

100 Registration Cases Over Three Years Part 4: Procedure and Jurisdiction

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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 fourth of a four-part series.

Procedure

HPARB states: "Procedural fairness requires that an applicant be given an opportunity to respond to any concerns that the Committee has before it makes a determination." The lack of adequate notice of the regulator's concerns and adequate reasons for its decision can result in a referral back to the regulator to allow the applicant to provide more information to enable an informed decision to be made: *Y. F. P. v College of Psychologists of Ontario*, 2020 CanLII 63852 (ON HPARB), <https://canlii.ca/t/j9jxp>.

However, not every inadequacy of notice will result in a referral back to the regulator: *College of Registered Psychotherapists of Ontario and Registered Mental Health Therapists of Ontario*, 2019 CanLII 93539 (ON HPARB), <https://canlii.ca/t/j2r8m>.

Even if the regulator did not provide full notice of the concerns it has with the application, HPARB will often consider whether the defect is cured by the process before HPARB where the applicant is given an opportunity to provide information and make submissions on the point: *Cohen v College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario*, 2020 CanLII 91886 (ON HPARB), <https://canlii.ca/t/jbs3n>.

This approach to curing any procedural unfairness also means that HPARB will often accept additional evidence that was not before the regulator at the time that the original decision was made. However, in those cases any decision favourable to the applicant will generally result in a referral back to the regulator to consider the additional information: *Breton v College of Psychologists of Ontario*, 2020 CanLII 90815 (ON HPARB), <https://canlii.ca/t/jbqk3>; *P. D.-R. G. v College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario*, 2020 CanLII 49272 (ON HPARB), <https://canlii.ca/t/j8th6>.

HPARB looks to whether the regulator's process is transparent, objective, impartial and fair. The use of forms and guides (such as a mapping tool for assessment of educational equivalency) provides assurance that the procedure meets these expectations: *C.F. v College of Registered Psychotherapists*, 2019 CanLII 115465 (ON HPARB), <https://canlii.ca/t/j3scb>.

Procedural shortcomings by the regulator cannot substitute for an objective requirement that is not met by the applicant: *K.B. v College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario*, 2020 CanLII 49615 (ON HPARB), <https://canlii.ca/t/j8v7z> (delay in processing the application). However, HPARB has indicated that it will exercise discretion in analyzing objective requirements in the applicant's favour where there is no "identifiable and significant public interest to the contrary": *E.M. v Ontario (College of Registered*

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Kinesiologists), 2019 CanLII 75371 (ON HPARB), <https://canlii.ca/t/j1zb9> (assessing educational substantial equivalency).

HPARB will reconsider a decision it has made if it appears that factual errors were made (e.g., in counting the minimum required hours of instruction): *J.H. v College of Psychologists of Ontario*, 2019 CanLII 121575 (ON HPARB), <https://canlii.ca/t/j480l>.

Other Similarly Situated Registrants

In some cases, the applicant asserts that others with similar education or experience have been accepted for registration. HPARB's approach is to state that it expects consistency on the part of the regulator but, in the absence of detailed information about the education and experience of other applicants, it is unwilling to accept this assertion as a basis for appeal:

For registration decisions, the Board has found that "in the interests of transparency and fairness, and as an assurance that the College's assessment can be relied on to produce justifiable results, the Board would expect to see that similarly situated applicants are assessed with similar results." [citation omitted] The Board does not have any information on the work or education that were sufficient for the Applicant's colleagues to be registered with the College. However, the Board would expect that if the colleagues performed similar work to the Applicant and that work was found to fall within the scope of practice of psychotherapy, the Applicant's work would similarly be found to fall within that scope. Also, if the colleagues' education that met the requirements was similar to that of the Applicant, his education would also be found to meet the requirements. (*C.B. v College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario*, 2019

CanLII 72763 (ON HPARB), <https://canlii.ca/t/j1trr>.)

In addition, if other applicants were admitted under a different route, such as grandparented provisions for existing practitioners at the time the legislation was enacted, HPARB will generally not compare individual requirements from the distinct pathways: *Siegel v College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario*, 2021 CanLII 34199 (ON HPARB), <https://canlii.ca/t/jflrl>; *McLeod v College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario*, 2021 CanLII 41966 (ON HPARB), <https://canlii.ca/t/jq03b>.

Jurisdictional Issues

There are very few cases in which the jurisdiction of HPARB is raised. Its role is fairly well defined in the enabling legislation. However, sometimes jurisdictional issues arise.

For example, in one case HPARB determined that it did not have jurisdiction to direct how information should be posted on the public register of the regulator: *Solomon v College of Psychologists of Ontario*, 2021 CanLII 63354 (ON HPARB), <https://canlii.ca/t/jh2zv>.

HPARB has not dealt with the retrospectivity issue very often in recent years. However, its view appears to be that a new registration requirement applies to applicants even though they obtained the education (or other registration component) previously, even where the component at issue met the requirements at the time it was obtained: *O.V. v College of Psychologists of Ontario*, 2020 CanLII 51677 (ON HPARB), <https://canlii.ca/t/j8zsv>. However, this interpretation may depend on the wording of the provisions: *Narula v College of Psychologists of Ontario*, 2021 CanLII 74804 (ON HPARB), <https://canlii.ca/t/jhksj>.

Labour Mobility and Human Rights

HPARB considers the mobility provisions of the legislation based on the Canadian Free Trade Agreement: *College of Physicians and Surgeons of Ontario v R.R.*, 2019 CanLII 18858 (ON HPARB), <https://canlii.ca/t/hz13w> (examination requirement no longer applies, but suitability concerns can be considered).

However, where those provisions do not apply (e.g., because language fluency was not assessed in the other Canadian jurisdiction), HPARB does not see its role as further enhancing labour mobility: *Z. S. v College of Occupational Therapists of Ontario*, 2020 CanLII 28323 (ON HPARB), <https://canlii.ca/t/j6qn2>.

HPARB does not consider a practitioner who is still being monitored by their home regulator for billing infractions as being “in good standing”, and conduct concerns constitute another basis upon which to deny registration under the mobility provisions: *W.-S. (V.) W. v College of Optometrists of Ontario*, 2019 CanLII 35335 (ON HPARB), <https://canlii.ca/t/hzzfl>.

There are very few cases where discrimination based on race or place of origin are raised before HPARB. Where raised, HPARB considers the evidence provided in support of the claim, whether the registration requirement itself has an apparent adverse impact, and whether the process and criteria used by the regulator considered irrelevant factors: *Gonash-Nelson v Ontario (College of Registered Psychotherapists and Registered Mental Health Therapists)*, 2021 CanLII 80179 (ON HPARB), <https://canlii.ca/t/jht6c>.

In another case, HPARB found that there was no evidence to support the assertion that refusal of a third-party body to admit the applicant into their program was because of the applicant’s age: *A.H.S.M. v College of Physicians and Surgeons of Ontario*,

2020 CanLII 30676 (ON HPARB), <https://canlii.ca/t/j6ch7>.

Similarly, HPARB recognizes the need to accommodate for an applicant’s disabilities, but that such accommodation cannot substitute for an applicant’s lack of knowledge, skill and judgment: *C.S. v Ontario (College of Physicians and Surgeons)*, 2019 CanLII 49856 (ON HPARB), <https://canlii.ca/t/j0s7f>. The applicant must indicate how the regulator should have accommodated a disability; the failure of an educational program to accommodate a disability is not something the regulator can address: *Sloss v College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario*, 2021 CanLII 88746 (ON HPARB), <https://canlii.ca/t/jj5vt>; *Garew v College of Physicians and Surgeons of Ontario*, 2022 CanLII 915 (ON HPARB), <https://canlii.ca/t/jlqds>.

Treatment of the *Payne* Decision

The Divisional Court of Ontario indicated in *College of Physicians and Surgeons of Ontario v. Payne*, 2002 CanLII 39150 (ON SCDC), <https://canlii.ca/t/7bh9> that the Registration Committee of the regulator had expertise in the significance of registration requirements. The Court held that the role of HPARB was to provide a “civilian overlay on the operation of the self-governing health professions.” As such, the Court’s direction was that HPARB should defer to the expertise of the regulator on issues relating to competence to practise.

In only one of the cases we reviewed, the *Payne* case appears to have been applied by HPARB in the context of whether an examination requirement should be exempted: *Ciurleo v Ontario (College of Chiropractors)*, 2021 CanLII 85583 (ON HPARB), <https://canlii.ca/t/jhsrq>.

However, HPARB often distinguishes the application of *Payne* (i.e., in the remaining five cases). For

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example, HPARB has indicated that applying *Payne* depends on whether the issue in the case calls for that expertise: *J.H. v College of Psychologists of Ontario*, 2019 CanLII 121575 (ON HPARB), <https://canlii.ca/t/j480l>.

HPARB also distinguishes *Payne* on the basis of whether it had evidence before it that was not before the regulator: *M. K. P. v College of Nurses of Ontario*, 2020 CanLII 101091 (ON HPARB), <https://canlii.ca/t/jc6v5>. HPARB also interprets that it complies with the principle in *Payne* where it refers a matter back for reconsideration rather than directs the registration of the applicant. For both propositions, see: *Mor v College of Psychologists of Ontario*, 2021 CanLII 109382 (ON HPARB), <https://canlii.ca/t/jk4hd>.

In yet another case that made no reference to *Payne*, HPARB describes its role as to consider its reviews independently from the regulator:

The Board's mandate when conducting a review of an application is to consider de novo whether the Applicant meets the requirements for registration, based upon all the information before it. In this case, the Board's role is to review the application and not ... the decision of the Committee refusing to issue a certificate of registration. (*R.Y. v College of Registered Psychotherapists and Mental Health Therapists of Ontario*, 2019 CanLII 91588 (ON HPARB), <https://canlii.ca/t/j2npc>.)

In other cases HPARB appears to make findings of an expert nature contrary to those made by the regulator without referencing *Payne*: *J.P. v College of Registered Psychotherapists and Registered Mental Health Therapists of Ontario*, 2019 CanLII 84510 (ON HPARB), <https://canlii.ca/t/j2chg> (hours were within the scope of practice of psychotherapy and applicant demonstrated the "safe and effective use of self"); *Manley v College of Psychologists of Ontario*, 2021 CanLII 41498 (ON HPARB), <https://canlii.ca/t/jfz6j>

(regulator's expertise in asynchronous online learning is not definitive).

However, the Divisional Court has reversed the Board's decision in the *Manley* case: *College of Psychologists of Ontario v. Ontario (Health Professions Appeal and Review Board)*, 2022 ONSC 1365 (CanLII), <https://canlii.ca/t/jn1vs>. The Court concluded that on issues like whether an unapproved educational program was substantially similar to an approved program, the Board was required to defer to the expertise of the regulator. However, as is often the case on Board reviews, where additional information is before the Board than was before the regulator, the impact of the regulator's expertise changes:

In those circumstances, absent evidence that the Registration Committee exercised its powers improperly, the Board is limited in what it can do. It cannot do more than refer the application back to the Registration Committee for further consideration by a panel on the basis of the more extensive evidentiary record together with the Board's reasons and recommendations.

It appears that the *Payne* decision will be given new life.

Reviewing HPARB's registration decisions over a three-year period indicates that it is a busy tribunal dealing with a variety of registration issues.