

SEP 24 2018



S-1810320

NO.
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN

THE SOCIETY OF CANADIANS STUDYING MEDICINE ABROAD,
OLIVER KOSTANSKI, and
HARRIS FALCONER

PETITIONERS

AND

THE COLLEGE OF PHYSICIANS AND SURGEONS OF BRITISH COLUMBIA,
HER MAJESTY QUEEN IN RIGHT OF THE PROVINCE OF BRITISH
COLUMBIA AS REPRESENTED BY THE MINISTRY OF HEALTH,
THE UNIVERSITY OF BRITISH COLUMBIA,
THE CANADIAN RESIDENT MATCHING SERVICE,
THE ASSOCIATION OF FACULTIES OF MEDICINE OF CANADA, and
THE HEALTH PROFESSIONS REVIEW BOARD

RESPONDENTS

PETITION TO THE COURT

ON NOTICE TO:

The College of Physicians and Surgeons of British Columbia
#300-669 Howe Street,
Vancouver, B.C. V6C 0B4

Her Majesty Queen in Right of the Province of British Columbia
as represented by the Ministry of Health
1001 Douglas St.
Victoria, B.C. V8W 9J7

The University of British Columbia
#240-6328 Memorial Road
Vancouver, B.C. V6T 1Z2

Canadian Resident Matching Service--CARMS
171 Nepean Street, Suite 300
Ottawa, Ontario, K2P 0B4

The Association of Faculties of Medicine of Canada
2733 Lancaster Road, Suite 100
Ottawa, Ontario, K1B 0A9

The Health Professions Review Board
Suite 900, 747 Fort St., Victoria

The Attorney General of British Columbia
1001 Douglas Street, Victoria BC V8W 2C5.

The Attorney General of Canada
c/o Department of Justice Canada
900-840 Howe St., Vancouver BC V6Z 2S9.

This proceeding has been started by the petitioner(s) for the relief set out in Part 1 below.

If you intend to respond to this petition, you or your lawyer must

- (a) file a response to petition in Form 67 in the above-named registry of this court within the time for response to petition described below, and
- (b) serve on the petitioner(s)
 - (i) 2 copies of the filed response to petition, and
 - (ii) 2 copies of each filed affidavit on which you intend to rely at the hearing.

Orders, including orders granting the relief claimed, may be made against you, without any further notice to you, if you fail to file the response to petition within the time for response.

Time for response to petition

A response to petition must be filed and served on the petitioner(s),

- (a) if you reside anywhere within Canada, within 21 days after the date on which a copy of the filed petition was served on you,
- (b) if you reside in the United States of America, within 35 days after the date on which a copy of the filed petition was served on you,
- (c) if you reside elsewhere, within 49 days after the date on which a copy of the filed petition was served on you, or

(d) if the time for response has been set by order of the court, within that time.

(1)	The address of the registry is: 800 Smithe St., Vancouver BC V6Z 2E1
(2)	The ADDRESS FOR SERVICE of the petitioners is: Brian Samuels, Barrister & Solicitor, c/o Samuels & Co. 2000 Ontario St. Vancouver BC V5T 2W7 E-mail address for service of the petitioners: brian@samuelslawcorp.com
(3)	The name and office address of the petitioners' lawyer is: Brian Samuels, Barrister & Solicitor, c/o Samuels & Co. 2000 Ontario St. Vancouver BC V5T 2W7

ENDORSEMENT ON ORIGINATING PLEADING OR PETITION FOR SERVICE OUTSIDE BRITISH COLUMBIA

The Petitioners, The Society Of Canadians Studying Medicine Abroad; Oliver Kostanski; and Harris Falconer, claim the right to serve this Petition on the Respondents, Canadian Resident Matching Service and The Association of Faculties of Medicine of Canada, outside British Columbia on the ground that the proceeding includes a claim for an injunction ordering a party to do or refrain from doing something in British Columbia, pursuant to Rule 4-5(1) of the Supreme Court Civil Rules and clause 10(i) of the Court Jurisdiction and Proceedings Transfer Act.

CLAIM OF THE PETITIONERS

Part 1: ORDER(S) SOUGHT

1. A declaration pursuant to s 2(2) of the *Judicial Review Procedure Act* ("JRPA") that the decision of the Respondent Health Professions Review Board" (the "HPRB"), dated July 27, 2018, denying that it had authority over the Petitioners' Application for Review of the decision of the College of Physicians and Surgeons of BC (the "College") dated June 19, 2018, refusing requests made by the Petitioners (the "HPRB Decision") is *ultra vires* or otherwise invalid.

2. A declaration pursuant to the JRPA that the decisions by each of the Respondents other than the HPRB (collectively referred to as the "Respondents"), or one or more of them, to exclude the Petitioners Oliver Kostanski ("Dr. Kostanski") and Harris Falconer from eligibility to compete in the 2019 Residency Matching Process (defined in the attached Appendix) on an equal basis with Canadian Medical Graduates ("CMGs", defined in the attached Appendix) (the "Decisions") are *ultra vires* or otherwise invalid;
3. A declaration pursuant to subsection 24(1) of the *Charter of Rights and Freedoms* (the "Charter") that the Decisions unjustifiably infringe upon the rights of Dr. Kostanski, Mr. Falconer and other CSAs under s. 6, s. 7, and s. 15 of the Charter;
4. An order in the nature of *certiorari*, pursuant to the JRPA and s. 24(1) of the Charter, quashing the Decisions and the HPRB Decision;
5. An order in the nature of prohibition pursuant to the JRPA and the Charter that prohibits the Respondents and each of them from:
 - a. excluding all Canadians Studying Medicine Abroad ("CSAs", defined in the attached Appendix) from competing on an equal basis with Canadian Medical Graduates ("CMGs", defined in the attached Appendix) in any future residency matching processes.
 - b. requiring CSAs to participate in or complete the IMG Clinical Assessment Program (the "CAP", defined in the attached Appendix) as a condition of eligibility for future residency matching processes;
 - c. requiring CSAs to enter into Return of Service Contracts (defined in the attached Appendix) as a condition of access to residency; and
 - d. implementing any system of matching residency applicants with Residency Positions that puts CSAs at a disadvantage vis-à-vis CMGs.
6. A declaration that the College exempt Dr. Kostanski from passing an English language fluency exam.
7. In the alternative, an order under s. 5 of the JRPA that the College reconsider the applications of Dr. Kostanski and Mr. Falconer for registration as an educational postgraduate (resident) on equal footing with CMGs.

8. A declaration that Dr. Kostanski and Harris Falconer be eligible to compete on an equal basis with CMGs in any future Residency Matching Processes.
9. An order in the nature of mandamus pursuant to the *Judicial Review Procedure Act* that the Respondents allow Dr. Kostanski, Harris Falconer and all other CSAs to compete on an equal basis with CMGs in any future Residency Matching Processes.
10. An order substituting the decision of this Honourable Court for the HPRB Decision.
11. Such directions as may be necessary for the purpose of carrying out any reconsideration of the Decisions;
12. Costs of these proceedings; and
13. Such further orders and relief as counsel may advise and this Honourable Court may allow.

Part 2: FACTUAL BASIS

Context

1. This case is about access to residency training in BC for Canadian medical graduates who have obtained their medical degrees from medical schools outside of Canada and the US.
2. The College regulates access to the medical profession pursuant to, *inter alia*, ss. 16, 19 and 20 of the Health Professions Act RSBC c.183 (the "HPA"). Section 16(2)(c) of the HPA provides that it is an object of the College "to establish the conditions or requirements for registration of a person as a member of the college". Section 19 of the HPA empowers the College to enact bylaws (the "Bylaws") establishing classes of registrants (s.19(1)(i)) and establishing the requirements for registration as a member of the College (s.19(1)(m)-(m.4), HPA). Section 20 of the HPA requires the registration committee of the College to grant registration as a member of the College to all qualified applicants (s.20(1) and (2), HPA).

3. Section 16(1) of the HPA provides that it is the duty of the College at all times “to serve and protect the public” and “to exercise its powers and discharge its responsibilities under all enactments in the public interest”.
4. Registration as a member of the College entitles that person to practice medicine in British Columbia, subject to the conditions imposed on the registrant by the College in accordance with the Bylaws.
5. Residency is the gateway to licensure as a physician for new medical graduates, and the College is statutorily responsible as the sole gatekeeper under the HPA.
6. It is therefore the duty of the College to establish the rules and standards for licensure, and to make a decision with respect to each applicant how, and through what process he or she can become licenced.
7. In exercising its powers, the College must also ensure that the process is compliant with the *Canadian Charter of Rights and Freedoms*, the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (UK), 1982 c 11, and principles of administrative law.
8. Under the Bylaws of the College, including *inter alia* Bylaws 2-0, 2-10 and 2-11, becoming a fully licensed physician requires the following before the College will license for independent practice:
 - a. graduation from a medical school approved by the College, being the medical schools listed on the FAIMER/WHO World Directory of Medical Schools;
 - b. postgraduate medical training (residency training); and
 - c. passing of certification examinations.
9. To fulfill the postgraduate medical training referred to above and to work as a resident physician, a medical graduate must be registered with the College.
10. Bylaw 2-24 establishes the registrant class of “educational – postgraduate (resident)”. Bylaw 24-2 provides:

24-2 (2) For the purposes of section 20(2) of the Act, to be granted registration in the educational – postgraduate class as a postgraduate resident, an applicant must

- (a) have a medical degree,
- (b) be enrolled in postgraduate training in the Faculty of Medicine, UBC,
- (c) provide a request for registration to the registrar from the Associate Dean of Postgraduate Medical Education, Faculty of Medicine, UBC, and
- (d) be legally entitled to live and work in Canada.

11. The College has therefore enacted Bylaws which make it a precondition for enrolment as a postgraduate resident in BC that the individual be enrolled in postgraduate training in the Faculty of Medicine UBC.
12. The Respondents UBC, CaRMS, AFMC and the Ministry, with or without the involvement of the College, have established the Residency Matching Process for BC which matches applicants with postgraduate medical training positions (“residency positions”).
13. The Residency Matching Process has two ‘streams’: (a) the stream for CMGs (the “CMG Stream”); and (b) for international medical graduates (“IMG” as defined in the Appendix below), the IMG stream (the “IMG Stream”).
14. The CMG Stream offers a much larger number of positions and a much wider range of opportunities for medical graduates to specialize in comparison to the IMG Stream. In addition, it does not require medical graduates to enter into Return of Service Contracts (defined in the Appendix below) with the Ministry.
15. This system, described below, creates barriers for CSAs to obtain residency positions and ultimately to become licenced physicians in BC, and discriminates against CSAs vis-à-vis CMGs (defined in the attached Appendix).
16. While the College is statutorily required to determine whether any medical graduate should qualify for registration for postgraduate medical training, it appears that some or all of the Respondents have participated in the creation and implementation of the Residency Matching Process – with the result that whether a Canadian who obtained a medical degree overseas may qualify for residency training in BC is effectively decided through the Residency Matching Process.

17. The implementation of this system with respect to each CSA applicant constitutes a decision, which the College alone is statutorily required to make, with respect to licensure of that applicant.
18. While the College is statutorily required to make those decisions, it appears that the creation and implementation of the residency matching system was (and is) done through a collaboration of all of the Respondents.

The Parties

19. The Petitioner, Society of Canadians Studying Medicine Abroad ("Socasma"), is a non-profit Society registered under the laws of the Province of British Columbia.
20. Socasma's purpose is to advocate for access to postgraduate medical education, including residency training and sub-specialty training, for CSAs who face discrimination and are denied what Socasma considers to be fair access to postgraduate medical training. Socasma is the only organization in Canada which represents and advocates for all CSAs. Socasma does not represent the interests of other IMGs.
21. The Petitioner Oliver Kostanski ("Dr. Kostanski") is a Canadian citizen, residing at 4281 Madeley Road, in the City of North Vancouver, in the Province of British Columbia. He is a medical graduate of Poznan University of Medical Sciences (Poznan), an American affiliated medical school located in Poland.
22. The Petitioner Harris Falconer ("Mr. Falconer") is a Canadian citizen, residing at 2203-2075 Comox Street, in the City of Vancouver, in the Province of British Columbia. He has almost completed his medical studies at American University of Integrated Sciences (AUIS) in Barbados.
23. Dr. Kostanski and Mr. Falconer have passed the Medical Council of Canada Evaluation Examination, i.e., (the "MCCEE") (defined in the attached Appendix) and the National Assessment Collaboration Objective Structured Critical Examination (the "NAC OSCE") (defined in the attached Appendix) designed to determine whether an international medical graduate has the requisite knowledge and clinical skills to enter residency training. They have both been denied access to the CAP. As a consequence, neither can qualify to practice medicine in BC.

24. The Respondent College is an entity established pursuant to an *Act Respecting the Profession of Medicine and Surgery*, SBC C. 13, 1886 (commonly referred to as the "Medical Act"), and is continued as a college under s. 15.1(3) of the HPA.
25. The HPRB Respondent is a quasi-judicial tribunal established pursuant to the *Health Professions Act*, RSBC 1996, c. 183 ("HPA") and has an office at Suite 900 – 747 Fort Street, Victoria, BC V8W 3E9. Among other things, the HPRB Respondent has jurisdiction to review any registration decision by the registration committee of the College that refuses a grant of registration (ss. 50.53 and 50.54 of the HPA).
26. The Respondent Her Majesty the Queen in Right of the Province of British Columbia as represented by the Ministry of Health of British Columbia (the "Ministry") has an address for service at 1001 Douglas Street, Victoria BC V8W 9J7.
27. The Respondent University of British Columbia ("UBC") is a corporation continued as a university under s. 3(1)(a) of the University Act, RSBC 1996 c 468.
28. The Respondent Canadian Resident Matching Service--CARMS ("CaRMS") is incorporated under Part II of the Canada Corporations Act and continued under the Canada Business Corporations Act. CaRMS is a national, not-for-profit, fee-for-service organization that provides matching services for medical residencies throughout Canada.
29. The Respondent the Association of Faculties of Medicine of Canada ("AFMC") is a Society registered under the laws of Canada, and is an association of the 17 Faculties of Medicine of Canadian universities, including UBC.

Nature of this Petition

30. This is an application for judicial review under ss. 2, 5 and 7 of the JRPA.
31. In May 2018, the Petitioners applied to the College and to each of the other Respondents to make a decision to, *inter alia*, allow Dr. Kostanski, Mr. Falconer, and all other CSAs to compete for the same positions and on the same conditions as CMGs in the CMG Stream of the 2019 CaRMS match.

32. On June 19, 2018, the College denied the application (this denial is referred to herein as the "Decision of the College"). On July 24, 2018 UBC denied the Petitioners' application (this denial is referred to herein as the "Decision of UBC"). In June of 2018 CaRMS denied Dr. Kostanski's and Socasma's application (this denial is referred to herein as the "Decision of CaRMS"). It made no decision in regard to Mr. Falconer. The other Respondents did not respond. On July 16, 2018 the Petitioners applied for review of the Decision of the College to the Health Professions Review Board ("HPRB"). On or about July 27, 2018 the HPRB refused to interfere with the Decision of the College. The specific responses are found in the exhibits to the Pawliuk affidavit at pp. 3130 – 3135 and 3978 - 3980.
33. This Judicial Review application is with respect to the above stated Decisions.

The System of Exclusion

34. The impediments to access to residency training imposed on CSAs but not CMGs which the Petitioners seek to eliminate, are:
- a. disallowing CSAs from competing with CMGs for the same positions, on the same conditions, in the CMG Stream;
 - b. requiring CSAs to complete the CAP; and
 - c. requiring CSAs to enter into Return of Service contracts,
- and are collectively described below as the "System of Exclusion".
35. The effect of the System of Exclusion in BC is to restrict the ability of CSAs:
- a. to become licensed as physicians based on characteristics, knowledge, and skills relevant to the practice of medicine;
 - b. to access base specialties and to sub-specialize; and
 - c. to choose where to reside and practice medicine after becoming licensed.

Background

36. The College is legislatively authorized and charged under the HPA, including without limitation sections 16(2), 19 and 20 thereof, with determining standards and licensing requirements for the medical profession in BC. In exercising this power and discharging this responsibility, the College must at all times act in the public interest and serve and protect the public (see HPA s. 16(1)).
37. Pursuant to s. 19 the HPA, the College enacted the Bylaws. The Bylaws establish approximately 20 classifications of licensing and the requirements for each classification, including four “Educational - Postgraduate” classifications, one of which is “Educational - Postgraduate (Resident)”.
38. UBC through its Faculty of Medicine is the only institution identified in the Bylaws of the College as being able to offer residency positions in BC under the “Educational - Postgraduate (Resident)” classification, s. 2-24.
39. A Memorandum of Understanding dated September 28, 2006 [Pawliuk affid. Exh. p. 419] between the Ministry and UBC states that administration of residency training (as well as sub-specialization training) is comprised of two components:
 - a. the academic component operated and managed by the Faculty of Medicine of UBC; and
 - b. the employment and work experience component administered by health care agencies under the Ministry.
40. The Ministry provides funding for both components of postgraduate medical training [Pawliuk affid. Exh. p. 419].
41. Medical school education authorized under the University Act is separate and distinct from postgraduate medical training mandated as a term of licensure by the College. UBC, through its Senate, approved a motion that medical residents receiving postgraduate medical training at UBC are not students of UBC. [Pawliuk affid. Exh. p. 1098].

The Two Iterations and Two Streams

42. CaRMS administers the system of “matching” medical graduates to residency positions in BC and across Canada under a contract with the AFMC [Pawliuk

affid. Exh. p. 2841]. CaRMS “member organizations” include, *inter alia*, the AFMC, the Federation of Medical Regulatory Authorities of Canada (FMRAC) which represents the provincial Colleges, and the Canadian Federation of Medical Students (CFMS) which represents students studying in Canadian medical schools. [Pawliuk affid. Exh. p. 3973]. Socasma has applied to become a member organization, but has been denied membership. [Pawliuk affid. Exh. pp 2842 – 2850 and 3972 – 3975]. The College therefore participates in the Residency Matching Process through its membership in the FMRAC.

43. CaRMS receives eligibility requirements and rules set in each province to access postgraduate residency positions in that province. It receives information including what positions are available in each province and in what disciplines. It accepts applications from residency applicants. Each residency program sets up interviews of applicants which it is prepared to consider. The programs and applicants assess and rank each other. These rankings are sent to CaRMS which through an algorithm matches the rankings of the applicants and the programs. This concludes the first round of competition which is called the “first iteration”. The positions not filled in the first iteration go into a second round of competition called the “second iteration.”
44. Particulars of the Residency Matching Process are known to the Respondents.
45. The first iteration has two separate “streams”. In all provinces, except Quebec, access to residency training in the CaRMS Match segregates applicants based on place of education into two streams of competition: the CMG Stream and the IMG Stream. In the first iteration, CMGs must compete in the CMG Stream and IMGs must compete in the IMG Stream for residency positions allocated to each stream. In the second iteration there is only one stream which combines all positions remaining unfilled from both the CMG and IMG Streams.
46. The two streams are significantly divergent in terms of number of residency positions compared to number of applicants, the disciplines available, and the conditions attached to the residency positions.
47. Prior to 1993 when teaching hospitals administered the first year of postgraduate training, there was only one stream of competition where all Canadian citizens and permanent residents (regardless of place of medical education) were free to compete for any residency position.

48. The exclusion of IMGs began in 1993 when the AFMC passed a resolution to segregate and exclude IMGs from the first iteration. IMGs were restricted to competing for residency positions in the second iteration from 1993 until 2007.
49. In 2006 following a lawsuit filed by an immigrant physician challenging the exclusion of IMGs from the first iteration, the AFMC for the first time since 1993 did not pass a motion restricting IMGs from accessing the first iteration of the CaRMS match. Instead, a two-stream system was created, segregating IMGs from CMGs. [Pawliuk affid. Exh. p. 772]
50. The current two-stream System of Exclusion was implemented in BC commencing with the 2007 Match.

First Iteration: Available Positions in BC

51. In the CMG Stream the number of residency positions varies but is approximately the same as the number of students admitted to UBC medical school each year. In 2017 there were 288 residency positions allocated to the CMG Stream in British Columbia. In the CMG Stream in BC in 2017 there were 1.03 residency positions per applicant who graduated from UBC.
52. Across Canada from 2009 to 2017 there were generally between 1.026 and 1.12 CMG residency positions available for each Canadian CMG applicant. In other words, the number of CMG residency positions almost directly matches the number of Canadian CMG applicants.
53. Of the residency positions in BC in 2017, 83% were reserved for CMGs in the first iteration.
54. The IMG Stream in BC has 58 residency positions allocated to it. Between 2015 and 2017 there were approximately 1000 IMG applicants each year for the 58 positions offered in each year, a ratio of 0.06 residency positions in British Columbia per IMG applicant.
55. In Canada the ratio of IMG applicants to positions available was 0.13 position per applicant in 2017.

First Iteration: Available Disciplines in BC

56. The CMG Stream provides positions in all 29 base disciplines recognized by the College. The disciplines available to CMGs are:

Anatomical Pathology, Anesthesiology, Cardiac surgery, Dermatology, Diagnostic Radiology, Emergency Medicine, Family Medicine, General Pathology, General Surgery, Hematological Pathology, Internal Medicine, Medical Genetics, Medical Microbiology, Neurology, Neurology—Pediatric, Neuropathology, Neurosurgery, Nuclear Medicine, Obstetrics & Gynecology, Ophthalmology, Orthopedic Surgery, Otolaryngology—Head & Neck Surgery, Pediatrics, Physical Medicine & Rehabilitation, Plastic Surgery, Psychiatry, Public Health & Preventive Medicine, Radiation Oncology, Urology, and Vascular Surgery.

57. Access to these base disciplines provides the opportunity for CMGs to later sub-specialize and become licensed in approximately 70 disciplines recognized by the College.
58. In the CMG Stream in 2017, 118 residency positions were in family medicine and 170 were residency positions in a base specialty.
59. The IMG Stream provides positions in only four base disciplines. The disciplines available to IMGs are:

Family Medicine, Internal Medicine, Pediatrics, and Psychiatry.

60. Of the 58 IMG Stream positions, 52 are in family medicine, and the remaining 6 positions are divided among internal medicine, pediatrics, and psychiatry.

Second Iteration: Available Positions

61. Positions not filled in either stream of the first iteration flow into the second iteration. Both IMGs and CMGs compete in the second iteration for the same positions. However, few positions go into the second iteration. The number of positions flowing into the second iteration has been decreasing in BC. In 2010, 15 positions flowed into the second iteration. In 2017 only four positions flowed into the second iteration in BC.

Match Rates of CMGs and IMGs

62. In 2017 in Canada, 2830 CMGs matched compared to 411 IMGs. IMGs comprised 12% and CMGs comprised 88% of those who matched. At the end of the second iteration 96.5% of current year CMGs were matched.
63. After the second iteration, residency positions may come available and be filled outside the match. As a result more CMGs obtain residency positions reducing the number of unmatched CMGs. CaRMS reports that 97.57% of Canadian schooled CMGs match in the match year and ultimately more than 99% receive residency positions [Pawliuk affid. Exh. p. 3800].
64. The likelihood of IMGs matching in the second iteration is dropping across Canada and in BC. In 2018 no IMGs matched in BC in the second iteration. The following table shows the decreasing number of IMGs matching in the second iteration:

Year	IMGs matched in Canada in the second iteration	IMGs matched in British Columbia in the second iteration
2013	127	12
2014	75	2
2015	70	5
2016	65	1
2017	53	1
2018	43	0

[CaRMS R-1 Reports Table 52 - Pawliuk affid. Exh. p. 3800]

Other Restrictions

A. Return of Service Contracts

65. Applicants who match to residency positions in the IMG Stream must sign a return of service contract ("Return of Service Contract") with the Ministry as a condition of commencing residency training in British Columbia.
66. Applicants who match to residency positions in the CMG Stream have no similar requirement, and are free to stay in the province or leave the province.

67. The Return of Service Contracts imposed on positions in the IMG Stream provide, *inter alia*, that after the applicant becomes fully licenced (s)he will work where the Ministry directs him or her to work for a specified number of years. If the matched IMG refuses or fails to sign the Return of Service Contract the residency position to which (s)he matched is revoked.
68. Return of Service Contracts interfere with the ability of IMGs to pursue sub-specialization training. This is because most sub-specialization training positions commence in the last year of residency training or immediately upon completion of residency training, while the terms of Return of Service Contracts require that the physician begin work where directed within 3 months of certification.
69. The Return of Service Contracts provide that if the terms are breached, the physician will be obligated to pay the Ministry between up to \$480,375 for those trained in Family Medicine to \$879,581 for those training in Psychiatry.
70. Neither Return of Service Contracts nor discrimination between CMGs and IMGs is expressly required by the Bylaws or authorized by the HPA.

B. Mandatory Clinical Assessment Program (CAP)

71. The College requires that all IMGs as a pre-condition to licensure as a resident physician must have a medical degree from a medical school listed in the FAIMER World Directory of Medical Schools.
72. The rules published by CaRMS [Pawliuk affid. Exh. p. 3954] require IMGs to pass the MCCEE and the NAC OSCE.
73. The Medical Council of Canada (the "MCC", defined in the Appendix below), which administers the MCCEE, describes the MCCEE as follows [Pawliuk affid. Exh. 2069]:

"The MCCEE is a general assessment of the candidate's basic medical knowledge in the principal disciplines of medicine. It is also designed to assess the skills and knowledge required at the level of the new medical graduate who is about to enter the first year of supervised postgraduate training."

74. The MCC which also administers the NAC OSCE describes the NAC OSCE [Pawliuk affid. Exh. 2071] as follows:

“The NAC OSCE is designed to evaluate an IMG’s clinical skill at the level of the Canadian medical graduate entering postgraduate training.”

75. Until 2017, an IMG who had met the FAIMER degree requirement and had passed the MCCEE and the NAC OSCE had the right to enter the CaRMS match process for residency positions in BC.
76. Effective 2018, an IMG must also complete a mandatory one day CAP for eligibility to compete for any residency position. A CMG does not have to complete the CAP. UBC was involved in the development of the CAP. [Pawliuk affid. Exh. pp. 774 and 1520]
77. The College has stated that the CAP is outside its statutory mandate. [Pawliuk affid. Exh. p. 3130].
78. Only 200 IMG applicants are now accepted into the CAP each year under the rules and requirements established by some or all of the Respondents. In each of the years 2015, 2016, and 2017 more than 1000 IMGs applied for residency positions in BC. Thus 80% of IMGs who had passed the MCCEE and the NAC OSCE and had graduated from a FAIMER listed medical school are now denied the right to compete for residency positions and hence licensing in BC. CMGs have no similar “assessment” imposed on them. All CMGs who graduate are entitled to compete for residency positions.
79. Prior to instituting the mandatory one-day CAP, UBC stated that “... There will be substantial changes to the UBC IMG CAP to adjust to the increasing numbers of IMG applicants...” [Pawliuk affid. Exh. p 1437].
80. In August 2015, Socasma asked the Chair of the IMG Advisory Committee to allow Socasma to be represented on the IMG Advisory Committee which was charged with advising in respect to IMG assessments in BC. [Pawliuk affid. Exh. p. 2853]. Immigrant physicians are represented on that committee. Socasma’s request was denied in the spring of 2016. [Pawliuk affid. Exh. p. 2855]

C. English Language Examination

81. The College requires CSAs to prove English language fluency by paying for and taking an English fluency examination unless the primary language of their medical education was English and the primary language of patient care was English. Although the College Registration Committee may exempt an applicant from the English language examinations “in exceptional circumstances”, being a CSA, born and raised in Canada does not meet the exceptional circumstances required for exemption, even if a CSA’s first language is English. The examination results are only valid for 2 years.
82. Bylaw 2 specifies the general registration and licensure requirements. It provides that every applicant for any class of registration must have ability to speak, read and write English to the satisfaction of the registration committee. It does not provide a basis on its face to distinguish between Canadian citizens educated in Canada and those educated internationally.
83. Dr. Kostanski was born and raised in Canada. His first and strongest language is English. He is fluent in English.
84. Dr. Kostanski went to medical school in Poland where classes were in English. The primary language of patient care in Poland is Polish. As Dr. Kostanski can speak Polish, he was able to communicate with patients in Polish.
85. The College did not exempt Dr. Kostanski from the English fluency examination.

D. Other Barriers

86. There are direct prohibitions attached to at least some of the residency positions offered in the IMG Stream which prevent IMGs from sub-specializing. For example, in internal medicine sub-specialization normally begins in the final (4th) year of residency. IMGs seeking to compete for positions in the IMG Stream in BC must take “general” internal medicine in the 4th year of residency training, as opposed to choosing one of approximately 10 sub-specialties available to CMGs who do residency training in internal medicine. Further the sub-specialty requirements provide that someone seeking to enter sub-specialty training in internal medicine must apply in 3rd year. [Pawliuk affid. Exh. pp 1698 and 1704]

87. CSAs face negative stereotyping and systemic discrimination.
88. Socasma has applied to have representation on CaRMS, the Medical Human Resources Planning Task Force, the IMG Advisory Committee, and the Canadian Federation of Medical Students. In all cases, representation was not granted. [Pawliuk affid. Exh. 02842 – 02882]

E. Statements Made by the Respondents and HPRB

89. Socasma has asked the Respondents to identify their authority, the process of decision making, and the role each plays in the System of Exclusion.
90. The College has stated, *inter alia*, that:
 - a. the HPA refers to registration for independent practice, not educational registration, that the College is not responsible for entry to professional training programs, that UBC is responsible for its admission policies for students, residents, and fellows, and that the Faculty of Medicine is not accountable to the College for its admission policies [Pawliuk affid. Exh. pp. 726 – 727];
 - b. the College takes no position on training and assessment programs related to postgraduate medical education [Pawliuk affid. Exh. p 1518];
 - c. the College does not know by what process or by what authority UBC became authorized to administer the post graduate resident physician program including the selection of residents [Pawliuk affid. Exh. p 728];
 - d. the College is not in a position to know by what authority UBC operates the residency program [Pawliuk affid. Exh. p 728];
 - e. it has no jurisdiction to be involved in the eligibility, selection process or selection of medical residents, and that the College has nothing to do with CaRMS [Pawliuk affid. Exh. p 729];
 - f. it denies that its bylaws delegate authority or discretion to UBC or empower it to run the residency program. [Pawliuk affid. Exh. pp 728 – 729];
 - g. while it mandates that an applicant's medical degree must be from a medical school the College recognizes, it does not require IMGs to pass the MCCEE

nor the NAC OSCE to be eligible to compete for residency positions. The College states that to the best of the College's knowledge, passing the MCCEE has never been required as a condition for registration as a resident physician. [Pawliuk affid. Exh. pp. 688 - 9].

91. The HPRB has taken the position that it lacks authority to interfere with the College's Decision.
92. UBC has provided, stated or authored the following:
 - a. instructions to CaRMS setting out eligibility criteria required for access to residency training in BC are provided by UBC [Pawliuk affid. Exh. pp. 1606 - 1672];
 - b. that the new rule requiring the NAC OSCE in the second iteration of the CaRMS Match was made "upon recommendation and approval from the Medical Human Resource Planning Task Force, the committee with representation from UBC's Faculty of Medicine, the Ministry of Health, Ministry of Advanced Education and Information Technology, provincial Health Authorities, BCMA and the College of Physicians and Surgeons of BC" [Pawliuk affid. Exh. p 1468];
 - c. UBC Faculty of Medicine is "responsible for all matters related to postgraduate training". [Pawliuk affid. Exh. p. 1491 – 1492]. UBC has made this statement despite the fact that postgraduate residents are not students of UBC according to the UBC Senate's resolution;
 - d. UBC is unaware of any provincial Act or Regulation or agreement that authorizes UBC to run medical residency programs and has no records on the issue [Pawliuk affid. Exh. p. 1314];
 - e. "neither the University of British Columbia nor the Medical Human Resources Planning Task Force is the author of these rules. The rules govern eligibility for particular iterations of the Canadian Resident Matching Service (CaRMS) process which is the mechanism through which all Canadian medical schools fill their residency positions" [Pawliuk affid. Exh. p. 1500];

- f. UBC is a participant in CaRMS but “does not direct this system and cannot unilaterally change the rules under which the system operates” [Pawliuk affid. Exh. p. 3134];
- g. “UBC administers the IMG Clinical Assessment Program on behalf of the Ministry of Health. UBC has no authority to eliminate this system.” [Pawliuk affid. Exh. p. 3134].

93. The Ministry has provided or stated the following:

- a. May 31, 2006 - Common Briefing Note. The Ministry note states that access to residency for IMGs is developed through collaboration between AFMC and CaRMS and various provinces [Pawliuk affid. Exh. p. 772];
- b. November 3, 2014, letter from the Ministry. It states that “AFMC, CaRMS, and the provinces created a revised framework for the match”. “...the separate streams in the first iteration protect positions for Canadian medical graduates so they compete only against each other for designated positions and to ensure capable CMGs can complete the medical education they started in Canada.” [Pawliuk affid. Exh. p. 836].
- c. 2007 - Instructions to CaRMS. The Ministry instructed CaRMS that residency positions in BC were to be in two segregated streams in the first iteration, one for CMGs and the other for IMGs, and that IMGs are required to sign a Return of Service Contract [Pawliuk affid. Exh. p. 1604];
- d. April 23, 2015 letter from Ministry to R. Pawliuk. The Ministry states that determining eligibility is a collective process, involving the AFMC and CaRMS and “provincial jurisdictions” [Pawliuk affid. Exh. p. 841];

“...there is not one provincial body that makes this determination. It is a collective process through the AFMC, CaRMS, and provincial jurisdictions that determines the separate streams for residency matching.”
- e. December 2011 Government Briefing Document by UBC and various ministries. The brief states that the provincial Ministries of Health determine the eligibility rules for IMGs in the CaRMS match for the province. [Pawliuk affid. Exh. p. 438 specific reference at p.2];

- f. July 11, 2013 Minutes of the Medical Human Resources Planning Task Force chaired by Dean of UBC and Assistant Deputy Minister of the Ministry. The minutes state that the Ministry is planning to impose return of service contracts on all IMGs “to ensure fairness for all IMGs” [Pawliuk affid. Exh. p. 1215] [emphasis added].
94. CaRMS has variously stated:
- a. February 6, 2014 email from CaRMS to R. Pawliuk. “The institutions that establish the eligibility criteria for each provinces [sic] are the College of Physicians and Surgeons of each individual province”. [Pawliuk affid. Exh. p. 1600];
 - b. September 3, 2014 email from CaRMS to P. Macdonald. Eligibility “...is established by the provincial Ministry of Health, in consultation with the medical school” [Pawliuk affid. Exh. p. 1602];
 - c. September 4, 2014 CaRMS website. The website at that time stated that “residency positions may be offered to graduating students and physician graduates (applicants) who are registered with CaRMS and meet the eligibility requirements established by provincial medical regulatory authorities.” [Pawliuk affid. Exh. p 1598];
 - d. May/June 2015 PowerPoint presentation prepared by CaRMS for CSAs. CaRMS states that it is not a decision-maker and does not create provincial or program requirements. [Pawliuk affid. Exh. p. 1947];
 - e. June 2016 CaRMS website. The website stated that “participating institutions and provincial regulatory authorities” set the eligibility requirements. [Pawliuk affid. Exh. 1599];
 - f. updated December 2017—CaRMS website. The CaRMS website setting out eligibility criteria for British Columbia states that UBC (Faculty of Medicine) and the Ministry “have agreed to the following policies for the R-1 [first iteration] Match”. [Pawliuk affid. Exh. p. 1666].
95. The AFMC passed a resolution which resulted in the two-stream system, reproduced on the CaRMS website under eligibility criteria, stating that eligibility for postgraduate training is determined by each Canadian medical school. This

resolution also sets out the AFMC's rationale for the System of Exclusion [Pawliuk affid. Exh. p 2808]:

"Since Canadian medical schools are the principal source of the physician workforce for Canada,
Be it resolved by the AFMC Board of Directors:
That all graduates of Canadian medical schools be assured access to a residency position in Canada to complete training necessary to enter practice..."

Part 3: LEGAL BASIS

1. The Petitioners rely upon the following legislation and law:
 - a. *Health Professions Act*, RSBC 1996 c. 183 ("HPA"), including sections 16, 19, and 20;
 - b. *Administrative Tribunals Act*, SBC 2004, c. 45;
 - c. *University Act*, RSB 1996 c. 468;
 - d. Bylaws of the College of Physicians and Surgeons of British Columbia, including bylaws 1-15, 2-24 and 2-26;
 - e. *Judicial Review Procedure Act*, RSBC 1996 c. 241 (the "JRPA");
 - f. *Canadian Charter of Rights and Freedoms* (Charter) ss. 6, 7, 15, and 24;
 - g. The inherent jurisdiction of this Honourable Court.
2. The Petitioners also rely on the principles of administrative law, restraint of trade, and equity.
3. The Decisions should be set aside, and the Petitioners' applications allowed on the grounds that the policies, procedures and rules that comprise the System of Exclusion:
 - a. are made without legitimate authority including wrongful delegation, and fettering of discretion;

- b. are made for unauthorized and/or improper purposes;
 - c. are discriminatory, arbitrary, and unreasonable;
 - d. are not transparent, objective, impartial, or fair;
 - e. are contrary to public policy and the public interest;
 - f. are in violation of the Charter and including sections 6, 7, and 15; and
 - g. are an unreasonable restraint of trade, contrary to public policy and the public interest.
4. The Decisions that relate to Return of Service Contracts are also in violation of principles of common law and equity.
 5. The HPRB Decision should be set aside, and the Petitioners' application allowed on the grounds that the HPRB's decision that it lacked authority to interfere with the College's decision was an error of true jurisdiction or *vires*.
 6. Residency is the gateway to licensure as a physician for new graduates, and the College is statutorily responsible as the sole gatekeeper. The Decisions, which arise from the creation and implementation of the System of Exclusion, create adverse effects in respect to admission to residency for CSAs, and therefore ultimately admission to the medical profession, including:
 - a. restricted access to residency, which is contrary to the purposes and objectives of the HPA;
 - b. CMGs are arbitrarily preferred at the expense of CSAs for limited residency positions. CSAs are excluded without regard to the individual's knowledge, skill, and abilities;
 - c. negative stereotyping of CSAs and other IMGs which implicitly deems them as inferior or "second class" with their admission to residency being determined on an "if, when, and where needed" basis as determined by the Respondents; and,
 - d. subordination of CSAs, and violation of their Charter rights.

7. The College is the only body authorized by legislation to regulate admission to the medical profession. The legislative authority for the College's power to mandate residency training and to regulate it and matters incidental to it is found in the HPA and the College's Bylaws, including in particular under ss. 16, 19 and 20 of the HPA and Bylaw 2-24.

8. Statutorily, it is only the College that has jurisdiction to determine standards and eligibility for residency. Also, CaRMS has stated the College determines eligibility of CSAs with respect to the match [Pawliuk affid. Exh. p. 1598 and 1600]. Despite this, one or more of the Respondents have acted to institute, maintain and perpetuate the System of Exclusion that directly or indirectly bars CSAs from access to licensure through residency without the jurisdiction to do so, by subjecting them to restrictive, exclusionary rules not applicable to CMGs, such as:
 - a. Barring CSAs from competing in the same CaRMS matching process as CMGs, requiring them instead to compete in a segregated CaRMS matching process for far fewer positions in only 4 of the 29 base specialties;
 - b. Mandating that CSAs pass the CAP, despite having medical degrees from FAIMER schools and despite the limited number of CAP positions;
 - c. Imposing onerous and punitive Return of Service Contracts on CSAs as a pre-condition of CSAs securing residency in BC, which require them to practice for lengthy periods in underserved locations, at the cost of further developing their careers and on pain of exorbitant monetary penalties, and at great personal cost.

The Standard of Review

9. The Respondents and the HPRB Respondent must be correct in their determination of true questions of jurisdiction, or *vires* and, where applicable, in their interpretation of the Charter. Because none of the Respondents or the HPRB Respondent made any analysis or determination of the law in making the Decisions, this Court is equally well equipped to determine the correctness of the Decisions without deference. Thus, the standard of correctness should be applied.

10. Other elements of the Decisions favour a correctness standard, such as:
 - a. the Decisions relate to extricable questions of law. The questions of law in this case require uniform and consistent answers.
 - b. the Decisions are not ones subject to discretion within the decision-makers' specialized areas of expertise.

Authority

11. The College has misconstrued its empowering legislation when it denies that it has no legislative mandate to grant the Petitioners' applications and to set aside the System of Exclusion. Its jurisdiction finds its sources in the HPA and the College's bylaws (including, *inter alia*, sections 16, 19(1), including subparagraph (i.1), and 20 of the HPA, and bylaws 1-15(3) and 2-24(2)).
12. The HPRB Respondent has misconstrued its empowering legislation when it denied that it has authority to grant the Petitioners' applications for review and set aside the College's Decision. Its jurisdiction finds its sources in the HPA, and in particular in sections 50.53 and 50.54 thereof.
13. None of the Respondents have the authority to create or apply inequitable barriers to residency, whether directly or indirectly. The College has the authority and duty to ensure that admissions and eligibility requirements imposed by third parties acting as gatekeepers to the profession do not amount to inequitable barriers.
14. Under the HPA, the College is the sole gatekeeper to the medical profession. Only the College is empowered to register and regulate physicians, including resident doctors. Only the College is empowered to determine qualifications and standards of competence, skill, or character necessary for registration. None of the other Respondents has the jurisdiction to determine standards and eligibility of applicants for residency training, including by instituting, maintaining and perpetuating the System of Exclusion.
15. Residency is a program of work and study. In BC, the academic component of residency is provided by UBC, the employment component is provided by BC Health Authorities, and funding is provided by the Ministry. [Memorandum of Understanding ("MoU") dated September 28, 2006 Pawliuk affid. Exh. p. 419]

16. Bylaw 2-24 of the College specifies that a condition for licensure as a resident doctor is that the applicant be enrolled in postgraduate training in the Faculty of Medicine, UBC.
17. There is no enabling statute for the System of Exclusion.

1. Administrative Law Errors of the Respondents other than the HPRB

Wrongful delegation

18. The College has wrongfully and/or unlawfully delegated to the other Respondents or abdicated its exclusive power to set standards and other eligibility criteria for licensure of resident doctors by effectively or impliedly adopting the System of Exclusion and its results.
19. The College cannot lawfully delegate its powers, including the power to set standards and other eligibility criteria, to a third party unless it is expressly or implicitly permitted to do so by its enabling legislation. There is no such enabling legislation.
20. The College's criteria for registration in the Education-postgraduate (resident) class are set out in bylaw 2-24(2), which is reproduced above.
21. This unlawful delegation and/or fettering by the College has resulted in three distinct standards for registration of resident physicians under Bylaw 2-24, which are altered from time to time by the other Respondents or one or more of them:
 - a. CMGs (who need only graduate from a Canadian or American medical school).
 - b. CSAs and other IMGs (who are Canadian citizens or permanent residents) who
 - i. must graduate from a FAIMER school,
 - ii. pass the MCCEE and NAC OSCE,
 - iii. obtain and pass one of the limited number of CAP positions, plus

- iv. pass an English equivalency exam unless the primary language of their medical education was English and the primary language of patient care was English.
- c. IMGs who are foreign nationals training under a work visa (Visa Trainees), mostly from Saudi Arabia, to whom UBC has sold residency positions who
 - i. must graduate from a FAIMER school; plus
 - ii. pass an English equivalency exam if they graduated from a country where the primary language is not English.

Fettering of Discretion

- 22. The College has fettered its discretion and allowed the other Respondents to make and apply unauthorized and inflexible eligibility criteria for admission into residency via the College's implied adoption of the System of Exclusion.
- 23. It is an abuse of discretion for a statutory decision-maker such as the College to fetter its discretion by policy, contract, neglect, or some other means. Fettering of discretion occurs when a decision-maker does not exercise any independent judgment in a matter, such as when it binds itself with another person's opinion, policy, or practice. Similarly, it is an abuse of discretion to permit another person to dictate its judgment. (*Giordani v. City of Brandon*, 147 DLR (4th) 116).
- 24. In the instant case, the College has not conducted an assessment of each CSA who applies for residency on his or her merits. Rather, it has permitted the other Respondents to institute, maintain and perpetuate the System of Exclusion in a manner that restricts CSAs' access to residency, without authority. Moreover, it has impliedly adopted the System of Exclusion and accepted the results in a rigid and inflexible manner.

Improper purpose

- 25. The College's Decision is inconsistent with, and fails in the College's duty to uphold, the statutory purposes and objectives of the HPA. Those statutory purposes and duties are addressed in sections 16, 19 and 20, the bylaws, and relevant case law. They include:
 - a. to serve, protect, and act in the "public interest";

- b. to ensure that the rules of admission to residency are for the purpose of ensuring that the person has the knowledge, skills and abilities to become a resident physician and for no other purpose;
 - c. to determine access to residency on the basis of individual merit, on the basis of knowledge, skill, and abilities relevant to the practice of medicine;
 - d. to ensure that the College's registration procedures are transparent, objective, impartial, and fair; and
 - e. to ensure that the gateways to residency are open to all who meet the academic achievements, competencies and qualifications relevant to a class of registrants established by the College and to ensure those gateways are not obstructed by third parties.
26. "In public regulation of this sort there is no such thing as absolute and untrammelled 'discretion'". All actions must be within the purpose contemplated by the empowering legislation. (*Roncarelli v. Duplessis*, [1959] SCR 121, *B.C. College of Optics Inc. v. The College of Opticians of British Columbia*, 2016 BCCA 85, paras. 10, 30-31, 46-48 and 65)
27. The use of licensing power for other purposes or irrelevant considerations, such as to limit access to the profession or to exclude qualified persons, is not authorized by legislation governing the professions.
28. "The only relevant question, apart from non-educational requirements, to be asked of any applicant for admission, no matter what his place of origin and no matter where he took his training, is whether he has met the required educational standards established in the Province. This question can only be answered by comparing the applicant's training with the established standards. Such an enquiry admits of only one of two possible conclusions: either the standards have been attained by the applicant, or they have not." [Pawliuk affid. Exh. page 1178, McRuer Report].
29. Implicit in a system of access based on merit is that the opportunity for membership is open to all who have met the standards established for competence. To allow otherwise would frustrate the relevant legislative scheme. (*Smith & Rhuland Ltd. v. R.*, [1953] 2 S.C.R. 95).
30. "There can be as little doubt, that the colleges are obliged, in conformity to the trust and confidence placed in them by the Crown and the public, to admit all that are fit; and to reject all that are unfit ... all persons who are so qualified, and have

bestowed their time and money and labour, in the proper studies that tend to such qualifications, have a right to be admitted to exercise and practise their profession. And the public have also a right to the assistance of such a person, who has by his labour and studies rendered himself capable of serving the public by giving them proper advice and directions.” (*R. v. Askew* (1768), 4 Burr. 2186, 98 E.R. 139, quoted with approval in *Bakht v. College of Physicians and Surgeons of British Columbia*, 1980 CanLII 619 (BC SC), appeal dismissed, 1981 CanLII 538 (BCCA).

31. Departure from the empowering Act’s “... objects is just as objectionable as fraud or corruption”: *Law Society of BC v. Trinity Western University*, 2018 SCC 32 (CanLII) para. 275. The College departed from these “objects” by adopting the System of Exclusion and its results.

Discriminatory, Arbitrary, and Unreasonable

32. The Decisions offend principles of administrative law by being arbitrary, unreasonable, and discriminatory. The Decisions are incorrect and unreasonable because:
 - a. the Decisions were based on considerations irrelevant to the purpose and objects of the HPA , such as protection of CMGs at the expense of CSAs in their competition for a limited number of residency positions, and controlling in what geographic regions and in what disciplines CSAs will work;
 - b. the Respondents failed to consider the evidence presented by the Petitioners in support of the applications;
 - c. the Decisions are arbitrary with no rational connection between the System of Exclusion and the purpose for which residency training was mandated by the HPA and the College; and
 - d. the Decisions do not meet the criteria of justification, transparency and intelligibility within the decision-making process. They amount to an inequitable barrier with respect to CSAs’ access to residency.
33. The Decisions, which are based on the System of Exclusion, are also discriminatory in the administrative law sense.

2. Administrative Law Errors of the HPRB

34. By letter dated July 27, 2018, the HPRB refused the Petitioners' application to review the Decision of the College, and refused to exempt Dr. Kostanski from taking English fluency examinations.
35. The Petitioner's application for review alleged that the College and/or its Registration Committee made the errors of administrative law described above and infringed Charter Values in making its Decision.
36. In the HPRB's Decision, it stated:

The Health Professions Review Board (the "Review Board") only has the authority to review a decision of the Registration Committee made by a College in regard to a complaint. Therefore, without a specific decision from the College's Registration Committee, there is nothing the Review Board can do to assist you at this time.
37. This Decision contradicts the HPRB's own jurisprudence and wrongfully declines jurisdiction. A decision refusing to enter upon an inquiry on the basis of lack of authority raises an issue of true jurisdiction or *vires*. Such a decision is reviewable on a standard of correctness: *Dunsmuir v. New Brunswick*, 2008 SCC 9 (CanLII) at paras. 50 and 59. The HPRB has the power to review a decision made by the College (HPA, Section 50.54 (2)), which includes a decision refusing the application of a person who seeks a grant of registration as a member, under Section 20 of the HPA. (See also HPA, Section 50.54 (1)(a)).
38. The Review Board has held that a registrar's advice to an applicant for registration that his or her application will not be considered by a registration committee is a reviewable decision. A decision by the College not to refer an application for a determination relating to registration to its registration committee is a reviewable decision. The College cannot rely on its refusal to act in accordance with its duties as a basis for denying jurisdiction.
39. Additionally, the Review Board has held that it is able to review the validity of a pre-condition to registration, before an applicant is required to comply with it: *B.C. College of Optics Inc. v. The College of Opticians of British Columbia*, 2016 BCCA 85, <http://canlii.ca/t/gnf2t>, paras. 30 and 65.

40. Similarly, a decision by the College refusing to consider the validity of a precondition to registration, such as the components of the System of Exclusion, is a reviewable decision. The College cannot rely on its refusal to act in accordance with its duties as a basis for denying jurisdiction.
41. The Review Board has jurisdiction to review a requirement set by a third party for discrimination. Therefore, a decision by the College refusing to consider a requirement set by the other Respondents, such as the System for Exclusion, for discrimination is a reviewable decision. The College cannot rely on its refusal to act in accordance with its duties as a basis for denying jurisdiction.

3. Breaches of Charter and Infringement of Charter Values

42. The Petitioners claim that their Charter rights have been violated, particularly:
 - a. Section 6 mobility rights, including without limitation the rights to leave Canada temporarily and to return, and to reside, work and study anywhere in Canada;
 - b. Section 7 liberty rights, including without limitation the right to make fundamental personal choices including the choices of where to reside, education, and occupation;
 - c. Section 15 equality rights, including without limitation the analogous grounds of place of education, attributed national origin and nationality, involving the right to work without restriction and to study freely.
43. A decision based on an erroneous interpretation of a Charter right is not only incorrect, it is unreasonable.
44. A statutory regulator such as the College always has an interest in promoting shared values, such as equality and human rights. An administrative decision maker's exercise of power including delegated power must be consistent with the *Charter* and *Charter* values.

Charter s. 15

45. The Petitioners claim their rights under section 15 have been violated and they have suffered adverse effects as a result.

46. Section 15 provides: "Everyone has the right to equality before the law and to equal protection of the law without discrimination because of race, national or ethnic origin, colour, religion, age or sex."
47. The Petitioners say that place of education, temporary residence, citizenship, nationality and attributed nationality are grounds that are analogous to the grounds enumerated in s. 15(1). National origin is a ground enumerated in s. 15, and includes attributed national origin.
48. The purpose of Section 15 of the Charter is:

"to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping, or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration." [*Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para 4]
49. The results and the purposes of the System of Exclusion are to effectively protect residency positions for CMGs and to limit the number of CSA and IMG physicians while requiring CSAs to work in underserved medical disciplines and areas of the province. These purposes are antithetical to s. 15 of the Charter.
50. The effect of the System of Exclusion on CSAs is to discriminate against them regarding access to medical residencies which provide work and study programs required to qualify to practice medicine in their home country, contrary to s. 15 (1) of the Charter. The discrimination, *inter alia*:
 - a. is based on their temporary residence at the place where they received their medical degree;
 - b. deprives them of two of the basic rights of their nationality or citizenship: the right to work, freely, without restriction and the right to study in Canada;
 - c. disadvantages and burdens them by treating them as if they were foreign nationals or persons of foreign national origin who are not already members of Canadian society with subsisting fundamental and personal interests and connections with their home country and as if they lack Charter rights.

51. Discriminatory treatment imposes a burden on CSAs, and withholds a benefit from them, in a manner which reflects stereotypical application of presumed group or personal characteristics and/or which otherwise has the effect of perpetuating or promoting the view that the petitioners are less capable or worthy of recognition or value as human beings or as a members of Canadian society.
52. Governmental actions, including legislative provisions and policies, that discriminate against doctors are contrary to s. 15(1).

Charter Rights: Section 6

53. The Petitioners claim their rights under s. 6(1) and 6(2) of the Charter have been infringed and violated. Sub-sections 6(1) and (2) of the Charter state:
 - (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
 - (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
 - (a) to move to and take up residence in any province; and
 - (b) to pursue the gaining of a livelihood in any province.
54. The mobility right to choose one's residence is a fundamental right under s. 7:

“Choosing where to establish one's home is, likewise, a quintessentially private decision going to the very heart of personal or individual autonomy.” Tied into freedom to choose one's residence is the concept of basic dignity. [Godbout v. Longueuil (City) [1997] 3 S.C.R. 844 at para 66]
55. Section 6 of the Charter prevents discrimination in access to a livelihood in the medical profession based on temporary out-of-province residence.
56. The System of Exclusion violates sections 6(1) and (2) of the Charter. It effectively bars all but a small percentage of CSAs from exercising the right to return to BC, to move to and take up residence to study and work in BC, and to pursue the gaining of a livelihood in their chosen profession. The alternative, if they wish to practice medicine, is self-exile and banishment to a country not their own. Or, according to Health Match BC (a medical recruitment agency which is funded by the Ministry) and the College, CSAs should consider going back to

school to re-do their medical degree in Canada or the US, becoming a physician assistant, or taking up a non-health related career [Pawliuk affid exh p. 762-763]. Even those few who succeed in obtaining residencies are denied the right to reside and gain a livelihood in their profession where and when they choose without onerous governmental interference and burdens.

Charter of Rights: Section 7

57. Section 7 states:

“Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

58. Deprivation of these freedoms can only be done in accordance with principles of fundamental justice. That has not occurred here.

59. For example, choices relating to education and occupation are fundamental personal life choices, protected under section 7. Education is recognized as fundamental to the development of one’s personality and self-realization. It has implications in most if not all aspects of a person’s life. The right of an individual to work or practice a profession is a fundamental right, protected under section 7 of the Charter, even if it includes an economic element. Section 7 of the Charter guarantees Dr. Kostanski, Mr. Falconer and other CSAs personal autonomy and the right to make fundamental personal and life choices, such as those related to education, occupation, and residence without improper government interference or penalty. That right has been violated.

Restraint of Trade

60. The Petitioners claim that each component of the System of Exclusion amounts to an unreasonable restraint of trade that is contrary to public policy and the public interest.

61. The doctrine of restraint of trade applies to professional bodies in BC.

62. Restraint of trade is contrary to public policy and the public interest, and therefore unreasonable restraints of trade are void.

63. The College has been given a statutory monopoly with respect to the licensure of physicians in exchange for the overriding obligation to act in the public interest. It is not entitled to use its licensing powers for any purpose other than establishing and preserving standards of character, competence and skill. Despite this, the College has impliedly adopted the System of Exclusion, which is an unreasonable restraint of trade. It is a method of excluding a sub-set of Canadians from residencies by imposing conditions which are onerous, punitive and unreasonable.
64. The public interest is to ensure that the public have the widest choice in the selection of medical practitioners. The public has a right to the assistance of all persons who are qualified and fit to practice medicine. It is contrary to that public interest to permit the College, aided by the other Respondents, to restrict that choice and widen the profession's monopoly.

APPENDIX 1

Defined Terms and Acronyms

In this Petition, the following terms are defined as follows:

- a. CAP Clinical Assessment Program (in BC). This is a one day assessment imposed on IMGs in BC beginning with the 2018 CaRMS Match which has the effect of limiting the number of IMGs (including CSAs) who can compete for residency positions.
- b. CFMS Canadian Federation of Medical Students. This organization represents students in Canadian medical schools.
- c. CMG Canadian Medical Graduate. A graduate of a Canadian or LCME-accredited American medical school.
- d. CMG Stream The CMG Stream is part of the segregated system of access to residency training in Canada. In the first iteration of the CaRMS Match, CMGs are entitled to compete for residency positions available in this stream. There are residency positions in all 29 base medical disciplines in the CMG Stream.
- e. CPSBC College of Physicians and Surgeons of BC (the "College").

- f. CSAs Canadians Studying Medicine Abroad. Canadian citizens and permanent residents who left Canada to study medicine outside of Canada and the US. CSAs are almost exclusively raised as children in Canada.

- g. FAIMER Foundation for Advancement of International Medical Education and Research. FAIMER is a non-profit foundation that has a directory of medical schools which it recognizes. The College recognizes FAIMER medical degrees. The FAIMER directory of medical schools is sometimes referred to as the WHO (World Health Organization) directory.

- h. IMGs International Medical Graduates. Includes:
 - CSAs; and
 - immigrant physicians who obtained their medical degrees outside of Canada and the US prior to coming to Canada.

IMGs must be either Canadian citizens or permanent residents to compete in the CaRMS match.

- i. IMG Stream The IMG Stream is part of the segregated system of access to residency training in Canada. In the first iteration of the CaRMS Match, IMGs are restricted to competing in the IMG Stream. The IMG Stream in British Columbia is a limited opportunity stream which has substantially fewer residency positions than applicants and only offers residency positions in 4 of the 29 base medical disciplines. Return of service obligations are attached to all positions in the IMG Stream.

- j. LCME Liaison Committee in Medical Education. This is an American institution which accredits the 134 American medical schools and the 17 Canadian medical schools.

- k. MCC Medical Council of Canada. The MCC establishes national standards in medicine subject to provincial regulatory body acceptance. The MCC administers, *inter alia*, the MCCEE and the NAC OSCE.

- l. MCCEE Medical Council of Canada Evaluation Examination. Taken by IMGs to assess the skills and knowledge required at the level of a new medical graduate who is about to enter into the first year of supervised postgraduate training.


- m. NAC OSCE National Assessment Collaboration Objective Structured Clinical Examination. Taken by IMGs to evaluate an IMG's clinical skills at the level of a CMG entering postgraduate training.
- n. Post graduate training. Also referred to as Post graduate education. This is on-the-job paid training or medical apprenticeship mandated by the College to ensure a physician has the knowledge and experience necessary to practice medicine safely before being licensed for independent practice. It is comprised of residency training and subsequently, if a physician chooses, sub-specialization also known as fellowship training.
- o. Residency Matching Process The Residency Matching Process is the system through which Canadian citizens and permanent residents obtain access to residency training. The process is called the CaRMS Match. Briefly, the system matches medical graduates seeking residency positions to available residency positions throughout Canada.
- p. Residency Positions Residency positions are on-the-job paid training positions involving both work and study in specific medical disciplines under the supervision of a licensed physician who is overseen by a university Faculty of Medicine.
- q. Return of Service Contracts. Applicants who obtain a position in the IMG Stream are required to sign these contracts as a condition of being able to secure their position. The contracts provide, *inter alia*, that on completion of residency, the applicant will work where the Ministry directs him or her to work for a specified number of years.
- r. WHO World Health Organization.

Part 4: MATERIAL TO BE RELIED ON

1. Affidavit #1 of Rosemary Pawliuk sworn September 4, 2018; and
2. Such other and further materials as counsel may advise.

The petitioner(s) estimate(s) that the hearing of the petition will take 5 days.

Date: 24 September 2018



Brian M. Samuels

To be completed by the court only:

Order made

in the terms requested in paragraphs of Part 1 of this petition

with the following variations and additional terms:

Date:[dd/mmm/yyyy]..... Signature of <input type="checkbox"/> Judge <input type="checkbox"/> Master
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