

100 Registration Cases Over Three Years Part 3: Policy Issues Related to Registration

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The Health Professions Appeal and Review Board (HPARB) renders a lot of decisions. Many, of course, have similar issues and reviewing them can become repetitive. Few people have the luxury of reading all of the decisions. As an experiment, we reviewed 100 recent registration decisions of HPARB decided over the past three years. Our goal was to see if we could identify principles and concepts underlying HPARB's approach to recurring registration issues, especially those that might be different from approaches taken in the past.

The following summarizes our analysis, which may be instructive both to regulators appearing before HPARB and regulators who deal with registration issues scrutinized by other tribunals and the courts. This is the third of a four-part series.

Use of Policies and Guidelines

HPARB is sometimes faced with a registration requirement that can be interpreted or applied in different ways. Regulators frequently develop policies or guidelines to assist in the process. For example, where language fluency is required, regulators sometimes develop policies as to what score on established language fluency tests would indicate reasonable fluency to practice the profession. HPARB is supportive of using test scores established in policy where the policy is based on an analysis of the language fluency necessary to practise the profession safely and effectively: *Z. S. v College of Occupational Therapists of Ontario*, 2020 CanLII 28323 (ON HPARB), <https://canlii.ca/t/j6gn2>.

HPARB sometimes accepts that policies are a reasonable interpretation or application of the

registration requirement. For example, HPARB has accepted a policy that 100 hours of education and training related to the scope of practice of psychotherapy is sufficient to "demonstrate that the applicant is competent to safely practise psychotherapy": *E.D. v College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario*, 2020 CanLII 62578 (ON HPARB), <https://canlii.ca/t/j9h17>.

Likewise, in another case, HPARB concluded that a guideline indicating that a program must include a practicum or internship to be considered substantially equivalent to an approved program, was acceptable:

... it is improper for a health profession college to create guidelines regarding registration that effectively create requirements that are contrary to regulatory provisions, but in this case the Board finds that the College guideline in question is in keeping with the requirements of the Regulation and, thus, the guideline is not contrary to the regulatory requirement. (*Stubbs v College of Psychologists of Ontario*, 2021 CanLII 37 (ON HPARB), <https://canlii.ca/t/jccqt>.)

However, where it appears to HPARB that the regulator is creating a substantive registration requirement (rather than interpreting and guiding an existing registration requirement), HPARB is unlikely to apply the policy. For example, HPARB declined to accept a regulator's policy that educational courses in psychology should be taught through a psychology department. HPARB concluded that substantively similar courses taught through another department (e.g., family studies) should be accepted, and that the regulator's policy was not a reasonable / liberal interpretation of the legislation: *A.M. v College of Psychologists of Ontario*, 2020 CanLII 27935 (ON HPARB), <https://canlii.ca/t/j6g17>.

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In another case, HPARB did not accept a policy that appeared to require clinical supervisors to be from the same profession or same province as the regulator: *Breton v College of Psychologists of Ontario*, 2020 CanLII 90815 (ON HPARB), <https://canlii.ca/t/jbqk3>.

HPARB is of the view that work experience requirements should include any work experience within the scope of practice of the profession as contained in the legislation. A policy that defines acceptable work experience more restrictively than the definition in the legislation was not applied: *D.V. v College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario*, 2019 CanLII 18849 (ON HPARB), <https://canlii.ca/t/hz12s>; *D.F. v College of Registered Psychotherapists of Ontario and Registered Mental Health Therapists of Ontario*, 2019 CanLII 22723 (ON HPARB), <https://canlii.ca/t/hzbjs>.

Similarly, HPARB did not accept a policy that appeared to reject asynchronous online education without a full analysis as to whether the education was substantially similar, especially where that qualification was not clear from the registration regulation: *Manley v College of Psychologists of Ontario*, 2021 CanLII 41498 (ON HPARB)¹, <https://canlii.ca/t/jfz6j>, reversed *College of Psychologists of Ontario v. Ontario (Health Professions Appeal and Review Board)*, 2022 ONSC 1365 (CanLII), <https://canlii.ca/t/jn1vs>; *Santhirasegaram v College of Psychologists of Ontario*, 2021 CanLII 802 (ON HPARB), <https://canlii.ca/t/jckf5>; *Mor v College of Psychologists of Ontario*, 2021 CanLII 109382 (ON HPARB), <https://canlii.ca/t/jk4hd>.

¹ However, on this point the Divisional Court disagreed with HPARB's approach to the issue: *College of Psychologists of Ontario v. Ontario (Health Professions Appeal and Review Board)*, 2022 ONSC 1365 (CanLII), <https://canlii.ca/t/jn1vs>.

Experience Requirements

Some regulators require practice experience within the scope of practice of the profession. Often that practice must be supervised. HPARB shows some deference to the regulator as to whether the practice experience is acceptable: *R.W. v College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario*, 2020 CanLII 39300 (ON HPARB), <https://canlii.ca/t/j870s> (look for objective evidence as to the nature of the experience including the job description and case file examples).

However, HPARB will intervene where it finds that the description of the practice activities by the applicant, supervisors and documents demonstrate that there were an acceptable number of hours within the scope of practice of the profession: *C.B. v College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario*, 2019 CanLII 72763 (ON HPARB), <https://canlii.ca/t/j1tr>.

Canadian Experience Requirements

There has been considerable discussion in recent years about whether Canadian-experience requirements are appropriate or even consistent with human rights law. HPARB has occasionally been asked to address Canadian-experience requirements.

HPARB has upheld them in some circumstances. For example, it was upheld where it was a transitional requirement to accommodate existing practitioners when new legislation came into force: *N. M. A. G. v College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario*, 2020 CanLII 64010 (ON HPARB), <https://canlii.ca/t/j9k29>.

However, in the decisions we reviewed HPARB did not address the policy or human rights concerns head on.

Currency Requirements

Some Colleges require applicants who graduated some time ago to either have recent practice experience or to undergo a refresher program. HPARB accepts the purpose of these requirements:

In the Board's view, standards of qualification for registration that require an applicant to demonstrate currency ensure that health professionals update their knowledge, skills and judgment and serve to protect the public interest. The currency requirement is based on the rationale that knowledge in healthcare continues to evolve through research and the introduction of new techniques and by staying up-to-date with developments, health professionals provide safe care to patients. (*Bourdeau v College of Occupational Therapists of Ontario*, 2020 CanLII 23920 (ON HPARB), <https://canlii.ca/t/j61gr>.)

In another case HPARB said:

The purpose of the currency requirement is to ensure applicants are aware of developments in the field of psychotherapy, and that their competencies do not recede over time. To ensure adequate protection of the public, applicants must demonstrate that they are competent to practise psychotherapy immediately upon entry to the profession. (*Keen v College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario*, 2021 CanLII 108446 (ON HPARB), <https://canlii.ca/t/jk1tw>.)

HPARB is cautious about accepting informal substitutes for the currency requirement:

Neither the Applicant's work as a Staff Development Officer, assistance with occupational therapy related matters provided to family and friends nor unevaluated reviews of the College's Standards and PREP module, demonstrate that the Applicant possesses current knowledge, skills and judgment to provide care that will protect the public. (*Bourdeau v College of Occupational Therapists of Ontario*, 2020 CanLII 23920 (ON HPARB), <https://canlii.ca/t/j61gr>.)

Likewise, volunteer hours in which the profession is not being practised, even though the work is related, do not count towards currency hours: *Veronica Gabriela Videla v College of Registered Psychotherapists of Ontario*, 2019 CanLII 29116 (ON HPARB), <https://canlii.ca/t/hznln>.

Substitutions / Alternatives

One of the more challenging aspects in registration matters is whether an applicant can provide substitutions or alternatives for meeting a requirement. At least where the requirement is non-exemptible, HPARB is reluctant to accept alternatives that do not meet the registration requirements: *J.H. v College of Psychologists of Ontario*, 2019 CanLII 121575 (ON HPARB), <https://canlii.ca/t/j480j> (teaching and work experience cannot substitute for program hours of instruction; teaching experience cannot substitute for supervised work experience).

HPARB has said that: "Exemptions are warranted where an applicant meets the spirit of a registration requirement though not the specific requirement itself." (*Keen v College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario*, 2021 CanLII 108446 (ON HPARB), <https://canlii.ca/t/jk1tw>.)

In another case, HPARB has identified its approach as follows:

However, a requirement should only be exempted if the reasons for the requirement's existence can be satisfied in another way. (*Zhang v College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario*, 2019 CanLII 141813 (ON HPARB), <https://canlii.ca/t/j8t30>.)

Even where a registration requirement is exemptible, HPARB is reluctant to accept subjective evidence, that is not external to the applicant, as an alternative to the requirement at issue: *A.H.-A.O. v Ontario (College of Physicians and Surgeons)*, 2019 CanLII 50927 (ON HPARB), <https://canlii.ca/t/j0tm9> (opinion testimony of skill and competence not a substitute for an examination requirement).

Significant prior practice experience is not an adequate substitute for an objective, valid and reliable examination especially where there has been a history of failed examination attempts: *Ciurleo v Ontario (College of Chiropractors)*, 2021 CanLII 85583 (ON HPARB), <https://canlii.ca/t/jhsrq>; *Gareiw v College of Physicians and Surgeons of Ontario*, 2022 CanLII 915 (ON HPARB), <https://canlii.ca/t/jlqds>.

Similarly, clinical experience is not a substitute for formal education: *Andrews v College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario*, 2021 CanLII 120892 (ON HPARB), <https://canlii.ca/t/jkw15>.

Likewise, reference letters related to language fluency, especially where they are based on observations in another capacity (e.g., as a volunteer) or language fluency test success for another purpose (e.g., admission to a training program) are not substitutes for the objective evidence of an approved language fluency test: *Z. S. v College of Occupational Therapists of Ontario*, 2020 CanLII 28323 (ON HPARB), <https://canlii.ca/t/j6gn2>.

Terms, Conditions and Limitations

A related concept is whether, rather than fully meeting an exemptible requirement, an applicant can be registered with terms, conditions and limitations (TCLs) that address the gap in qualifications. HPARB has stated: "the imposition of terms, conditions or limitations is not intended to be an alternate path by which the requirements of registration can be satisfied." See: *A.R. v Ontario (College of Registered Psychotherapists and Registered Mental Health Therapists)*, 2019 CanLII 50278 (ON HPARB), <https://canlii.ca/t/j0srq>.

The more significant the registration requirement, the less likely that TCLs will be considered: *C.G.D. v College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario*, 2020 CanLII 39017 (ON HPARB), <https://canlii.ca/t/j85tm> (TCLs not considered where there was an unsuccessful Prior Learning Assessment and Recognition (PLAR) result); *C.L.C. v College of Traditional Chinese Medicine Practitioners and Acupuncturists of Ontario*, 2019 CanLII 24916 (ON HPARB), <https://canlii.ca/t/hzqhs> (TCLs not available for deficiencies that are serious, relate to matters which are fundamental to competency in the profession TCLs should only be used for gaps that be easily remedied); *E.H. v College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario*, 2019 CanLII 85405 (ON HPARB), <https://canlii.ca/t/j2dnm> (TCLs not a viable alternative to education that is not substantially equivalent to an approved educational program).

Even for competencies that are sometimes viewed as "non-core", such as language fluency, TCLs may be inappropriate where the competency relates to safe and effective services, especially when supervision cannot adequately address the concern: *Z. S. v College of Occupational Therapists of Ontario*, 2020 CanLII 28323 (ON HPARB), <https://canlii.ca/t/j6gn2>.

Grey Areas

A COMMENTARY ON LEGAL ISSUES AFFECTING PROFESSIONAL REGULATION

An interesting issue is whether TCLs should be applied where an applicant meets the registration requirement but would benefit from some additional supervision or other protective measure. HPARB has done so in at least one case: *D. E. S. v College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario*, 2020 CanLII 10757 (ON HPARB), <https://canlii.ca/t/j57cs> (TCL requiring supervision on proper use of credentials even though prior use did not constitute unsuitable conduct).

In the next issue of Grey Areas we will examine how HPARB approaches various procedural and jurisdictional issues related to registration.