BETWEEN: Applicant APPLICANT

AND: College of Physicians and Surgeons of British Columbia COLLEGE

BEFORE: Lorianna Bennett, Panel Chair REVIEW BOARD

DATE: Conducted by way of written submissions closing on June 29, 2018

APPEARING: For the Applicant: Julie K. Gibson, Counsel

For the College: Michelle Stimac, Counsel

I INTRODUCTION

[1] This is a review of a College decision wherein the College decided to revoke the Applicant’s provisional license to practice medicine.

[2] On December 2, 2013, the Registration Committee of the College of Physicians and Surgeons of BC notified Health Match BC (a Ministry of Health funded recruitment agency) that, subject only to credentials verification, it had decided to grant the internationally trained Applicant provisional registration for the practice of psychiatry under the supervision of a physician in the sponsoring health authority.¹

[3] Provisional registration is a unique registration category created by the College of Physicians and Surgeons (the “BC College”). It is specially geared to foreign-trained physicians prepared to work in under-serviced areas of the province. One feature that makes provisional registration unique is that while a registrant’s licence runs from year to year on a renewable basis, the grant of registration contemplates conditions that do

¹ Section 50.54(1) of the Act defines “applicant” as including not only a person without any practice status, but also person granted registration on conditions, including a provisional registrant. As will be discussed below, this distinction is important for the purposes of determining a person’s right to procedural fairness. That caveat noted, this decision will use the term “Applicant” to describe the physician in order to ensure consistency with the Act.
not need to be satisfied until well beyond the first one year licence period. The condition at the centre of this review states that subsequent full licensure will be dependent on [the Applicant]…

… within five years of commencement of practice in British Columbia, obtaining the certification examinations of the Royal College of Physicians and Surgeons of Canada (RCPSC) or certification through the RCPSC Practice Eligibility Route (PER) in psychiatry, failing which his registration may be cancelled unless extended by the Registration Committee in exceptional circumstances [emphasis added].

[4] Provisional registration is intended to be for a finite period of time, to enable provisional registrants to practice within certain parameters while completing the necessary qualification examination and certifications for independent practice on the full register. While certifications are being sought, the BC College sets the terms of the registrant’s immediate and ongoing supervision, including the reports that must be obtained and submitted by the supervisor. The national examinations and national certifications however are developed and assessed by bodies external to the BC College, and on which the BC College relies.

[5] The Royal College of Physicians and Surgeons (the “Royal College”) is one of the relevant national bodies. As submitted by the BC College: “Through the Bylaws, the College has required that specialist registrants complete the Royal College certification. The College has entrusted the assessment of specialists to the Royal College and the Inquiry Committee (the “Committee”) can therefore rely on the results of the assessment.”

[6] Starting in 2017, the Royal College offered two “routes” to certification for psychiatrists. A traditional examination was one route, and a newer option involving practice assessment, referred to as a “PER” (referred to alternatively as the “Practice Eligibility Route” or “practice ready assessment”) was the other route. The PER will be described in more detail below.

[7] Why would the BC College grant provisional registrants five years to obtain Royal College certification? Part of the answer lies in what is at stake for an applicant who has uprooted himself or herself to come to Canada as a foreign trained physician to fill a need. The other part is that the Royal College certification process is challenging, particularly when certification must be pursued while practicing under supervision in a new country in an under-serviced area. It is common ground that for the Royal College itself, failure to obtain certification on the first one or even two attempts does not preclude certification on a further attempt. Consistent with that, the Royal College eligibility letters here gave the Applicant opportunities over three years to take its examinations. Those letters did not say “one strike, you’re out” or even “two strikes you’re out.” Nor did the Registration Committee set out such limitations when it fashioned the five year Royal College certification condition for the Applicant. In this context, the observation of the hospital chief of staff in an email to the College after the reconsideration decision is noteworthy - that while Canadian residents now spend the

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2 The Registrant notes (and this is not contested by the BC College) that the Royal College allows Canadian candidates three attempts at the certification examination before a physician is said to have failed to obtain specialty certification.
last six months of their publicly funded training learning exam skills techniques, “there is a systemic problem of a lack of a mechanism to prepare IMGs [International Medical Graduates] for an examination system that is very foreign to those trained under more British models.” The Registration Committee must be taken to have known how the Royal College operates when it fashioned the five year condition.

[8] The five year clock on the Applicant’s five year Royal College certification term started in August 2014 and is to expire in August 2019.

[9] The issue on this application arises because in April 2017 – three years into the life of that condition - the Royal College provided the BC College with the result of the Registrant’s PER assessment with this description: “Severe fail: The Candidate’s performance during the assessment did not achieve the standard and demonstrated significant safety concerns.”

[10] BC College staff promptly wrote to the Applicant referencing the Royal College results, noting that his 2013 registration decision required him to “maintain eligibility” to access his chosen route to certification within five years, and then followed with the oblique comment that his file “is being presented to the Registration Committee for their review and not for non-compliance with your ongoing registration and licensure requirements.” [emphasis added]

[11] Following deliberations conducted in May 2017 and again July 2017, the Registration Committee decided to allow the Applicant’s license to “lapse” at the end of July 2017 – meaning that the Applicant’s licence would not be renewed. When the Committee made its July 2017 decision, it knew that the Royal College had decided to allow the Applicant to re-attempt certification in 2018.

[12] One issue on this review is whether the Registration Committee’s decision-making was procedurally fair. Another is whether it was reasonable for the Committee to decline to renew the Applicant’s annual licence when it knew on reconsideration in July 2017 that the Royal College had granted his request to re-attempt certification in 2018, prior to expiry of the original five years the Committee had granted the Applicant to satisfy this condition. For the reasons that follow, I have concluded that the decisions were procedurally unfair, and that this file must be sent back to the Committee with directions.

II BACKGROUND

A. The Application

[13] On August 20, 2013, a senior consultant with Health Match BC wrote to the BC College providing the Applicant’s CV and supporting documents, and requesting a preliminary assessment of the Applicant for licensure in the specialty of psychiatry.

[14] On August 30, 2013, the Deputy Registrar responded by setting out the BC College’s requirements for provisional registration, including the requirements he needed to be allowed to “access” Royal College certification via either examination or the PER practice assessment. His letter went on to state:
Interestingly, [the Applicant] has had his postgraduate training evaluated by the Royal College … and a copy of his July 17, 2013 ruling has been appended for verification. [The Applicant] is deemed eligible to access the 2014 Spring Examinations in Psychiatry as per the Royal College’s letter dated July 17, 2013. His ruling is valid for 2014, 2015 and 2016.

B. The 2013 Registration Decision

[15] On November 25, 2013, the Applicant’s application was formally considered by the Registration Committee.

[16] In Resolution #13-807, the Committee resolved that the Applicant (subject to verification of credentials and English language proficiency) was eligible for registration and licensure in the provisional-specialty class under sponsorship and supervision for a period of one year from a date to be determined.

[17] The Resolution stated that subsequent extensions of the Applicant’s licensure would be conditional; these conditions included obtaining the Qualifying Examinations of the Medical Council of Canada within five years (which he passed in July 2013), and additionally:

...within five years of commencement of practice in British Columbia, obtaining the certification examinations of the Royal College of Physicians and Surgeons of Canada (RCPSC) or certification through the RCPSC Practice Eligibility Route (PER) in psychiatry, failing which his registration may be cancelled unless extended by the Registration Committee in exceptional circumstances.

[18] On December 2, 2013, the Deputy Registrar wrote to Health Match BC setting out the Registration Committee’s November 25, 2013 decision.

C. Finding a position and a supervisor

[19] Under the terms of the Committee’s approval, the Applicant still required a job offer from a health authority together with other associated provincial and federal approvals as well as a supervisor prepared to objectively evaluate the Registrant. That process commenced in earnest in the spring of 2014 and concluded by August 2014.

[20] The college record of investigation (the “Record”) makes clear that the BC College views the responsibilities and expectations of a supervisor as significant. In this case, those responsibilities include the approved supervisor providing the BC College with an initial evaluation report, followed by an annual evaluation report “confirming that [the Applicant] is practicing to the standard that one would expect of a specialist working in psychiatry in British Columbia. Any concerns must be documented in detail in the Supervisor Evaluation Report.” In August 2014, the BC College advised the Applicant’s first supervisor (Dr. G) as follows:

Although the source of the information you have used to evaluate [the Applicant] is ultimately left to your discretion, we request that you use information from at least two of the following:

- Chart reviews of a minimum of ten patient charts,
- Chart stimulated interview summaries,
- 360 degree evaluations including interviews with colleagues and other health care professionals.

Other assessment tools may also include direct patient/physician observations while [the Applicant] interviews patients, utilizing the mini-CEX assessment form. Please use the tick boxes on the first page of the Supervisor Evaluation Report document to indicate which tools you have used.

[21] The College’s two page email included 16 pages of attachments, including a Guideline for supervisors, a document headed “Expectations of Supervisors for Provisional Registrants” and a Supervisory Evaluation Report form.

D. The first Certificate of Licensure

[22] Effective August 5, 2014, the College granted the Applicant his first provisional registration licence:

For the practice of psychiatry restricted to [named area] and other areas as determined by the [health authority] and under the supervision of [Dr. G] under the terms and conditions as per resolution 13-807.

E. Supervisor Evaluation Reports, 2014 and 2015

[23] On December 15, 2014, Dr. G provided the College with the first Supervisor Evaluation Report, which consisted of a chart audit, a 360 degree evaluation and direct physician/patient observation in clinical settings. In this 10 page document, the Supervisor recorded that the Applicant generally meets and sometimes exceeds expectations on all the indicia identified (Medical Expert, Communicator, Collaborator, Manager, Health Advocate, Scholar, Professional). Under the heading “Any Specific Concerns”, the answer was “no.”

[24] By July 3, 2015, a new supervisor (Dr. W) had been designated. He issued the second Supervisor Evaluation Report, based on direct physician/patient observation in clinical settings. That report, which was even more favourable than the report of his predecessor, recorded that the Applicant meets and sometimes exceeds expectations on all the indicia identified. Again, under the heading “Any Specific Concerns?” the answer was “no.”

F. Royal College Certification

[25] Based on the November 2013 Resolution and the August 4, 2014, licensure date, the Applicant had until August 4, 2019, to obtain Royal College certification.

[26] As noted above, the BC College was aware as early as August 2013 that the Royal College had in July 2013 deemed the Applicant eligible to access its Spring 2014 psychiatry examinations and that the ruling was valid for 2014, 2015 and 2016.

[27] On December 6, 2013, (shortly after the BC Registrar’s letter advising the Applicant of the grant of provisional registration), the Royal College revised its eligibility
ruling, advising the Applicant that he was eligible for its Spring 2015 examinations in psychiatry, and that the ruling was valid for examinations of 2015, 2016 and 2017.

G. BC College Staff’s Emails to the Applicant about Royal College Certification

[28] On February 27, 2015, just six months after the Applicant had begun his practice, an official at the College emailed the Applicant referring to the Royal College’s July 2013 eligibility ruling and asking for a status update as to whether he had yet attempted the examinations.

[29] Staff’s February 27, 2015, email went on to advise the Applicant that, instead of writing the traditional examination, another option was open to him:

The College wishes to also inform you of the alternate Practice Eligibility Route (PER) to certification which is presently under development at the [Royal College]. The PER to certification process would likely include a detailed 360 degree review of the physician’s practice which may require interviews with colleagues, reviews of hospital and office charts, and a mini clinical examination where the assessor would observe clinical interactions with patients within the office situation; there may be chart based recall, patient satisfaction surveys, etc….

The College requests that you commit to one of the following options above (RCPSC traditional or PER routes to certification) made available to you under the Health Professions Act, with respect to your advancement to the Full Class of Registration in British Columbia.

You must respond to this letter no later than **August 5, 2015**.

[30] With its email, staff enclosed additional information on the PER option as well as the requisite undertakings in the event the Applicant were to decide on that route.

[31] College staff’s email provided no explanation as to why it was requiring the Applicant to “commit” to one route or the other so early in the five year period granted by the Registration Committee, particularly as the Applicant had already obtained Royal College rulings that he was eligible up to and including 2017. The answer appears to lie in Bylaw 2-14(11)(b) enacted on January 1, 2012, which states: “A specialist granted provisional registration must … (b) within one year of commencing practice in British Columbia, confirm the route chosen to RCPSC certification through the provision of an undertaking, in a form satisfactory to the registration committee.”

[32] The BC College did not receive a response to its February 2015 email from the Applicant by August 5, 2015. College staff wrote to him again on August 25, 2015, this time with an objectively confusing opening sentence:

When you were provided licensure on August 5, 2014, you were informed that within one year of commencement of practice in British Columbia, you were to provide confirmation of your route chosen for certification in _anesthesiology_.

To date, the College has not received your response as to which route you have chosen for certification in _anesthesiology_. Please fill out and return the form(s) attached with your decision as which route you have chosen for certification in
anesthesiology by September 15, 2015, or your file may be referred to the Registration Committee to determine your ongoing registration and licensure eligibility. [emphasis added]

[33] The repeated reference to anesthesiology is an obvious error and might well cause a reasonable person to wonder whether the email was in fact intended for him.

[34] Despite the objectively confusing nature of the email, the Applicant responded to the BC College on August 31, 2015, and on October 6, 2015.

[35] On August 31, 2015, the Applicant advised the BC College that he had applied to the Royal College for the PER option, and that, pending its response, he had filled out the detailed Royal College forms, as well as the Undertaking required by the BC College. The Undertaking required by the BC College included the following:

4. I will complete the PER route to certification once this route becomes available in my chosen specialty/subspecialty, within the timeframe as set out by the [Royal College].

5. I agree that failure to complete the PER in accordance with [the Royal College’s] timeframe may result in cancellation of my registration with the College]…

8. I authorize the College to inform any person or body that it considers appropriate of the existence and content of these Undertakings, and to make inquiries with [the Royal College] from time to time, in its discretion, to monitor my progress.

9. I understand and agree that I have voluntarily entered into these Undertakings pursuant to Bylaw 2-14(11) with full awareness of my rights and responsibilities and I have had the opportunity to seek independent legal advice with respect to those rights and responsibilities and the consequences of these Undertakings.

[36] On October 6, 2015, the Applicant communicated the Royal College’s advice that he would not be eligible to enroll in the PER option until he had two years of continuous practice in one location – meaning August 2016.

[37] I pause to observe that I have considerable difficulty reconciling the Undertaking required by the BC College with its Bylaw and the 2013 Registration Committee decision. The Bylaw and Registration Committee decisions make clear that while a registrant must commit to a “route” within a year, the only time limit to obtain certification is to do so in what the registration committee describes as “five years,” and what the Bylaws describe as “within the period designated by [the Royal College]”: Bylaw 2-14(11)(c). On the other hand, the Undertaking required by the BC College can be read as requiring the applicant to complete the PER route as soon as it becomes available, with the repeated phrase “within the Royal College’s timeframe” being less than clear. A reasonable provisional registrant would clearly conclude that the regulator expected him to undertake the assessment at the earliest opportunity.

[38] The potential for problems in all this is evident. A reasonable provisional registrant might understandably conclude that even if he was less prepared than he would like to be for an examination or the PER assessment, lack of success on an early assessment would not be fatal given that he had five years and the Royal College
offered more than one attempt. As will be seen below, that view was not shared by the Registration Committee,

[39] If the BC College provided notice to provisional registrants regarding the potential consequences of a fail or severe fail even if time was left within the five year window while further attempts were still permitted by the Royal College, those registrants could govern themselves accordingly and make a strategic decision about when to attempt the Royal College exam or assessment. No such notice was provided here.

H. Supervisor Evaluation Report, August 2016

[40] On August 10, 2016, the BC College received its third Supervisor Evaluation Report respecting the Applicant (the second report by Dr. W), utilizing both chart audit assessment and direct physician patient observation in clinical settings. As with the other audits, the Applicant was found to have generally met and sometimes exceeded all expectations, with no specific concerns identified.³

I. Licence Renewals

[41] In the period between August 2014 and April 2017, the College renewed the Applicant’s provisional licence. It appears that these annual renewals were granted by College staff without the necessity of referral to the Registration Committee.

[42] Each renewal was “under the terms and conditions as per resolution 13-807,” which included the August 2019 deadline to obtain Royal College certification.

III THE REFERRAL TO THE REGISTRATION COMMITTEE

A. April 21, 2017 Notice to the Applicant

[43] In April 2017 the Royal College notified the BC College that the Applicant had taken the PER assessment. This notification caused a College staff member to send a letter to the Applicant on April 21, 2017. After setting out the background, including reference to the Royal College’s original eligibility letter to sit examinations in 2014, 2015 and 2016, the letter stated:

The College has received the results of the 2017 PER route B practice-based assessment from the RCPSC, which state that you were not successful in this examination, and that your performance during the assessment “demonstrated significant safety concerns.

Please note that it is also a requirement of your registration and licensure on the provincial class that you maintain eligibility to access your chosen route to RCPSC certification within five years of commencement of practice in BC.

³ I note for completeness that the Record in this matter includes correspondence starting in November 2015 wherein College staff received information about an investigation related to a matter involving the Applicant during his previous UK practice. As that information was not placed before the Registration Committee, did not form the basis for any decisions made in this matter, and forms no part of the College’s submission on this application, I make no further reference to it in this decision.
Your file with therefore be referred to the Registration Committee. The Committee will consider the following options:

- Cancelling your registration and licensure three months from the date of the Registration Committee meeting, allowing time for you to wind-down your practice,
- Continuing your registration and licensure to allow you the opportunity to obtain RCPSC certification by a specific date, or else your registration and licensure will be cancelled, or
- Other options put forward by the Committee.

Please note that extensions to registration and licensure requirements are granted only in exceptional circumstances.

If you have any additional information you wish the Committee to review, please provide this directly to me via email no later than May 12, 2017. Information that would be helpful for the Committee review includes:

- Your official outcome documentation from the 2017 PER practice-based assessment from the RCPSC,
- A RCPSC ruling letter confirming your ongoing eligibility for either the PER or traditional examination route to certification,
- Evidence that you are enrolled in the next available RCPSC PER route B practice-based assessment, PER route A examinations, or the traditional examination route, and
- A detailed explanation of why you have not met your registration and licensure requirement to obtain RCPSC certification in psychiatry, including any exceptional circumstances preventing you from meeting this requirement.

[44] The Royal College’s email notifying the BC College of the “severe fail” was not placed before the Registration Committee. The College advises that the Committee “was provided with information from this document.” The College seeks to tender the document, together with other information, as new evidence on this review. As noted below, I have admitted this document.

[45] There is no evidence in the Record that the BC College, pursuant to clause 8 of the Undertaking, made inquiries of the Royal College regarding the details of its findings or explored with the Royal College how these assessment findings might or might not translate into actual practice risks given the Applicant’s favourable supervisor reports.

B. Applicant’s April 24, 2017 Response

[46] On April 24, 2017, the Applicant responded to the College advising that he had yet to receive the 2017 PER results “so I am writing based on the information from you [sic] email as I am aware that time is of the essence.” To this end the Applicant:

(a) Provided the BC College with further copies of the Royal College’s extension letter allowing him to write examinations in 2015, 2016 and 2017. He stated:
So far I have only attempted the [Royal College] examinations once through the traditional route in 2015 and the PER route 2017. As a result I do believe I am still eligible to do at least one more attempt at getting certification through either the traditional route or the PER route.

(b) Noted that he had written to the Royal College to clarify his eligibility to enroll for the next available examination through either the traditional or PER route.

(c) Noted that College staff had itself recognized that he had been granted five years to obtain certification “and I believe I am still within five years of practice and registration with [the BC College].”

(d) Stated: “All of the above are the options I am looking and I will let you know as soon as I am aware of my status with the [Royal College].”

[47] These responses sought to address what the Registrant reasonably understood was a key basis for the referral to the Registration Committee – that he had failed to comply with the five year eligibility requirement. If the primary issue to be considered was whether the Registration Committee should take extraordinary action on his license based on the concern that he posed a safety risk to the public, fair notice would in my view have required much greater clarity and proper disclosure, as will be set out below.

C. The College’s reply

[48] Unfortunately, the necessary clarity was not forthcoming. Instead on May 4, 2017, the College staff member provided this oblique reply:

I want to restate from my letter to you dated April 21, 2017, that, because you are still within your five years, your file is being presented to the Registration Committee for their review and not for non-compliance with your ongoing registration and licensure requirements… [emphasis added]

[49] On May 17, 2017, another College staff member followed up stating that the Committee will require this letter of result from the [Royal College] in order to review your file and registration requirements at its meeting of May 23, 2017. Please provide this document … no later than Friday, May 19, 2017.”

[50] There is no evidence that the Applicant provided the BC College with the letter of result. As noted above, there is also no evidence that the BC College ever asked the Royal College for the details, as appears to be permitted by the Undertaking.

D. The Applicant’s May 22, 2017 email to the BC College

[51] On May 22, 2017, the Applicant did provide the BC College with an email exchange he had had with the Royal College arising from his PER exam.

[52] The first email in the email string was a detailed email from the Applicant to the Royal College headed “An appeal to be allowed to retake the examination.” In the

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4 The statement that “your file will therefore be referred to the Inquiry Committee” comes immediately after the paragraph setting out the 5 year requirement. Further, the final three items of “additional information” the Registrant was invited to provide all related to that issue.
email, the Registrant stated that he was embarrassed by his performance. He summarized accompanying circumstances which, he said, may have contributed to his poor performance. Specifically he stated:

(a) His application to the Royal College was extremely rushed due to a last minute opening which did not provide adequate time for him to properly prepare for the exam; “I had to rush to complete all my assessments, multi-source feedback while working an already full scheduled practice.”

(b) Based on the notice he was given in December 2016, he only had three months to prepare for the March 2017 assessment. He had already exhausted his leave and holiday quotas and so could not take time off to prepare for the assessment as expected.

(c) During the first part of that three month period (December 2016 and January 2017) he was distracted with personal family matters. He stated: “As I was already committed I felt I had no choice but to carry on as I was under the impression of being privileged to get the one ‘opening’ available in 2017. However at no point did I feel prepared or ready for the examination.” He acknowledged full responsibility for his performance and stated that he would have performed better if the conditions were more favourable, and thus was seeking another opportunity “on humanitarian grounds.”

(d) He created a six point study plan as follows:
- To attend update and psychiatry revision courses (a) Ottawa Review course and (b) London, Ontario review course;
- To dedicate at least one hour a day studying and revising for the examination;
- To read journals and guidelines regularly to update his knowledge;
- To practice MCQs and OSCE scenarios with his colleagues in preparation for the examination;
- To contact and engage in regular discussions with fellow candidates preparing for the examination; and
- To work under the close supervision of his supervisor to achieve all of the above.

[53] The second email in the email string was the Royal College’s May 12, 2017, response to the Applicant explaining that he would need to make a formal application for renewal of examination eligibility, and in that application, he would again need to indicate whether he was interested in the traditional examination route or PER assessment again. The final email in the email string was the Applicant’s completed application form to the Royal College.

IV THE REGISTRATION COMMITTEE’S MAY 23, 2017 DECISION

A. Staff’s briefing document

[54] College staff prepared a briefing document for the Committee in advance of its May 23, 2017, meeting.
This briefing document and the documents it attached were not provided to the Applicant. The document did not attach or make reference to the Applicant’s May 22, 2018, email string to the Royal College.

While much of the briefing document replicated the information set out in the College April 21, 2017, letter to the Applicant, the options it set out included details on which the Applicant may well have wished to make a submission. The options presented by staff were:

1. Cancel the applicant’s registration and licensure effective August 23, 2017, allowing three months to wind down his practice;

2. Extend [the Applicant’s] registration and licensure to enable him to obtain an eligibility ruling for the traditional certification examination or PER (practice-based assessment) by July 20, 2017, for the 2018 sitting of either route. [The Applicant] must complete the following:
   
a. Provide an eligibility ruling from the RCPSC for the 2018 PER Route A (certification examinations) or PER – Route B (practice-based assessment) by July 20, 2017.

   If [the Applicant] does not obtain an eligibility ruling, his registration and licensure would be subject to cancellation three months following, due to his lack of eligibility to achieve RCPSC certification as required by College bylaws and policies.

   Should [the Applicant] obtain an eligibility ruling for the PER-Route A (certification exam) or the PER – Route B (practice-based assessment), he must sit and be successful on the next available sitting (spring 2018).

   If [the Applicant] is not successful on the spring 2018 PER – Route A or Route B assessment, his registration and licensure would be subject to cancellation three months following, due to his non-compliance of the terms and conditions on his registration as required by College bylaws and policies.

   b. Attend the College for an in-person interview with Registrar staff to discuss the deficiencies identified in the PER – Route B and how the same will be addressed and to discuss his study plan and preparation for the spring 2018 RCPSC-PER Route A or PER Route B.

   c. Provide his authorization for the College to discuss its concerns with his supervisor and his sponsor, and

   d. Provide his results from the RCPSC PER - Route A (traditional examination) or PER - Route B by July 30, 2018.

   If [the Applicant] does not complete any of the actions above, his registration and licensure will be cancelled allowing him three months to wind down his practice;
practice, due to his non-compliance with his continuing registration and licensure requirements, unless extended by the Registration Committee in exceptional circumstances.

(3) Other options.

B. May 23, 2017, Registration Committee Decision

[57] On May 23, 2017, the Registration Committee met and decided to proceed in accordance with the first option presented by staff. The Committee’s Minutes include the following:

The Committee reviewed the results of [the PER] which confirmed that he was unsuccessful on the assessment. It noted with concern that the [Royal College] report reads “severe fail; the candidate’s performance during the assessment did not achieve the standard and demonstrated significant safety concerns”.

The Committee acknowledged that [the Applicant] had not provided any further documentation regarding his eligibility to access the 2018 [Royal College] examinations.

[The Committee] considered its policy regarding provisional registration which stipulates that a provisional registrant must provide proof of being currently eligible to take the certification examination in order to maintain registration and licensure with the College.

[58] As noted, the Applicant had the day before provided information to the College about his active efforts to access the 2018 examinations. That information was not before the Registration Committee.⁵

[59] The Committee continued:

The Committee acknowledged the supervisor reports. The Committee discussed the role and expectations of supervisors for provisional registrants… The Committee expressed concerns in relation to the stark contrast between the satisfactory supervisory reports provided by Dr. [W].

[60] Dr. W provided two supervisor evaluation reports. The Committee Minutes do not explain the nature of the “stark contrast” between them, and I can find none based on my review. It takes no special expertise to see that they are both positive. If it were otherwise, one would have expected earlier action by the BC College.⁶

⁵ Neither the Staff Briefing Document (Record, p. 292), nor College counsel’s later letter outlining the material that was before the Committee in May 2017 (p. 320), refers to this email. Nor do the Committee’s May 23, 2017, Minutes reflect any awareness of it. I find that this email was not before the Committee in May 2017 despite the suggestion in the Record Index (by way of a triangle) that it was. ⁶ I have considered the possibility that this is an incomplete sentence, and that the Committee meant to say “the stark contrast between the supervisor reports and the result of the PER assessment.” However, given the number of members on the Committee and the presence of numerous staff members at the meeting I am not prepared to read text into comprehensive minutes that have been approved by the Committee itself. I note as well that the same sentence was reproduced in the College’s August 16, 2017, letter to Registrant’s counsel communicating the Committee’s July 2017 reconsideration decision.
The Committee also stated that the College had on April 17, 2017, advised the Applicant that continued registration and licensure “was contingent upon him maintaining eligibility to access [Royal College] certification” and that he “has not provided proof of being eligible” to access the next examination or PER sitting. The April 17, 2017, letter stated:

Please note that it is also a requirement of your registration and licensure on the provincial class that you maintain eligibility to access your chosen route to RCPSC certification within five years of commencement of practice in BC.

As noted, the Applicant did provide current proof in 2017 that he was eligible to write the 2017 examination. He had applied to the Royal College to be allowed to write the 2018 examination, and was waiting to hear. Insofar as this paragraph implied a breach of the conditions of registration, it contradicted College staff’s May 4, 2017, advice that the issue was not one of non-compliance with ongoing registration and licensure requirements.

The Registration Committee Minutes continued:

The Committee reviewed its primary mandate to protect the public and ensure that registrants are practicing competently and to the expected standards. The Committee acknowledged that the [Royal College] is the national examining and certifying body for medical specialists in Canada. The Committee reviewed the structure of the PER route to certification as an assessment of competency. The Committee noted that such an assessment may include the following: direct observation of practice, in-practice chart stimulated recall and/or chart reviews, preview of practice profiles and outcome data, etc. The Committee expressed serious concern with respect to patient safety in light of the [Royal College’s] comment regarding [the Applicant’s] 2017 PER (practice ready assessment). The Committee acknowledged that the College’s mandate obligates the Committee to place patient safety above all other considerations and expressed disquiet in relation to [the Applicant’s] ongoing registration and licensure with the College, in the circumstances.

On the basis of the available evidence and its careful review of the matter, the Committee concluded that it would not be prepared to grant [the Applicant] ongoing registration and licensure in the provisional; specialty class. Accordingly, the Committee resolved that [the Applicant’s] registration and licensure lapse effective three months from the Committee meeting, August 23, 2017, to allow him sufficient time to wind down his practice as he is not currently eligible to access the [Royal College] certification examination or PER in 2018.

Moreover, given the serious concerns identified, the Committee directed that [the Applicant] enter into voluntary undertakings with the College until his licence lapses to refrain from accepting any new patients into his practice and from providing services in emergency medicine.

The Committee further directed that, in order for [the Applicant] to be considered for re-registration and re-licensure in British Columbia, he would be required to comply with all the standards and qualifications for registration and licensure in effect at the time of his re-registration and meet the requirements for the Full – specialty class
pursuant to section 2-11 of the College Bylaws, including obtaining his [Royal College] certification in psychiatry and the LMCC.

[64] I find that the Committee based its decision on public safety, following the results of the PER assessment and based on its view that the Applicant was in breach of the conditions of registration.

C. Communicating the May 23, 2017, decision

[65] On May 24, 2017, the College’s Registration Manager telephoned the Applicant and followed up with an email. The email stated: “After careful review and consideration of all information provided for its review, specifically the safety concerns and other deficiencies identified during your practice assessment,” the Committee decided to cancel his license effective August 23, 2017, with limitations immediately effective including that the Applicant could not accept new patients or provide emergency services from that point forward.

[66] The Applicant was advised that the Committee would be issuing a formal decision that would be issued to him by June 6, 2017. No such decision was ever prepared and sent.

[67] The Applicant reminded the manager that he already had Royal College permission to attempt certification again in 2017. The manager’s response was: “I recommend that you contact the [Royal College] to find out what your options are.”

V THE COMMITTEE REVIEW

A. The Applicant’s request to “appeal”

[68] On June 2, 2017, the Applicant wrote to the BC College stating that he wished to “appeal” the Committee’s decision. He stated his belief that even though he was unsuccessful in 2015 (the exam) and in 2017 (the PER), he was still eligible for at least one more attempt, but was following up with the Royal College, whose most recent email (June 1, 2017) stated that the matter was under review. He reiterated that the 2013 registration decision had given him until 2019 to meet the Royal College requirements.

B. College advice that the Registration Committee would “review” on June 22, 2017

[69] On June 5, 2017, the College emailed the Applicant advising him that on June 22, 2017, the Registrant Committee would “review” its previous decision, and that the June 2, 2017, emails requesting an appeal would be included. He was invited to include any new information, including the steps he will take to obtain the Royal College certification by August 2019.

[70] Neither the reason for the review, nor the focus of the review, was disclosed.
C. June 12, 2017, letter from Applicant’s legal counsel

[71] On June 12, 2017, the Applicant’s legal counsel wrote to the BC College. Counsel argued that it was procedurally unfair not to provide her client with reasons for the previous decision, to give him no document disclosure and to not notify him of the reason for re-referring the matter to the Committee. Counsel asked whether the Registration Committee had the supervisor reports. Counsel argued that the lack of transparency about the reason for the re-referral, and the late timing of disclosure, meant he could not provide responsive submissions and that this would reflect on the reasonableness of the Committee’s decision.

[72] Counsel submitted that the previous decision was also procedurally unfair, as the Applicant received no notice of the Committee’s Policy regarding exam eligibility, and no notice that the Committee was considering limiting his practice.

[73] Counsel stated that “The impositions of conditions, presumably in the name of public/patient safety, is bizarre when one considers his role as a psychiatrist, for several years, has been the subject of serial reports to the College attesting to his competence…” Counsel stated:

As well, cancellation of [the] licence after allowing him only 2 attempts at the certification process, when the [Royal College] permits 3 is arbitrary and capricious, particularly when no notice of this was ever given to registrants at the time they were asked to sign the attestation of the chosen route to certification and … particularly when provisional registrants accessing the traditional route to certification are afforded 3 tries over 3 years.

[74] Counsel argued that it was arbitrary and unfair to cut short the Applicant’s licensure earlier than 2019, particularly if the Royal College was prepared to allow him to make further certification attempts. Counsel noted that by cancelling his licence, the BC College was also effectively ending the PER option, which requires active practice, and argued that the conditions imposed pending cancellation disclosed “an unsettling ignorance of the supervision reports…”

[75] Counsel noted that several of the Applicant’s colleagues, who were in a good position to speak to his professionalism and skills, had recently written to the BC College in support of the Applicant.

[76] One of the Applicant’s colleagues, a psychiatrist, wrote to the BC College on June 9, 2017 as follows:

He has been practicing [here] for the past three years. During that time I have worked closely with him on the [Inpatient Unit]. …He has been reliable and a key part and valued member of our inpatient team…When he was told he could no longer see new patients over 70 new psychiatric consultation appointments had to be cancelled and as a result we currently have no openings for new patients. We are currently short staffed from a psychiatric perspective and have great difficulty providing adequate mental health services to the population we serve…
[The Applicant] has been allowed only three years to get the psychiatric credentials necessary to practice where my understanding that most doctors are allowed five years to do so. This seems unfair to me. I also know of a number of psychiatrists in this province with British qualifications who have been allowed to practice long term without completing the Canadian examinations. So I do not think it unreasonable for [the Applicant] to be allowed a further two years to get the full qualifications needed to practice as a psychiatrist in BC.

Another psychiatric colleague wrote the following to the College on June 11, 2017:

…[The Applicant] has become a valuable member to the Psychiatric team…He has had a significant impact on Patient Care and has been a great help in cutting down wait time…he is … conscientious…his invaluable experience in General Adult Psychiatry and Addictions has been quite beneficial in him being the only Psychiatrist offering a once a month out-patient Psychiatric Care clinic in an isolated and Rural Community…he also has an expansive Out-patient Clinic as well as offering Inpatient Care at the Regional Hospital…[The Applicant] would benefit for whatever resources and time extension that can be made available to him to accommodate his completion of his FRCPSC certification…The restrictions presently in place is beginning to have visible impact as up until he was restricted, he was the only Psychiatric Out-patient Doctor accepting new patients due to a significant long term Shortage of out-Patient Psychiatrists In the Community…(sic)

Counsel’s position was that the Applicant should be allowed to continue to practice within the period designated by the Royal College, and that in view of the evidence from his colleagues, there was no safety risk in doing so.

D. June 14, 2017 letter from College legal counsel

On June 14, 2017, College legal counsel wrote to the Applicant’s counsel assuring her that counsel’s June 12, 2017, letter would be placed before the Committee, providing counsel with a copy of the material that had been placed before the Committee on May 23, 2017, and stating:

As previously indicated, [the Applicant’s] file will be brought back before the Committee for its reconsideration. More specifically, following the Committee’s last review, it was identified that the Committee did not have the benefit of legal advice or the opportunity to consider all options available to it, particularly as it relates to the concerns expressed by the [Royal College] in regards to the ... 2017 practice-based assessment....

In the interests of procedural fairness … we would invite you to submit any additional information for the Committee’s consideration and request that the same be provided by July 11, 2017 such that this matter may be placed on the agenda for the Committee meeting on July 27, 2017.

E. Royal College notification regarding its 2018 Examinations

Also on June 14, 2017, the Royal College wrote to the Registrant and confirmed that his proposed study plan (under mentorship) had been accepted and that was
holding a place for the Applicant in the 2018 examination program subject to a satisfactory report from the mentor by March 1, 2018. This letter, a copy of which was also received by the BC College on June 14, 2017, stated:

…The acceptance of this study plan grants you provisional eligibility to the Psychiatry examination in 2018.

F. Further letter of support from colleagues

[81] On June 22, 2017, a third colleague wrote to the College in support of the Registrant.

G. No further submission from the Applicant

[82] The Applicant made no further submission in response to counsel’s June 14, 2017 letter.

VI THE REVIEW DECISION (JULY 27, 2017)

A. The Staff Briefing Document

[83] The Staff briefing document prepared for the Committee’s July 27, 2017, meeting summarized the history leading to the May 23, 2017, decision. It noted that, since that decision, the Applicant had applied to the Royal College to complete the 2019 assessment and it summarized his reasons he had given for his poor performance in the 2016 assessment. The briefing document outlines the Applicant’s understanding that he would remain eligible to have one further attempt at the exam.

[84] This briefing document, which was not provided to the Applicant, also made reference to counsel’s June 12, 2017, letter and to a memorandum from College legal counsel concerning “legal issues that may not have previously been considered by the Committee.” Since that memorandum is protected by solicitor client privilege, it is not included in the Record.

B. The July 27, 2017 Minutes

[85] After reviewing the history, the Committee turned first to the three letters of support that had been tendered from the Applicant’s colleagues. The Committee stated:

While the Committee acknowledged the letters of support … it was mindful of the generally isolated nature of the practice of psychiatry whereby others are not necessarily in a position to assess [the Applicant’s] practice or his competency.

[86] With regard to the three supervisor evaluation reports, the Committee “acknowledged that there have been no reported concerns in relation to [the Applicant’s] competency and that he is practicing to the standard expected of a specialist.” No further comment was made with respect to those reports.
The Committee acknowledged the Applicant’s explanation of the circumstances that affected the PER assessment, his study plan and the Royal College’s recent provisional eligibility to sit its 2018 examination.

The Committee concluded as follows:

The Committee acknowledged that the primary consideration in registration decisions is the protection of the public and that this mandate informs all other factors. The Committee noted the College’s responsibility to ensure that the public maintains confidence in the medical profession by not granting registration to someone who might put the public at risk. The Committee noted that it must first be satisfied that the physician should be granted registration and is fit to practice and then should consider what, if any, conditions should be imposed.

The Committee again discussed the role of the [Royal College] as the national examining and certifying body for medical specialists in Canada. The [Royal College] provides an independent and objective assessment regarding a specialist’s medical knowledge and clinical skills which is validated by passing such examinations. The Committee expressed serious concerns regarding [the Applicant’s] inability to obtain [Royal College] certification following two attempts and the [Royal College’s] categorization of his 2017 … PER result as: “severe fail: that the candidate’s performance during the assessment did not achieve the standard and demonstrated significant safety concerns”. Moreover, the Committee expressed that it is the [Royal College], not the College, who is the appropriate body to determine whether [the Applicant’s] practice skills meet the standards of care expected of a specialist in psychiatry in British Columbia.

The Committee acknowledged its initial eligibility ruling requiring [the Applicant] to obtain [Royal College] certification within five years of commencing practice in British Columbia (prior to August 5, 2019). In considering its options, the Committee canvassed the possibility of granting continued registration with the imposition of limits and conditions on [the Applicant’s] practice to address the safety concerns. The Committee noted [the Applicant] has not provided specific details regarding the deficiencies identified in the 2017 PER assessment in particular, a summary of his performance or the reasons why he did not meet the required standards set by the [Royal College]. Given that the Committee did not have the benefit of this information, it was felt it was not in a position to determine what additional limits and conditions would be appropriate to address the enduring safety concerns.

The Committee also discussed the information provided by [the Applicant] in relation to the factors which he states affected his ability to be successful on the 2017 PER. On the basis of the review, the Committee did not find [the Applicant’s] circumstances to be exceptional so as to warrant his continued registration and licensure.

Following its review of the available material and considering all available options, and given its concerns regarding patient safety, the Committee determined not to continue [the Applicant’s] registration and licensure in the provisional – specialty class and upheld its prior decision of May 23, 2017. However, the Committee expressed that should additional information come to light which may warrant a
reconsideration, it would be prepared to review the matter at that time. [emphasis added]

[89] The Committee added the following, which was a deviation from its May 2017 decision:

Notwithstanding the foregoing, the Committee determined that it would be prepared to grant [the Applicant] registration and licensure in the educational class for the purpose of completing the [Royal College] study plan in order to obtain eligibility for the 2018 [Royal College] certification examination.

[90] The College has applied to introduce as new evidence additional Minutes from July 27, 2017, where the Executive Director provided Committee members with a briefing on a Royal College booklet, designed for candidates, concerning the PER Assessment Route. The 17 page booklet explains the nature and elements of the assessment. The College argues that this information was part of the information before the Committee prior to its reconsideration. If that is so, it is not clear to me why this was not submitted to the Review Board as part of the Record. As noted below, I also admit this document into evidence.

C. Notification of decision

[91] On August 3, 2017, the College advised the Applicant’s counsel of the Committee’s decision. On August 15, 2017, the College’s Registration Manager telephoned the Applicant to provide him with an informal summary of the decision.

[92] On August 16, 2017, a College staff member wrote to the Applicant's counsel essentially reproducing the content of the Minutes as set out above. The letter commenced with an introduction that included the following representation:

In the fulfillment of its mandate and given its authority, the Committee obtains sufficient information of an applicant or registrant to ensure that decisions are made using an equitable and transparent process and the parties affected are afforded the opportunity to present their case fully and have decisions affecting their rights, interests or privileges made in a balanced, impartial and open manner.

D. The August 15, 2017 email from the Hospital Chief of Staff

[93] The Record also includes this email sent to the College following the reconsideration decision, from acting chief of staff and executive medical director for the associated regional hospital:

I am afraid that I only became aware of the issue below this morning....

I do not have access to his supervisor reports and admit that I am writing in possible ignorance of any critical performance issues, other than lack of success in the Canadian examination system competing against a standard determined by residents who now spend the last 6 months of publicly funded training learning exam skills techniques. As we have discussed, there is a systemic problem of a lack of mechanism to prepare IMGs for an examination system that is very foreign to those trained under more British models.
... I can assure you that staff in that area firmly believe that patient care and safety will be much more greatly comprised by his departure than having him stay under supervision. [emphasis added]

VII THE APPLICATION FOR REVIEW

A. Application for review

[94] The Applicant filed this application for review on August 10, 2017. He stated:

Cancellation of my licence at this juncture, after allowing only two attempts at the certification process, when the Royal College typically permits three, is arbitrary and unfair, particularly when no notice of this was given to me at the time I was asked to choose a route to certification when provision registrations accessing the traditional route to certification have been afforded three attempts....

I relied on the prior position of the Registration Committee to my detriment; it is unfair for the College now to deregister me on less than three weeks formal notice.

B. The Stay Decision

[95] As the Registration Committee’s cancellation decision was to take effect on August 23, 2017, the Applicant applied to the Review Board for a stay of the decision as permitted by s.50.62 of the Act.

[96] Despite the Registration Committee’s decisions, the BC College took no position on the application.

[97] On August 21, 2017, the Review Board granted a stay of the Committee’s decision pending the disposition of the review or until further order of the Review Board: Decision No. 2017-HPA-106(a).

C. Applicant’s Submission

[98] Counsel for the Applicant seeks an order directing the Registration Committee to extend the Applicant’s provisional registration period to enable him to take the Royal College’s 2018 and 2019 examinations (or assessments, at his option) and to allow him to continue to practice without restrictions until that time. Counsel argues that the Committee’s reconsideration decision was inappropriate because the Committee failed to act fairly toward the Applicant, the decision was arbitrary or based predominantly on irrelevant factors, and the Applicant satisfies the conditions in s.50.54(11)(a). In the alternative, the Applicant seeks an order remitting this matter to the Registration Committee.

[99] With regard to the standard of review to be applied on this application, the Applicant submits that where the remedy is other than a direction to grant registration, the Review Board must determine for itself the appropriate standard to apply: Decision No. 2016-HPA-195(a); Decision No. 2014-HPA-164(a). The Applicant submits that the Review Board should apply a standard that is “contextually appropriate,” that the test should be whether the decision was “appropriate and fair,” and that the decision should reflect the principles of “justification, transparency and intelligibility.”
The Applicant’s first argument is that the decision was procedurally unfair:

(a) It was arbitrary and unfair to allow him only two attempts at Royal College certification when the Royal College permits three attempts over a three year span for the traditional examination and especially because he was given no notice of the potential adverse consequence when he was asked to provide his “chosen route.”

(b) The entire process lacked transparency – the “abrupt decision to send the matter back for reconsideration, the absence of formal written reasons for its May 23, 2017, decision, and the paucity of communication about the nature of the reconsideration all suggest an alarming lack of transparency and a failure on the part of the Registration Committee to fulfill its own self-described mandate to make decisions ‘in a balanced, impartial and open manner’.”

The Applicant’s second argument is that the decision was flawed on the merits because it highly exaggerated the public safety concern:

(a) The Committee failed to give appropriate weight to the supervisory reports that the College itself solicited.

(b) The Committee inconsistently deferred to the Royal College’s judgment respecting the PER assessment while failing to give equal deference to its decision to allow him another attempt at certification.

The Applicant’s third argument is that the Committee failed to have regard to its discretion to extend registration in exceptional circumstances (Bylaw 12-14(12)), which in this case should have taken into account the Applicant’s attempt to balance his professional obligations and his study obligations: “He was led to believe that his initial grant of registration would take him to 2019, and that he would have three attempts at obtaining the Royal College certification. The Registration Committee’s inconsistent and patently unreasonable treatment of this matter has created an exceptional circumstance that warrants an extension of his provisional licensure, to permit him the opportunities that he was led to believe were available him to seek full licensure.” The Applicant argues that his supervisory reports and letters of support show that his “knowledge, skills and abilities are substantially equivalent to the standards of a psychiatrist practicing in British Columbia.”

D. College’s Submission

In response, the College provided a statement of points dated January 10, 2018.

The College submits that the Review Board ought to apply a reasonableness standard which grants a significant degree of deference to the Committee’s decisions. The core of its position on the merits is summarized as follows:

The Committee determined that based on the Royal College PER assessment results, [the Applicant] posed a potential risk to patients and, in fulfillment of the College’s mandate of public protection, determined that ongoing registration and licensure would not be in the public interest. The Committee therefore directed that [his] registration and licensure would lapse three months from the May 2017 decision.
The College accepts that a reasonable decision is one that is transparent, intelligible and justified. It argues that since it made a discretionary decision based on public protection, and having regard to its composition (at least four registrants and two members of the public), the Committee’s decision is entitled to significant deference. The College submits:

The Committee exercised its expertise and discretion in reviewing the factors and found that it must consider public safety above all else and [the Applicant's] result at the Royal College PER assessment indicated that his continued practice may result in the endangerment of the public. As such, the Committee took the reasonable decision of directing that his registration and licensure would lapse.

The College relies on Devlin v. College of Physicians and Surgeons of BC, 2002 BCCA 419 at para. [26]:

[26] … the evaluation of the appellant’s credentials, the weight to be given to the opinion of his peers in psychiatry, and to his failures of the LMCC examinations were quintessentially matters for the Council of the College. The courts must be very hesitant to interfere with a decision that falls squarely within the expertise of a professional tribunal.

The College submits that since each licence was for a one year term, any licence extension was subject to the Committee’s determination that the Applicant met the requirements for registration. When the Committee was provided with Royal College notification in April 2017 (“severe fail” and “safety concerns”) it exercised its authority under the November 2013 resolution and the Act

The College argues that it considered all the relevant factors, including the Applicant’s registration history, his previous unsuccessful assessments, the scope of the PER assessment, the supervisor reports, the Applicant’s submissions, the letters of support, the existence of exceptional circumstances, the College’s mandate, the least intrusive measures required to protect the public and the Committee’s authority. It argues that these are appropriate factors to balance and that the Decision flowed intelligibly from those factors. It argues that the Committee took into account the PER assessment document, and appropriately relied on the results of the assessment given the role of the Royal College.

With regard to the supervisor reports, the College advances an argument to which I will return below:

…the greater weight attributed by the Committee to the result of the Royal College PER assessment than to the supervisor reports is reasonable given the scope of each of these forms of assessment…. [The] PER assessment is an in-depth comprehensive review of the skills and knowledge of a specialist…administered by the Royal College, an examination and certification body to which the College has entrusted the assessment of specialists. The supervisor reports are completed by physicians who have been chosen by the health authority and approved by the College. The scope of their assessment is necessarily significantly more limited than the Royal College PER assessment.
The College submits that the scope of the supervisor reports is evident from the guidelines and evaluation form and that the purpose and purview are necessarily different from that of the Royal College PER assessment. As such it was reasonable for the Committee to attribute greater weight to the result of the PER assessment [particularly because the latter disclosed the result of] “Severe Fail” and the accompanying comment that the applicant presented safety concerns.

[110] The College points out that the Applicant was asked for but did not provide the BC College with the details of the PER assessment. The College submits that the Committee was entitled to give priority to public protection in making this decision.

[111] The College also disputes any breach of procedural fairness. It argues that the Applicant was provided with notice of both reviews, opportunities to make submissions and received an intelligible decision which considered his submissions. It reiterates that the Applicant chose not to provide the College with the details of the PER assessment.

[112] Finally, with regard to remedy, the College submits that the Applicant cannot obtain the relief sought not only because its decisions were fair and reasonable, but because this Board is not in a position to assess the critical requirement that the applicant’s “knowledge, skills and abilities” are equivalent to the academic achievements required of other registrants.

E. Opportunity to reply

[113] On February 9, 2018, counsel for the Applicant notified the Review Board that he would not be filing a reply.

VIII DISCUSSION AND ANALYSIS

A. Standard of review

[114] This is a registration review under s.50.54 of the Act. This section directs the Review Board to conduct a review, following which the Review Board may confirm the decision, send it back to the Committee for reconsideration with directions, or direct the Committee to make a decision the Committee could have made: s.50.54(9) of the Act.

[115] In contrast to s.50.6 of the Act which governs complaint disposition reviews, s.50.54 of the Act does not prescribe the issues we must consider, or the standard of review we must apply.

[116] The Act does set out a rigorous test that must be met before the Review Board can grant the remedy of directing the Committee to grant registration with or without limits or conditions. Section 50.54(10) of the Act states:

(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.

[117] As several previous Review Board decisions have correctly noted⁷, the rigorous multi-factor test in subsection (10) does not apply if the Review Board remits the matter to the Committee for reconsideration with directions that do not include the grant of registration. It applies only where the Review Board proposes to direct the Committee to grant registration with or without conditions. Where the Review Board does not propose to grant the remedy of directing that registration be granted, the application does not have to satisfy all of the multiple elements set out in subsection (10) of the Act.

[118] Subsection (10) of the Act does usefully recognize, consistent with our administrative law generally, that an independent review of a registration decision should take into account both the process leading up to that decision and the substance of the decision. This supports the conclusion that a reconsideration with directions (short of directing that registration be granted) may be ordered where the College’s processes were tainted by procedural fairness, or where the Committee’s decision was unreasonable on the merits.

[119] In Canada (Attorney General) v. Mavi, 2011 SCC 30, the Supreme Court of Canada described procedural fairness as follows:

38 The doctrine of procedural fairness has been a fundamental component of Canadian administrative law since Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police, [1979] 1 S.C.R. 311, where Chief Justice Laskin for the majority adopted the proposition that "in the administrative or executive field there is a general duty of fairness" (p. 324). Six years later this principle was affirmed by a unanimous Court, per Le Dain J.: "... there is, as a general common law principle, a duty of procedural fairness lying on every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges or interests of an individual": Cardinal v. Director of Kent Institution, [1985] 2 S.C.R. 643, at p. 653. The question in every case is "what the duty of procedural fairness may reasonably require of an authority in the way of specific procedural rights in a particular legislative and administrative context" (Cardinal, at p. 654). See also Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653, at p. 669; Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817, at para. 20; and Mount Sinai Hospital Center v. Quebec (Minister of Health and Social Services), 2001 SCC 41, [2001] 2 S.C.R. 281, at para. 18. More recently, in Dunsmuir v. New Brunswick, 2008 SCC 9, [2008] 1 S.C.R. 190, Bastarache and LeBel JJ. adopted the proposition that "[t]he observance of fair procedures is central

⁷ See for example Review Board Decision No. 2017-HPA-038(a) at paras. [75-81] and para. [133].


to the notion of the ‘just’ exercise of power” (para. 90) (citing D. J. M. Brown and J. M. Evans, Judicial Review of Administrative Action in Canada (loose-leaf), at p. 7-3).

39 Accordingly, while the content of procedural fairness varies with circumstances and the legislative and administrative context, it is certainly not to be presumed that Parliament intended that administrative officials be free to deal unfairly with people subject to their decisions. On the contrary, the general rule is that a duty of fairness applies. See G. Régimbald, Canadian Administrative Law (2008), at pp. 226-27, but the general rule will yield to clear statutory language or necessary implication to the contrary: Ocean Port Hotel Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch), 2001 SCC 52, [2001] 2 S.C.R. 781, at para. 22. There is no such exclusionary language in the IRPA and its predecessor legislation.

40 In determining the content of procedural fairness a balance must be struck. Administering a "fair" process inevitably slows matters down and costs the taxpayer money. On the other hand, the public also suffers a cost if government is perceived to act unfairly, or administrative action is based on "erroneous, incomplete or ill-considered findings of fact, conclusions of law, or exercises of discretion" (Brown and Evans, at p. 7-3; see also D. J. Mullan, Administrative Law (2001), at p. 178).

[120] Procedural fairness is properly assessed based on whether the process giving rise to a decision was, in all the circumstances, “fair.” As noted in Seaspan Ferries Corporation v. British Columbia Ferry Services Inc., 2013 BCCA 55:

[52] I agree with the submissions of Seaspan...that the standard of review applicable to issues of procedural fairness is best described as simply a standard of "fairness". A tribunal is entitled to choose its own procedures, as long as those procedures are consistent with statutory requirements. On review, the courts will determine whether the procedures that the tribunal adopted conformed with the requirements of procedural fairness. In making that assessment, the courts do not owe deference to the tribunal's own assessment that its procedures were fair. On the other hand, where a court concludes that the procedures met the requirements of procedural fairness, it will not interfere with the tribunal's choice of procedures.

[121] With regard to the review of the substance of the decision, I do not intend to spend a great deal of time expounding on the meaning of “unreasonable.” The key for the Review Board in this unique context is to recognize that the Committee has special expertise and that its judgment must given considerable weight and respect in any review. At the same time, it must be recognized that the Committee, despite its expertise, is not infallible and that its registration decisions are now subject to review by a specialized Review Board. The legislature created this review procedure for a reason. Unless the remedy proposed is to direct that registration be granted, the Review Board is entitled to expect that the Committee decision was reasonable – that the decision, to be sure, avoids being arbitrary and avoids improper purpose and irrelevant considerations – but also that it is sufficiently justified, transparent and intelligible in the circumstances, having regard for the reasons and the record, given the nature and importance of the decision being made.
B. Analysis

[122] I begin with an assessment of whether the decisions made in this case were arrived at pursuant to a process that was procedurally fair in all the circumstances. For the reasons that follow, I find that they were not.

[123] The law is clear that procedural fairness does not describe a “one size fits all” process or procedure. Its content depends on numerous factors, helpfully summarized in Mavi:

[42] A number of factors help to determine the content of procedural fairness in a particular legislative and administrative context. ... The duty of fairness is not a "one-size-fits-all" doctrine. Some of the elements to be considered were set out in a non-exhaustive list in [Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817] to include (i) "the nature of the decision being made and the process followed in making it" (para. 23); (ii) "the nature of the statutory scheme and the 'terms of the statute pursuant to which the body operates'" (para. 24); (iii) "the importance of the decision to the individual or individuals affected" (para. 25); (iv) "the legitimate expectations of the person challenging the decision" (para. 26); and (v) "the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances" (para. 27). Other cases helpfully provided additional elements for courts to consider but the obvious point is that the requirements of the duty in particular cases are driven by their particular circumstances. The simple overarching requirement is fairness, and this "central" notion of the "just exercise of power" should not be diluted or obscured by jurisprudential lists developed to be helpful but not exhaustive

[124] I do not propose to undertake a lengthy analysis of each factor. I will summarize by noting the following:

- The decision in question is a statutory decision made by a specialized statutory committee composed of physicians and members of the public who are required to exercise judgment and discretion having regard to the paramount duty of the College set out in s.16(1) of the Act:

  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.

- While the physician is an “applicant” on this review, he is a very special kind of applicant. The potential prejudice to the applicant here is far greater than that of an applicant who is merely seeking an initial licence or registration decision. He is an applicant who has been granted provisional registration on terms and conditions, following an extensive vetting and application process, who has uprooted himself and his family in order to act on the
registration granted to him, and for whom an adverse decision may result in severe personal and economic consequences.

- While the Committee does not hold formal hearings in the manner of the Discipline Committee, the College made a representation to the Applicant which in my view creates a legitimate procedural expectation – namely, that “In the fulfillment of its mandate and given its authority, the Committee obtains sufficient information of an applicant or registrant to ensure that decisions are made using an equitable and transparent process and the parties affected are afforded the opportunity to present their case fully and have decisions affecting their rights, interests or privileges made in a balanced, impartial and open manner.”

[125] Having regard to all the relevant factors, it is my view that the Applicant was entitled to a high degree of procedural fairness in the process that led to the registration decision in this case. While he was not entitled to the highest degree of procedural fairness as for example would a registrant subject to a formal discipline proceeding who would have a right to appear in person, be represented by counsel and cross-examine witnesses, he was not a mere “applicant” for a licence. The impact of the decision here-a mid-term, potential termination of his ongoing provisional registration status - was significant, even life-altering. A high degree of procedural fairness is reinforced by the College’s representations to the Applicant in the August 2017 decision letter which gave rise to a legitimate expectation that the Applicant was entitled to believe that he was treated “using an equitable and transparent process and the parties affected are afforded the opportunity to present their case fully and have decisions affecting their rights, interests or privileges made in a balanced, impartial and open manner.”

[126] The Committee’s duty to protect the public does not attenuate the duty of fairness. It reinforces that duty. Except in an emergency (not alleged here, as evidenced by the College’s position on the stay application), neither an applicant, nor a community being served by an applicant, are well served by a decision preceded by unfair procedures that deprived decision-makers of the opportunity to make the most informed decision.

[127] In my opinion, there are numerous aspects to the breach of the Applicant’s right to procedural fairness in this case.

[128] First, I find it was procedurally unfair for the BC College, having represented to the Applicant through its registration decision that he had five years to obtain Royal College certification, to fail to give the Applicant fair and transparent notice of the potential adverse consequences of failing the Royal College exam or PER assessment within that time even where the Royal College allowed additional attempts.

[129] It was obviously beneficial for the College to remind applicants of the deadlines set out in the Bylaws and in the registration decision, including the requirement to commit to a route within a year of starting practice, as required by the Bylaw. However, the College here went further. By use of the Undertaking, whose language was chosen
by the College, any reasonable applicant would conclude that the regulator was requiring him to obtain the certification at the earliest opportunity. In my view, doing so was procedurally unfair without also giving the Applicant proper and transparent notice that failing an individual exam or assessment mid-way through the five year window might jeopardize his license despite the Committee registration decision and Bylaws and despite any advice by the Royal College that he was eligible to take the exam or assessment again.

[130] If fair notice had been provided, the Applicant could have governed himself accordingly and made a properly strategic decision about when to attempt the Royal College exam or assessment. No such notice was provided and he proceeded to undertake an assessment when he was clearly not ready, where he reasonably believed that a failure would not be fatal and where he learned thereafter that, in the eyes of the Committee, it was. In my view, that was procedurally unfair, particularly as the result of that assessment was the foundation of the adverse decision that followed.

[131] The more difficult question is whether any of that matters from a remedial perspective now that the Applicant has written the examination and now that the Royal College has advised the BC College as follows:

   “Severe fail: The Candidate’s performance during the assessment did not achieve the standard and demonstrated significant safety concerns.”

[132] Given the Committee’s mandate, the results of the assessment could not be ignored by the Committee even if the assessment’s timing was informed by a process that was procedurally unfair.

[133] The procedural unfairness could have been cured by the Committee if it thereafter followed a clear and transparent process that specifically notified the Applicant of its concerns and that gave him a full and fair opportunity to address them, together with proper disclosure. However, that did not happen.

[134] The College’s April 21, 2017, letter to the Applicant was deficient. While it notified the Applicant that licence cancellation was going to be on the table as one option at the May 12, 2017, meeting (later moved to May 23, 2017), gave him the opportunity to provide “any additional information you may want this Committee to review” and stated that it would be “helpful” to have the official PER assessment documentation (updated on May 17 with an email stating that the College “requires” the assessment results), procedural fairness in these circumstances demanded more than this, particularly having regard to the oblique email of May 4 stating that “your file is being presented to the Registration Committee for their review and not for non-compliance with your ongoing registration and licensure requirements.”

[135] In my view, procedural fairness required the following prior to the May 2017 decision, none of which took place:

   (a) Clear notice inviting the Applicant to make submissions on (a) whether his continuing practice with or without conditions should be allowed as a matter of public safety and the public interest, and (b) the supervisor reports, and in
particular what the Committee would describe as “the stark contrast between the satisfactory supervisory reports provided by Dr. [W].”

(b) Disclosure of all information and detailed options provided to the Committee for its consideration with the exception of legal advice, including the new evidence which the College sought to tender on this review, which information the College states was made available to the Committee.

(c) Inclusion of the Applicant’s May 22, 2017, email to the Committee for its consideration.

(d) Clear notice that the Applicant’s failure to provide the PER assessment details would not prevent his file being considered and may result in an inference being drawn against him.

[136] The impact of these failures was significant. They led to a May 23, 2017, Committee decision that made findings that had a serious adverse impact on the Applicant. The Committee placed overwhelming weight on the Royal College’s language of “severe fail” and “demonstrated significant safety concerns” without identifying whether or how it followed up with the Royal College regarding the significance of that conclusion as a matter of clinical practice and without explaining how it came to grips with the supervisor reports which it merely “acknowledged” and about which it described a “stark contrast” which is inexplicable on a review of those assessments. The Committee also emphasized a breach of the condition of “continued eligibility to access Royal College certification.” That was procedurally unfair because the Applicant had specifically been told that non-compliance with conditions was not under consideration.

[137] As noted above, the Applicant was not given a copy of the Minutes of the May 23, 2017, meeting. Instead, he was telephoned by the Registration Manager and sent an email on May 24, 2017, stating: “After careful review and consideration of all information provided for its review [none of which was given to the Applicant], specifically the safety concerns and other deficiencies identified during your practice assessment, the Committee decided to cancel your licensure with the College effective August 23, 2017….”

[138] A reasonable person receiving this email might conclude that the reference to “safety concerns and other deficiencies identified during your practice assessment” that the BC College had in fact obtained the results, as it would appear to be entitled to do given the terms of the Undertaking. The email did not comment further on the fact that the Applicant failed to provide the details and the point was never mentioned again in the College’s correspondence with the Applicant or his counsel until it was referenced again in the Committee’s July 2017 reasons.

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8 I note that the supervisor reports are not referenced in the briefing note as being part of the materials provided to the May 23 Committee. The only reference to them in the briefing note is the general statement: “The College has received satisfactory supervisor reports to date.” Despite this, I find that, given the specific statements made in the Minutes, at least two of the reports (those from Dr. W) must have been before the Committee.
Had the sequence of events ended there, one could have no hesitation in concluding the Committee’s decision would have to be set aside due to a breach of procedural fairness.

The question is whether the process that unfolded after the Applicant asked to “appeal” cured the process and rendered it procedurally fair in all the circumstances.

As noted earlier, following the Applicant’s “appeal” email, the College notified the Applicant on June 5, 2017, that:

… the decision of the Registration Committee will be reviewed at the Committee’s meeting on June 22, 2017.

In your case, the College has already received your emails dated June 2, 2017 that the Registration Committee will review…

In addition to the information received to date, any new information that the Registration Committee has not already reviewed would be helpful. This information could include information related to:

- Steps you will take to obtain the [Royal College] certification … by August 2019, and
- Any other information you would like the Registration Committee to review.

Any additional information you provide must be received by the College by Friday June 9, 2017.

This notice gave the Applicant four days to respond to a review whose rationale, scope and focus were not disclosed. No further disclosure was provided. The Minutes setting out the reasons for the previous decision were not given. There was no reference to “the stark contrast between the supervisor reports.” There was no indication of what were the “other deficiencies identified during your practice assessment” as set out in the Registration Manager’s email. The statement inviting “any new information that the Registration Committee has not already reviewed” would be impossible to respond to when it was not known what information the Committee had already reviewed.

Despite the June 9, 2017, deadline, the Applicant was not able to respond until June 12, 2017, when his counsel wrote to the College. Counsel argued, correctly in my view, that the notice was deficient because it failed to notify the Applicant of the reason for the review and failed to disclose material adequate to enable a meaningful response, and argued that the process leading to the previous decision breached procedural fairness. Counsel noted the “very limited time we have had to prepare submissions.”

Within the procedural fairness constraints the Applicant’s counsel identified, counsel proceeded to argue that it was arbitrary and unfair to cut short his registration when the BC College had previously represented that he had five years to obtain Royal College certification. Counsel emphasized the Applicant’s previous supervisor reports, as well as two other letters of reference that were provided.
On June 14, 2017, counsel for the BC College wrote to the Applicant’s counsel. The letter:

(a) Provided some additional disclosure. However, in my respectful view the disclosure was inadequate from a procedural fairness perspective. Counsel’s letter enclosed some but not all of the documents that the Committee considered on May 23, 2017. The staff briefing document, which included the detailed options proposed for the Committee on May 23, 2017, was not enclosed. The supervisor evaluation reports that had been or would be considered were not identified or disclosed. The May 23, 2017, Minutes setting out the reasons and key concerns of the Committee were not disclosed. No notice was given of the Committee’s concerns regard the “stark contrast between the supervisor reports.” There was still no indication of what were the “other deficiencies identified during your practice assessment” as set out in the Registration Manager’s email, and there was no confirmation of what further information the College had obtained regarding the results.

(b) Stated that the matter was being brought back before the Committee because “it was identified that the Committee did not have the benefit of legal advice or the opportunity to consider all options available to it, particularly as it relates to the concerns raised by the Royal College...in regards to [the Applicant’s PER].” Counsel’s letter was silent as to what the reference to “all options available to it” might be. In my view, procedural fairness entitled the Applicant to be transparently advised of all the options that would be on the table, so that he could make meaningful submissions. This did not require legal advice to be disclosed.

(c) Advised that “Following its reconsideration, it will be open to the Committee to uphold its initial decision, render a different decision, or defer its decision pending the receipt of additional information”. The only reasonable reading of this statement is that the Committee was not going to review the decision afresh as would happen when a statutory decision-maker acknowledges a breach of procedural fairness, but would instead be exercising the power it has on an ongoing basis to determine whether it should change its position based on legal advice and the consideration of other (unstated) options, together with whatever additional information the Applicant might provide.

(d) Invited the Applicant to provide, by July 11, 2017, “any additional information for the Committee’s consideration...”. That kind of general invitation, in the circumstances listed above, was, without proper notice, not adequate to enable the Applicant to provide specific submissions on specific issues that would be central to the Committee’s coming deliberation.

On the other side of the ledger, I was initially troubled by the fact that the Applicant did not respond further despite the invitation. However, I have concluded that the decision not to do so was understandable in the circumstances, and did not in any event alter my view that the Applicant was not given sufficient notice and disclosure on which to offer further information or a meaningful response. I reiterate as well that while

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it is true that the Applicant never provided the detailed PER results to the College, the
College did not ask for them again as part of the review process, and there is no
evidence of any efforts made by the College to obtain those results, or an explanation of
the results, from the Royal College which notified the BC College of the results in the
first place.

[147] It would have been straightforward and transparent for the BC College and the
Committee to have plainly advised the Applicant that the Royal College results raised a
serious question about whether his was a case where he should not be allowed to
practice psychiatry on a provisional basis any longer despite the five year window,
despite his supervisor reports and despite his eligibility with the Royal College to take
the test again. He should have been given proper document disclosure, he should have
been given notice of the options the Committee would consider, and he should have
been plainly notified that he would have the opportunity to make submissions on the
weight to be given to the Royal College results, the weight to be given to the supervisor
reports, the options that were before the Committee and any other points or
submissions he considered relevant to those issues. That would have satisfied
procedural fairness because it would have allowed him to properly prepare evidence
and argument on the real objective significance of a “serious fail” having regard to all
the circumstances, potentially including the points that were made after the July 2017
decision by the Hospital Chief of Staff regarding the systemic issues regarding exam
preparation by Canadian residents as compared with IMEs. While the College submits
that the Committee on July 27, 2017, took into account the Applicant’s emails and
counsel’s June 12, 2017, letter, it is no answer to a breach of procedural fairness to
argue that the decision-maker took into account submissions that were made without
benefit of proper procedural fairness.

[148] As a matter of law, I am under no obligation to speculate as to whether the result
would have been different had procedural fairness been granted. As set out in Cardinal

… I find it necessary to affirm that the denial of a right to a fair hearing must always
render a decision invalid, whether or not it may appear to a reviewing court that the
hearing would likely have resulted in a different decision. The right to a fair hearing must
be regarded as an independent, unqualified right which finds its essential justification in
the sense of procedural justice which any person affected by an administrative decision
is entitled to have. It is not for a court to deny that right and sense of justice on the basis
of speculation as to what the result might have been had there been a hearing.

[149] There is in fact considerable wisdom in not speculating about what the outcome
would have been had procedural fairness been granted here. That is particularly so
since neither set of the Committee’s reasons explained how the Committee came to
grips with the positive supervisor reports as compared with the PER assessment
results. While the College, in submissions before me, has asserted that the supervisor
assessments are “necessarily considerably more limited than the Royal College PER
assessment,” and that this is “evident” from the guidelines and the evaluation form, the
Committee made no such finding in either decision and I am certainly in no position to
find that this is “evident”: 
(a) The May 23, 2017, Committee decision does not downplay the reports but in fact expressly acknowledges that a supervisor is to “address the registrant’s competency, ethics and professionalism and provide confirmation that the provisional registrant is practising to the standard expected of a physician practising in BC.” Its only other comment was the confusing expression of concern “in relation to the stark contrast between the satisfactory supervisory reports provided by Dr. [W]” when all the reports were positive. The May 23 decision makes no statement suggesting the “limited” nature of supervisor assessments required by the BC College, which assessments request the use of information from a minimum of two of the following (a) chart reviews of at least 10 patients; (b) chart stimulated interview summaries; and (c) 360 degree evaluations. What is apparent from the Record are the lengths the BC College has gone to in order to ensure proper supervision of provisional registrants during the five year window.

(b) The July 27, 2017, Committee decision does reference the “generally isolated nature of psychiatry” to explain the limited weight it gave the letters of support from colleagues. However, it made no such finding in relation to the supervisor reports, which were tailored to ensure that a BC College approved supervisor with appropriate expertise can assess psychiatric practice. The decision merely acknowledged those supervisor reports without making any comment about them, or explaining why, on the key issue (safety) it gave them so little weight as to conclude that it was unsafe to allow the Applicant to continue to practice under any circumstances. The Committee made no finding that the BC College’s own supervision process was “limited”, or that the supervisor’s reports were somehow inadequate on the facts.

(c) The Committee’s July 27, 2017, Minutes are even more oblique given the statement that “the Committee expressed that it is the Royal College, not the College, who is the appropriate body to determine whether [the Applicant’s] practice skills meet the standards of care expected of a specialist in the practice of psychiatry in British Columbia.” Where, as here, the BC College’s own Guidelines and process require a supervisor to undertake this very role, imposes significant and periodic assessment requirements to address the registrant’s competency, ethics and professionalism and provide confirmation that the provisional registrant is practising to the standard expected of a physician practising in BC, the Committee’s suggestion that the BC College has no role is, at the very least, confusing and highly questionable.

[150] In the end, I am not prepared to simply attribute to the Committee the College’s additional submission or justification regarding the supervisor reports. I am guided instead by the Supreme Court of Canada’s recent statement in Delta Airlines Inc. v. Lukacs, 2018 SCC 2, which held that where a decision-maker has already given reasons, further supplementing those reasons on review:

[27] … would undermine, if not negate, the vital role of reasons in administrative law. Dunsmuir still stands for the proposition that reviewing courts must look at both the reasons and the outcome. While this does not require “two discrete analyses” (Newfoundland Nurses, at para. 14), it means that reasons still matter. If we allow reviewing courts to replace the reasons of administrative bodies with their own, the
outcome of administrative decisions becomes the sole consideration. With that approach, as long as the reviewing court could come up with some possible justification — even if it contradicted the reasons given by the administrative body — the decision would be reasonable. This goes too far. It is important to maintain the requirement that where administrative bodies provide reasons for their decisions, they do so in an intelligible, justified, and transparent way.

[28] Finally, this would amount to the reviewing court assuming the role of the Agency by developing and applying a complaints procedure under the Act. It would be ironic to allow the appeal in the name of deference and then stipulate how the Agency should determine when to hear a complaint...

[151] I agree that it is the Committee’s role to reasonably weigh competing factors (Devlin, supra), but it is for the Committee to explain itself, particularly where the issue goes to the very key question that was before it. It is not enough to simply focus on the Royal College results without contending transparently with the implication of supervisor reports. A reasonable decision calls for such transparency in a decision of this significance. It is far from self evident to me that there could be only one reasonable outcome in the circumstances here, or that requiring the Committee to clearly confront the issue would unreasonably burden the Committee. Deference to the Committee’s expertise is not inconsistent with requiring it to explain its own thinking on key issues. The lack of transparency on this key issue also renders the decision unreasonable.

C. New evidence

[152] As noted earlier, the College has applied under s. 50.54(8) of the Act to adduce “new evidence” in the form of the Royal College’s April 13, 2017, email to the BC College with the attached results of the PER assessment, together with an excerpt from the Committee’s July 27, 2017, minutes with respect to the PER route to certification. I am satisfied that both should have been included in the Record in the first place. They are properly before the Review Board on this review.

D. Remedy

[153] The Applicant has requested that I direct the Committee to “extend” his provisional registration. I decline to do so on the basis that this would be equivalent to directing a “grant” of registration and I am in no position to conclude that, as required by s.50.54(10)(a)(iii) of the Act, “the conditions described in subsection (11)(a) or (b) are met.”

[154] However, based on my finding that the decisions of the Committee were tainted by procedural unfairness, those decisions are invalid by operation of law (Cardinal, supra). It follows that the Applicant’s provisional registration and licensure status continues by operation of law pursuant to the 2013 Registration Decision until a procedurally fair decision is made, one way or the other, by the Committee.

[155] Because the disclosure of the Record on this review has effectively given the Applicant proper notice of the Committee’s previous reasons, I will limit my directions as follows:
A. The Committee is directed to undertake a full and fresh reconsideration of the Applicant’s continued licensure after:

(a) Notifying the Applicant of all documents on which it intends to rely and any options it intends to consider (excluding only information protected by solicitor-client privilege), including any new information that it obtains or has obtained while this matter has been before the Review Board.

(b) Giving the Applicant a full and fair opportunity to be heard, including the opportunity to provide evidence and submissions on the weight to be given to the Royal College results, the supervisor reports, the options the Committee ought to consider and accept, and any other matter the Committee specifies in its notice as being important to its deliberation. The manner in which the opportunity to be heard is given (an oral presentation or in writing or both) is for the Committee to determine.

(c) Reviewing these reasons for decision.

B. The Committee is directed to provide reasons for its decision and to explain the result it arrives at after reconsideration, including a transparent explanation of how it assessed and weighed the supervisor reports and the Royal College PER assessment, including any further Royal College assessment that may have been undertaken by the Applicant while this matter was before the Review Board.

[156] In making this decision, I confirm that I have considered all of the information before me, the entire Record and both the Applicant’s and College’s Statement of Points whether or not they are specifically referred to in these reasons.

“Lorianna Bennett”

Lorianna Bennett, Panel Chair
Health Professions Review Board