELTS test score in all categories in one sitting as the minimum and defining criterion for the public interest to be protected after staff had initially referenced “6” and, more critically, without any regard to other relevant circumstances; and

- Provided no response to the Applicant’s submission that he fully met the requirements of the Exempt Branch of the Policy as set out in his letter of May 30, 2013.

CFPC Certification and the Application for Review

[212] In response to the 2015 Eligibility Letter, an official at Health Match BC wrote to the College on March 24, 2015, with the following observation:

As [the Applicant] does not hold MICGP and therefore is unlikely eligible for CFPC Certification without Examination, it appears he would not be eligible for a Provisional license to practice under the current bylaws and at this time, his only other option would be to apply for the PRA-BC Program? Could you please confirm.

[213] The College responded that the Applicant should still apply for CFPC without examination. It stated that if he could not provide the College with a letter attesting to his qualifying without examination, then he would need to complete a PRA (Practice Ready Assessment) for further consideration of licensure in BC and pay the appropriate fee. This possibility is referenced in the 2015 Eligibility Letter itself.

[214] On March 27, 2015, a Health Match BC official subsequently advised the College that the Applicant is not eligible for CFPC certification without examination and requested that the College process his PRA application without additional cost. Upon receipt of the application for PRA, the College responded with directions on how he will find out how to pay the preliminary fee.

XII APPLICANT’S POSITION

[215] The Applicant submits that the Registration Committee fettered unduly the discretion given to it under s.2-3(2)(d) of the Bylaws by applying inflexible criteria in assessing ELP. He submits that the Registration Committee failed to give adequate consideration to the statutory requirement under s.16 of the HPA to serve the public interest by failing to properly consider the need for physicians in the community he served. Further, he submits that the Registration Committee failed to act fairly by adding a virtually impossible requirement that he obtain certification from CFPC in one year.

[216] The Applicant submits that there is no record of communication between the College and him in the period from May 2009 to August 2012 that indicated he would have to demonstrate ELP. He submits that it was only after he had accepted a job in Canada, which the College was aware of, and only after he had made travel arrangements, that he received notice from the College that he would have to demonstrate ELP.
The Applicant submits that he satisfies the conditions of English language proficiency.

The Applicant submits that the Registration Committee meeting of April 15, 2010, which approved his first eligibility letter, the 2010 Eligibility Letter, contained no reference to a requirement to demonstrate ELP.

With reference to the interaction between the College and the Physician, the Applicant submits that the College failed to act fairly in the circumstances and that it violated one or more of the provisions of s.50.54(10)(a)(ii) of the HPA.

The Applicant requests that the Review Board declare that the Registration Committee failed to act fairly in all circumstances and direct that it grant registration to the Applicant such that he can commence practice as a family physician in his community of residence and have adequate time to meet the certification requirements of the CFPC.

Interactions between the College and Applicant following the Application for Review

Following his application for a PRA, the Applicant received, via Health Match BC, an eight-page letter from the Deputy Registrar dated May 8, 2015, which provided details that the College required to proceed with the assessment.

The Deputy Registrar advised Health Match BC that while the Applicant meets many of the requirements to participate in the PRA-BC Program, he does not appear to have met a screening requirement of 2 years of post-graduate training affiliated with and overseen by a family medicine training program, which is much more specific than the CFPC requirement.

Also on May 8, 2015, Counsel for the Applicant had a telephone discussion with the Deputy Registrar and counsel for the College.

The College’s record of that discussion, dated May 12, 2015, states that the Application for Review appears to misunderstand the requirement for CFPC certification, and noted that this is an issue that should be followed up with the Irish College and the CFPC “to determine whether the credentials he currently holds are acceptable to the CFPC for reciprocity.”

The May 12, 2015, College memorandum also states that Counsel for the Applicant raised the issue whether, with regard to the 2010 Eligibility Letter, “there was any currency issue and whether the English language proficiency was a requirement at that time as well.” The record states:

[Counsel] was advised that an eligibility ruling from the Committee expires three years from the date of issuance (i.e. [the Applicant’s] ruling expired in April 2013). [The Deputy Registrar] was unable to speak to the Committee’s decision in 2010 in relation to [the Applicant’s] postgraduate training.... [Counsel] was also advised that the College’s ELP
requirements were amended in 2012 to appropriately align the College’s criteria with the national standards and that the policy came into effect (June 2012) prior to [the Applicant] proceeding with his application for registration (October 2012).

[226] As noted above, the 2012 Resolution and ELP Policy, as set out in the Affidavit, unambiguously states that the alignment with national standards was satisfied with the first two criteria only.

[227] Following the receipt of correspondence from the Applicant, the Application for Review was held in abeyance until September 2015 when the College Record was requested. The College produced the Record in October 2015.

[228] The Record discloses correspondence between the Applicant, Health Match BC and the College between June and August 2015, during which period the Applicant was working with Health Match BC to establish an action plan for a 6-month term doing family medicine in his home country. That correspondence made clear that the Registration Committee would consider the issue again upon receipt of further information, and stating that “your best option to meet the training requirements of the PRA-BC program is to pursue formal post-graduate training in family medicine within another jurisdiction that [sic] you hold licensure.”

XIII REASONABLENESS

[229] As noted above, I have approached this review by asking whether the decision by the Registration Committee is reasonable.

[230] I note that in Review Board Decision No. 2014-HPA-164(a) at paragraph [96], the Review Board pointed out that in contrast to complaint disposition reviews conducted under s.50.6(5) of the HPA, registration reviews under s.50.54 are not governed by a statutory “reasonableness” standard. What s.50.54 does instead is to impose statutory preconditions in the narrow category of cases where the Review Board proposes to grant the specific remedy of directing the registration committee to grant registration with or without limits or conditions: ss.50.54(9), (10).

[231] This was also the subject of comment in Review Board Decision No. 2013-HPA-175(a) to 183(a) and 2013-HPA-209(a) at para. [25] and [26]. The Review Board held in those decisions that as there is no legislated standard of review to govern registration reviews generally then, other than for the powers granted under s.50.54(10), “…the standard of review… is a matter for the Review Board to determine within its exclusive jurisdiction.”

[232] I concur with the reasoning in those decisions in that “…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…(and)…in the end Applicants are …entitled to expect that the Review Board will be the body that finally determines whether the Registration Committee has correctly interpreted the [HPA] and the Bylaws.”
As noted earlier, I am content in this case to apply the standard of reasonableness. In doing so, I note that the deference involved in applying “reasonableness” does not mean absolute submission. Where, as in this case, the Record contains unrefuted evidence that the information provided to the Registration Committee did not accurately communicate the facts, deference gives way. Further, where the Registration Committee had discretion but failed to exercise it, exercised it without a rational foundation, asked the wrong question, fettered its discretion or acted without any identifiable rationale, the Review Board is entitled to intervene. Any other approach would render the Review Board’s mandate meaningless.

Reasonableness is a deferential standard as set out in Review Board Decision No. 2009-HPA-0039(b) at paras. [56 to 61] which I have adopted here. It is recognized that administrative tribunals are often presented with certain questions for which there may be a range of possible solutions.

As stated in Dunsmuir v. New Brunswick 2008 SCC 9:

A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But, it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law…

The HPA in s.50.54(6) confers on the Review Board the obligation to review a decision of the Registration Committee upon receipt of an application for review. It is significant that the HPA confers this function on the Review Board - itself a specialized administrative tribunal - rather than a court. This means that the Review Board is to apply its unique statutory perspective and understanding rather than simply attempting to mimic how a generalist court might assess reasonableness if the court were the reviewing body. Reference to Dunsmuir, supra is however helpful in explaining types of qualities that the Review Board looks for in a reasonable decision – justification, transparency and intelligibility.

I would simply add that “justification, transparency and intelligibility” also have some application to the Review Board’s consideration of the process used by the College in dealing with an application for registration. If the process that informed the Registration Committee’s substantive decisions was unfair, deeply flawed and lacked justification and intelligibility, it will be no surprise that the substantive outcomes that resulted would be similarly flawed.

XIV DISCUSSION

As set out above, there was significant confusion and misinformation in the College which led up to the 2015 Eligibility Letter. These are summarized below:
- The Registration Committee assumed that a new registration decision was necessary on the basis that the 2010 eligibility letter had expired and that the Applicant had been informed of this;

- The Deputy Registrar erred understanding the basic facts of the Applicant’s Application which from the beginning were in the College records, including;

  That the Applicant received his medical degree from an institution where the language of instruction was English, and

  The primary language of patient care at the institution where the Applicant obtained his medical degree was English.

- College documentation inconsistently set out the description of conditions to be considered in determining whether an applicant was exempt from ELP testing, maintained this inconsistency for a period of at least four years and then, without any explanation given the test it stated it was applying (country of physician training) concluded that the Applicant was not exempt and that he required ELP testing;

- The language of the documents, inconsistent or not, set out condition c) in the Exempt Branch of the ELP Policy which was not, based on the evidence the Review Board was given by the College, included in the ELP Policy approved by the Registration Committee and the College Board; and

- The Registration Committee let this matter extend over three years while not addressing the substance of the Applicant’s submissions that he, in fact, satisfied all three conditions for exemption from ELP evaluation.

[239] My findings regarding the unreasonableness of the Registration Committee’s 2015 Eligibility Letter are summarized under the following headings.

**Inaccurate and Assumed Information**

[240] The Registration Committee issued its 2015 Eligibility Letter, when the original letter, the 2010 Eligibility Letter, had by its own terms not expired, based on a presumed expiry date which was neither included in the letter nor communicated to the Applicant by the College in any document supported in evidence.

[241] The Registration Committee was, on the Examination Branch of the ELP Policy, deprived of English language test results which were in the College records and provided the best results the Applicant has achieved in testing based on the testing options College staff required of the Applicant.
Staff advising the Registration Committee attended the meeting on the basis that the Applicant had not obtained his medical degree from a school teaching in English, when the College records clearly showed that he obtained his degree from a school teaching in English. Further staff believed the language of patient care in the school where he obtained his medical degree was not English when the College records clearly show the opposite.

**Condition #1: The Examination Requirement**

A. **Conflict with the Resolution**

[243] Condition #1 imposed by the Registration Committee in its 2015 Eligibility Letter reiterated the testing requirement that College staff had previously insisted upon:

1. providing evidence of English language proficiency via either the TOEFL – iBT, or the IELTS (academic) examinations satisfactory to the Registration Committee;

[244] As noted above, the College’s affidavit, admitted as New Evidence before me, specifically describes the Exempt branch of the Policy as follows:

Physicians are considered to have met the proficiency requirements if the language of instruction at medical school and the primary language of patient care were conducted in English....

I confirm that the above noted summary of the revised ELP requirements were presented to and approved by the College’s Board in a closed meeting held on April 20, 2012.

[245] The ELP Policy set out in 2012 does not contain any version of a third criterion. The ELP Policy clearly states that Physicians are considered to have met the ELP requirements if the language of instruction and the primary language of patient care at medical school was English.

[246] The third criterion from the application documents which is set out as criterion c) or (iii) in either version, is not found in the Policy and there is no evidence of the Registration Committee or the College Board ever adopting any version of this criterion.

[247] If the Registration Committee or the College Board had clearly established a third criterion in 2012 or at some point thereafter, then that was omitted from the College’s New Evidence which the Review Board would have expected be complete given the subject matter of that Affidavit.

[248] The ongoing inconsistency and constant restatements of the third criterion belies the suggestion that the College subsequently adopted an official criterion c). Had it done so, the Record would not have displayed the various statements and restatements of the Policy in documents prepared by College staff between 2012 and 2015:
**Version 1: 2012 Application Form, 2012 Instructions, 2014 College Website, 2015 Registration Committee decision**

NOTE: 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. [emphasis added]


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 granted their medical degree. [emphasis added]

Physicians who do not meet these requirements must have either TOEFL IBT or Academic IELTS examination...

[249] The College concedes today that the Applicant satisfied the first two criteria (as set out in the ELP Policy) for the Exempt Branch, even though the Record shows that the Deputy Registrar incorrectly believed, as late as February, 2015, that this was not the case. As noted in the Executive Director’s current Affidavit: “I acknowledge that the language of instruction at [the medical school] was English as was the patient interaction.”

[250] The remedy that I will be granting in this matter will direct the Registration Committee to reconsider its decision with regard to Condition 1. If, upon reconsideration, it is indeed confirmed that there has been no approved revision to the ELP Policy, the Registration Committee will obviously be governed by the College’s admission on this review.

**B. Lack of rational or reasoned justification for its application of condition c) of the Exempt Branch**

[251] If, upon reconsideration, the Registration Committee discovers that there was a formal ELP Policy amendment that was made between 2012 and the date of its 2015 Eligibility Letter, which amendment was not disclosed to the Review Board but which added some version of clause c) to the Exempt Policy, then the Registration Committee

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5 I note as well that this is version of the policy quoted in Review Board Decision No. 2014-HPA-053(a) at para. [20].
will be required to consider whether the Applicant satisfies condition c). If that condition speaks to “the first and native language of the country where the physician was trained” (as stated in its 2015 Eligibility Letter), then the Registration Committee must provide a reasoned explanation if it concludes that the applicant’s training in Ireland is irrelevant to or does not satisfy that condition.

[252] As noted above, this Review Board has made clear on many occasions that it places considerable emphasis on the requirement that College decision-making be “transparent, intelligible and justified”: see for example Review Board Decision No. 2015-HPA-126(a), at paras. [88-90]. While the Review Board recognizes that there are many occasions where it is appropriate to accept that a college decision-maker, given its role, has made “implicit findings” on an issue, the question in each case is whether the Review Board is satisfied that, given the nature and significance of the issues, the reasons disclose a reasonable conclusion.

[253] At the risk of repetition, I note again that in this case, the Registration Committee offered no reasons, only a conclusion:

Given that the first and native language of the country where [the Applicant] completed his medical school ... is not English [the Applicant], as a condition of registering with the College is required to demonstrate English, language proficiency (ELP) in accordance with the standard set out above.

[254] As noted earlier, the Applicant had personally (May 30, 2013 via Health Match BC) and though counsel (December 14, 2014) specifically argued that the Applicant had met all three criteria, and emphasized his significant physician training in Ireland. The Applicant’s submission was not addressed and no reasons were offered by the Registration Committee in response to his clearly articulated reasoning why he, in his view, satisfied the ELP criteria for exemption from examination. The failure of the Registration Committee to respond to the Applicant on these submissions was, in my view, unreasonable in the circumstances.

[255] Given the significance of this issue for the Applicant and given the history of this case, the Registration Committee, in my view, had a duty to concisely explain itself on each criterion of the Exempt Branch of the Policy, and to explain why, if criteria c) is about the “country where the physician was trained,” post-medical school training is to be disregarded.

[256] Neither the Registration Committee’s reasons nor the Record disclose any rational explanation as to why “physician training” was not obviously intended to refer to post medical school training both as a matter of policy (otherwise, why use medical school in criteria a) but not criteria c)?) and as a matter of sound governance – and why an examination is required if a physician has successfully achieved medical school in English, patient care in English and years of residency in English in an English speaking country.
Neither the February 2015 Minutes nor the 2015 Eligibility Letter disclose any consideration having been given to this fundamentally important question as applied to the facts of this case.

This is all the more serious given the Registration Committee's inflexible insistence on minimum test scores in connection with the Examination Branch of the criteria, discussed below.

C. Fettering of Discretion regarding the Examination Branch of the Policy

With regard to the Examination Branch, all of the evidence makes clear that the College applies that branch rigidly, admitting of no exceptions. This is made clear in numerous documents, including the Minutes of the Registration Committee's February 19, 2015 meeting:

[The applicant] has not, to date, met the College’s ELP IELTS – Academic test score requirements of a minimum of 7 on each of the 4 test components, and an overall band score of at least 7.0 or has not met, to date, the College’s ELP – TOEFL-ibt test score requirements of a minimum total score of 96, and a minimum score of 24 on each of the test’s 4 sections of writing, reading, listening and speaking.

[After referencing 8 ELP test taken by the Applicant between October 2012 and April 18, 2013 each of which was under the requirement by an average of 1 point, and with a September 6, 2014 test being referenced, but “test results not provided”, the Minutes continue]:

[The applicant] has expressed to the College on several occasions the difficulty he has experienced in meeting the College’s ELP requirements. The Deputy Registrar for Registration along with the Director Registration Services have explained to [the applicant] that meeting the College’s ELP requirements remains a requirement to be eligible to practice in any class of registration and any subsequent licensure in British Columbia, and that there are no exceptions to the College’s ELP policy and its requirements. [emphasis added]

By the rigid application of the test score criteria, the Applicant submits that the Registration Committee improperly fettered its discretion. In Thamotharem v. Canada, 2007 FCA 198, the Federal Court summarized the principle against fettering discretion:

55 Effective decision-making by administrative agencies often involves striking a balance between general rules and the exercise of ad hoc discretion or, to put it another way, between the benefits of certainty and consistency on the one hand, and of flexibility and fact-specific solutions on the other. Legislative instruments (including such non-legally binding "soft law" documents as policy statements, guidelines, manuals, and handbooks) can assist members of the public to predict how an agency is likely to exercise its statutory discretion and to arrange their affairs accordingly, and enable an agency to deal with a problem comprehensively and proactively, rather than incrementally and reactively on a case by case basis.

56 Through the use of "soft law" an agency can communicate prospectively its thinking on an issue to agency members and staff, as well as to the public at large and
to the agency's "stakeholders" in particular. Because "soft law" instruments may be put in place relatively easily and adjusted in the light of day-to-day experience, they may be preferable to formal rules requiring external approval and, possibly, drafting appropriate for legislation. Indeed, an administrative agency does not require an express grant of statutory authority in order to issue guidelines and policies to structure the exercise of its discretion or the interpretation of its enabling legislation: Ainsley Financial Corp. v. Ontario (Securities Commission, (1994), 121 D.L.R. (4th) 79 (Ont. C.A.) at 83 ("Ainsley").


58 It is fundamental to the idea of justice that adjudicators, whether in administrative tribunals or courts, strive to ensure that similar cases receive the same treatment. This point was made eloquently by Gonthier J. when writing for the majority in Consolidated-Bathurst Packaging Ltd. v. International Woodworkers of America, Local 2-69, [1990] 1 S.C.R. 282 at 327 ("Consolidated-Bathurst"): It is obvious that coherence in administrative decision-making must be fostered. The outcome of disputes should not depend on the identity of the persons sitting on the panel for this result would be "difficult to reconcile with the notion of equality before the law, which is one of the main corollaries of the rule of law, and perhaps also the most intelligible one". [Citation omitted]

62 Nonetheless, while agencies may issue guidelines or policy statements to structure the exercise of statutory discretion in order to enhance consistency, administrative decision-makers may not apply them as if they were law. Thus, a decision made solely by reference to the mandatory prescription of a guideline, despite a request to deviate from it in the light of the particular facts, may be set aside, on the ground that the decision-maker's exercise of discretion was unlawfully fettered: see, for example, Maple Lodge Farms at 7. This level of compliance may only be achieved through the exercise of a statutory power to make "hard" law, through, for example, regulations or statutory rules made in accordance with statutorily prescribed procedure.

[261] If a reasonable explanation were to be offered in favour of the view that post graduate training "does not count" in meeting the criteria of the Exempt Branch of the policy, then the decision to adopt a rigid and inflexible "numbers based" approach in the Examination Branch of the policy, to the exclusion of years of successful post-graduate training in an English-speaking country, becomes a serious fettering of discretion.

[262] I want to make it clear that I agree that the Registration Committee is entitled to give the test scores great weight. However, it is not in my view entitled to consider test
scores to the exclusion of all other relevant factors where, as here, all the evidence pointed to the physician receiving his medical degree and physician training in English.

[263] I appreciate that an inflexible test score approach is easier to administer. It also prevents the Registration Committee having to explain why it made an exception for one person and not for another. The problem is that the rigidity of a facially “objective” policy can also give rise to unfairness and injustice.

[264] The College relies on Review Board Decision No. 2014-HPA-053(a) to support the view that the College has “adopted standards for English proficiency which are internationally recognized and accepted as objective ways to measure that proficiency.” The context of that case is important. The applicant there refused even to write the test. The Review Board held that it was not bad faith, arbitrary or an improper purpose for the registration committee to refuse to waive the testing requirement. As the Review Board stated: “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” (para. [25]).

[265] The issue under discussion here is whether, if testing is required, it is reasonable for the College to adopt an inflexible numerical approach irrespective of the test results and the other qualifications of the Applicant. For the reasons above, unless and until the numbers become binding rules instead of policy, the answer to that question is “no.” To the extent that any of the broader language in Review Board Decision No. 2014-HPA-053(a) suggests otherwise, I respectfully differ.

[266] With regard to Review Board Decision No. 2014-HPA-053(a), I also find it necessary to note that, perhaps because of how that case was argued, the Review Board decided the case by asking only whether the registration committee’s decision was arbitrary, made in bad faith, made for an improper purpose, based on irrelevant factors or discriminatory: Review Board Decision No. 2014-HPA-053(a) at para. [22]. In my view, however, the HPA is clear that the strict test applied by the Review Board in that case governs only as a precondition to the Review Board issuing directions to register an applicant: s.50.54(9)-(11). It is not the general standard of review. Where, as here, I have decided to send the matter back to the Registration Committee, I am within my authority to do so on the ground that the Registration Committee acted unreasonably because it improperly fettered its discretion, and thus failed to exercise the discretion its Bylaws require it to exercise.

[267] The College also relies on Ontario Health Professions Appeal and Review Board Decision 2009 CanLII 92443, which upheld a decision by the Ontario College of Audiologists and Speech Language Pathologists concerning an applicant who failed to satisfy its minimum ELP scoring requirements. In that case, a College Committee provided considered reasons explaining why it was not prepared to accept the alternatives suggested by the applicant in place of meeting the standards it had set: para. [11]. The College emphasized the special importance of these requirements in the audiology and speech language pathology contexts: para. [23]. The College and the Ontario Review Board both considered the extent of the gap between the results and the standard. The Review Board held that “the Committee properly evaluated the
information provided by the Applicant....” That decision is, in my view, a good example of a college being entitled to give its policy great weight, while at the same time looking at the facts to determine whether special circumstances exist to find in the Applicant’s favour.

[268] Where, as here, the relevant legal provisions (the College’s own Bylaws) require an exercise of judgment, that judgment must be exercised. It cannot be abdicated. While the College can create policies that require applicants to submit national and international assessment or test results, it is still required to exercise its discretion in individual cases: BC College of Optics Inc. v. College of Opticians of British Columbia, 2016 BCCA 85 at paras. [31-35]. As stated as paragraph [47] of the latter case:

47 ….. I agree with the appellant that the chambers judge erred by applying the concept of fettering prematurely to a situation in which the appellant had not yet engaged its decision-making discretion. In doing so, he interpreted the appellant's "fixed policy" too broadly, holding that its insistence on the NACOR assessment as a precondition amounted to a refusal to consider other evidence the respondent sought to proffer. There is nothing to support his finding that the appellant has excluded or discounted evidence the respondent intends to present. The respondent has not yet submitted its application for recognition or its evidence. [emphasis added]

[269] Unless and until the College’s policy is made into a binding rule, the Registration Committee has a duty to exercise discretion and judgment, which requires it to at least keep its mind open for exceptional circumstances, particularly where, as here, the Applicant has been extremely close to the rigid “across the board in one test” numerical standard and has had extensive physician training in a country recognized as English speaking, over many years. Unfortunately, the Registration Committee’s mind was closed – as made clear in the Registration Committee minutes: “there are no exceptions to the College’s ELP policy and its requirements.”

[270] Before concluding on this issue, I do want to address the potential argument that, whatever issues or confusion may have arisen from the Exempt Branch of the Policy, the College’s strict approach in this case must have been sound from a “public interest” perspective because the Applicant has not been able to achieve the “minimum” test standards.

[271] The first difficulty with this line of reasoning is that the numerical argument does not address all relevant considerations, including evidence that the Applicant has been able to train and function as an effective physician in the real, English speaking, world. The registration committee’s reasons give no consideration to this. It relies on test numbers for their own sake.

[272] Second, to the extent that the Registration Committee should be exercising at least a modicum of judgment and discretion, it should have had access to the September 2014 test results which, as noted above, showed:

Listening 7.5, Reading 7.0, Writing 6.0, Speaking 6.5, Overall band score 7.0
It is very difficult to envision that a Registration Committee, charged with exercising judgment and discretion and understanding its role, would not pause to give serious consideration to these results, together with the Applicant’s other training and references, in deciding whether it was satisfied as to the Applicant’s ability to speak, read and write English in a medical setting.

In summary on this issue:

(a) Even if the Registration Committee reasonably concluded that that applicant had not met the Exempt Branch of the ELP requirement and was required to take a language test, the current Policy was fettered by a strict and narrow interpretation of the numerical score as the only arbiter of ELP; and

(b) The Registration Committee is charged with exercising at least a modicum of discretion and that requires it to consider other factors, as set out above, beyond the simple numerical test result.

**Condition 4: CFPC Certification**

Condition 4 of the 2015 Eligibility Letter requires the Applicant to provide the College with “an original letter from the College of Family Physicians of Canada stating that his credentials appear to meet the criteria for the award by CCFP [sic] certification without examination.”

The 2015 Eligibility Letter requires CFPC certification to be awarded and presented to the College “within the first 12 months of commencement of practice in British Columbia.” The 2015 Eligibility Letter goes on to state that if the Applicant does not satisfy that condition, then “unless extended by the Registration Committee in exceptional circumstances, his registration and licensure with the College will be rescinded for non-compliance with College bylaw 2-15(1)(b)(ii). In the event of such recission, eligibility for re-registration and re-licensure in the Provisional; General/Family (Practice) class must be preceded by a satisfactory practice ready assessment of competency in a jurisdiction in Canada where such a program exists, in compliance with College bylaw 2-15(1)(b)(iii).”

As noted above, Condition 4 in the 2015 Eligibility Letter imposes conditions that extend considerably beyond the CFPC certification condition that was set out in the 2010 Eligibility Letter:

…..must, within five years of commencing practice in British Columbia, obtain certification with the College of Family Physicians of Canada (CFPC), failing which registration may be cancelled.

The Applicant’s position regarding Condition 4, as set out in the Notice of Appeal, was that Condition 4 is impossible to meet but asserts that he has equivalent family practice training, which would potentially invoke Bylaw 2-15(1)(b)(iii) and/or s. 20.43 of the HPA:
Bylaw

2-15(1) For the purposes of section 20(2) of the Act, to be granted provisional registration for general/family practice, an applicant must

.....

(b) meet one of the following requirements:

(i) have completed a general/family medicine program in Canada after July 1, 2010, but has not passed the CFPC examinations, provide a recommendation from the applicant’s Program Director and Chairperson of the Department of Family Medicine, attesting to competence and successful completion of all program requirements, acceptable to the registration committee,

(ii) have successfully completed a minimum of two years of accredited postgraduate training in a foreign jurisdiction recognized by the CFPC for the award of certification without examination, with a basic core of 44 weeks, consisting of eight weeks in each of medicine, surgery, obstetrics/gynecology, and paediatrics, and four weeks in each of psychiatry, emergency medicine, and general/family practice.

(iii) have undergone an assessment of competency acceptable to the registration committee in a Canadian province or territory.

HPA

20 (4.3) If a bylaw under section 19 (1) (i) establishes a class of provisional registrants for the purposes of this subsection, the registration committee may

(a) grant registration in the class for a limited period specified for the registrant by the registration committee,

(b) require the registrant to complete, within the period specified under paragraph (a), any examinations or upgrading of knowledge, skills or abilities the registration committee considers necessary for the registrant, and

(c) impose limits or conditions on the practice of the designated health profession by the registrant.

(4.4) Limits or conditions imposed in accordance with subsection (2.1), (3), (4.2) or (4.3) may be different for different registrants within a class of registrants.

[279] The Applicant takes issue with the College’s position expressed in May 2015 (after this review was filed) that from his 25 years of experience, it will only recognize 18 months of the 2 years required by the College’s Practice Ready Assessment Policy, thus requiring another “6 months of formal postgraduate training in family medicine rotations obtained in a recognized hospital affiliated with a University Faculty of Medicine Department of Family Medicine.”
As I understand the College’s position as expressed in an August 2015 email from College staff, the Registration Committee has not yet finally ruled on this issue, but that even if an allowance were made, the Applicant does not meet the formal requirements of the PRA-BC Policy, but might be able to obtain the relevant training in a foreign jurisdiction.

If and when this matter comes before the Registration Committee, that Committee would obviously need to consider the following:

1. Whether the applicant’s knowledge, skills and abilities are substantially equivalent to the standards set out in By-law 2-15: see College Bylaw 1-15(3).
2. Whether, even if it were not satisfied on the issue of substantial equivalency, it was prepared to grant him registration with practice or educational conditions, rather than bar him from registration until preconditions are met: HPA, s. 20(4.3).

A threshold issue the Registration Committee would be well advised to consider in context of the HPA is whether it was fair and appropriate to impose a new and more onerous condition when it had previously imposed a different condition on the Applicant in an Eligibility Letter that had no stated expiry date. This issue, together with the impact of the delays caused by the College’s problematic handling of the ELP issue, has troubled me greatly on this review.

While I appreciate the College’s position on this review that it applies the Bylaws that were in effect when the application was made, it is not at all clear that the College would have insisted on such compliance when the 2010 Eligibility Letter expressly set out a different requirement on this precise matter, the 2010 Eligibility Decision contained no deadline, the Applicant was not informed of a 3 year expiry date, his Application was filed within any 3 year window and the College took no steps to bring this January 2012 requirement to his attention until December 2014. Because of the assumptions it made, it does not appear that the Registration Committee considered whether, in the circumstances, it might be appropriate to “grandparent” the Applicant in respect of the CFPC requirement in all of the circumstances here, or be more flexible in exercising its “substantial equivalency” discretion in this case.

ORDER

Based on my findings above, it would be inappropriate for me to confirm the disposition. Thus, the question for me is which remedy, as between s.50.54(9)(b) and (c) I should grant:

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

(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.

[285] As already noted, s.50.54(10) states that a specific direction requiring the registration committee to "grant registration with or without limits or conditions" is only permissible, given the circumstances of the Applicant, if I find that (a) the registration committee failed to act fairly in considering the application, (b) the decision was made arbitrarily or in bad faith, for an improper purpose, was based entirely or predominantly on irrelevant factors, or failed to take requirements of the HPA into account, and the conditions set out in ss. (11)(a) and (b) are satisfied.

[286] Section 50.54(10) is clearly reserved for cases where the Review Board proposes to direct the registration committee to grant registration with or without limits or conditions.

[287] The Applicant has requested that I order the Registration Committee to grant him registration. In order for me to make this order I would have to find that all of the conditions set out in s.50.54(10)(a) of the HPA are satisfied.

[288] I am unable to make the order requested.

[289] There is indeed a powerful case to be made that, on the ELP issue, the Applicant was denied procedural fairness and was treated arbitrarily and in accordance with irrelevant factors. The College made false assumptions about his application, failed to demonstrate a coherent, supported and consistent explanation of the ELP Policy’s Exempt Branch and demonstrated a fettering of discretion in the application of the Examination Branch of the Policy.

[290] However, all this is still not enough for the Review Board to direct registration. To issue the remedy the Applicant requests, the Review Board must also be satisfied that the Applicant satisfies the conditions set out in s.50.54(11)(a) of the HPA:

(11) The following conditions apply for the purposes of subsection (10) (a) (iii):

(a) in the case of a person applying for registration as a member of the college,

(i) the person's knowledge, skills and abilities must be substantially equivalent to the standards of academic or technical achievement and the competencies or other qualifications required for registration in a class of registrants, and

(ii) the applicant must meet any other conditions or requirements for registration in the class of registrants;

[291] I do not have sufficient evidence before me to determine that the Applicant fulfills the conditions set out in s.50.54(11)(a). In this regard, I note that the 2015 Eligibility Letter imposes conditions 2, 3 and 5, not at issue on this review that would have to be met before any such conclusion could be reached.
I have given careful consideration to what order would best reflect the basis for my decision in this aspect of the case. In my order, I attach a deadline which I find reasonable and appropriate in the circumstance.

Order regarding Condition 1

I conclude that the appropriate order is to send the matter back to the Registration Committee with the direction that the Registration Committee, within 60 days from the date of issuance of this decision, reconsider its decision concerning Condition 1 set out in the 2015 Eligibility Letter as follows:

A. That the Registration Committee base its new decision on the Exempt Branch of the ELP Resolution and Policy that were approved in April 2012 (described in paragraph 23(d) of the Executive Director’s Affidavit), unless the Registration Committee is satisfied that the 2012 Resolution was validly amended to include some version of criterion c), not provided to this Review Board, prior to the date of its 2015 Eligibility Letter;

B. That the Registration Committee’s new decision take into account the College’s acknowledgement on this review that the Applicant has at all times satisfied criteria a) and b) of the Exempt Branch of the ELP Policy as it has been expressed in its various iterations since 2012.

C. That if the Registration Committee concludes that some version of what has been called criterion “(c)” or “(iii)” of the Exempt Branch of the Policy was validly added to the College’s Policy prior to the 2015 Eligibility Letter, the Registration Committee take into account the Applicant’s post medical school physician training and, if it concludes that that training does not exempt the Applicant from the Examination Requirement, provide fulsome reasons:

   (i) Which explain why the Registration Committee believes an Examination is required given the terms of the Exempt Branch and the Applicant’s unique situation, and

   (ii) Which take into account his training and experience, together with his Examination Results to date (including the September 2014 ELP test results), in addressing the question whether the Applicant has the ability to speak, read and write English to the satisfaction of the registration committee.

Condition 4

In consideration of the CFPC requirement imposed by Condition 4, I note the following factors:
(a) The 2010 Eligibility Letter expressly set out a different and less onerous requirement on this precise subject matter (CFPC certification) than does the 2015 Eligibility Letter.

(b) The 2010 Eligibility Letter contained no expiry deadline.

(c) The Record contains no evidence that the College informed the Applicant of any three-year expiry date on the 2010 Eligibility Letter despite the repeated statements by College staff and the Registration Committee that he was so informed, and which advice appeared as the justification for requiring the new application and imposing the new requirement.

(d) Even if there was at the time a “three-year window” for the 2010 decision as set out in some external policy or bylaw not provided to the Review Board (the College’s Affidavit does not specifically address this), the Applicant filed his Application in October 2012 within that window, and in reliance on that specific condition.

(e) In contrast to its reliance on the ELP Policy that had been revised in April 2012, the College took no steps following the Applicant’s October 2012 application to bring the January 2012 bylaw amendment to the Applicant’s attention until December 2014, and certainly did not notify him in any timely way that it believed the 2010 Eligibility Letter expired in April 2013.

[295] With the benefit of this decision, it is in my view open to the Registration Committee to now conclude that it was appropriate and reasonable for it to have concluded in October 2012 that the Applicant met the conditions set out for exemption from examination for ELP. Had the Applicant been deemed exempt from demonstrating ELP at that time, the Applicant would have had a strong argument that despite the January 2012 bylaw change, he was proceeding under the terms of the 2010 Eligibility Letter and should be grandparented in relation to that change. It would have been reasonable to expect the College to honour the express CPFC condition at that time, otherwise what would be the point of having a condition with such explicit terms set out in an eligibility letter.

[296] Indeed, in light of the Executive Director’s statement on this review that an applicant “must meet the requirements in effect at the time they submit their application, as opposed to those that are in effect at the time of the eligibility ruling” - what is the point of providing an eligibility letter, with express conditions defined therein, if those conditions are to be subject to any changes within the period the letter is valid? In this case, as we have seen, the Registration Committee proceeded between October 2012 and February 2015 in a manner consistent with their implicitly accepting the CFPC requirement as it was set out in the 2010 Eligibility Letter and not relying on the January 2012 Bylaw change. I find no logical and transparent reason to have an express condition such as the CFPC condition in the 2010 Eligibility Letter, if it is to be subject to change within the period of validity of the letter.

[297] I have considered whether I should make a formal finding that the Registration Committee had no legal authority to impose Condition 4 in light of the above factors –
whether all this is enough to conclude that the Registration Committee is bound by the 2010 CFPC condition. Despite my concerns, I do not think I can make such a finding without inviting further argument and thereby prolonging the matter to the detriment of the Applicant.

[298] I have considered the passage of time, the fact that the Registration Committee must reconsider Condition 1 and the fact that the Applicant has been working with Health Match BC on an action plan arising from Condition 4 which may have practically resolved or be close to practically resolving this issue.

[299] In all the circumstances, my conclusion on this issue is to strongly recommend that when the Registration Committee revisits this application pursuant to my Order concerning Condition 1, that it reconsider its decision concerning Condition 4 set out in the 2015 Eligibility Letter and after taking the factors listed in paragraphs [294] – [296] into account, consider whether the Applicant ought to be “grandparented” or relieved in some fashion from the strict application of the 2012 revision to Bylaw 2-15 in respect of the CFPC condition set out in the 2010 Eligibility Letter.

XVI CONCLUSION

[300] I conclude this decision with the order as set out above and with awareness that these reasons are very lengthy.

[301] I hope that, despite its length, this decision will be reviewed with care by the College and by all organizations involved in the registration process, particularly for foreign applicants.

[302] While the College is to be commended for keeping the public interest and public protection first and foremost in its decision-making, this does not exempt the College from the responsibility to take care to ensure that College policies are accurately represented and consistently expressed; to ensure that officials and committees understand the source and rationale for these policies; to ensure that applications are considered with due care; to ensure that decisions, particularly time-limited decisions, are clearly identified as such; and to ensure that College staff do not usurp the role and mandate of the Registration Committee, which needs to have all relevant information when it makes decisions. All this will enhance College decision-making in the public interest.

[303] I confirm that in making this decision, I have carefully considered all the evidence, whether or not it has been specifically referenced herein.

“Lorne R. Borgal”

Lorne R. Borgal, Panel Chair
Health Professions Review Board