

Human Rights Issues at Discipline

Richard Steinecke, Steinecke Maciura LeBlanc



2013 Annual Educational Conference
Hyatt Regency at the Arch | St. Louis
Oct. 3-5, 2013



Council on Licensure, Enforcement & Regulation
www.clearhq.org
© CLEAR 2013

Instructions for using the I<Clicker Audience Response System

- Click the On/Off switch on the remote (the bottom button)
- **Set the frequency to BB, by holding the On/Off button until the blue light blinks and then enter BB (leave the remote on in order to keep the frequency set)**

2
© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Instructions for using the I<Clicker Audience Response System

- Presenters will ask questions via their Power Point slides
- Wait until you see the countdown in the upper-left-hand corner of the screen
- Click the button that corresponds to your answer (A-E)
- A green light on your remote means the vote was counted, a red light means vote again
- Please leave your remote on the back table at the conclusion of the session

3
© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Human Rights in Canada

- Provincial Human Rights Codes
- Constitution (e.g., s. 15 equality rights)
- Principle of statutory interpretation
- Legislation addresses systemic discrimination
 - E.g., *Fair Access to Regulated Professions Act*
 - E.g., *Accessibility for Ontarians with Disabilities Act*
 - E.g., Workplace Violence and Harassment regs

4
© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Human Rights in Canada

- *Ontario Human Rights Code*
 - **6.** Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.
 - Override clause

5
© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Human Rights in Canada

- Types of Discrimination
 - Direct
 - Insensitive / stereotypical thinking (disability)
 - Treating people differently (e.g., international)
 - Treating people the same (e.g., paperwork)
 - Systemic
 - E.g., disability → incapacity
 - E.g., gender, race proportionality

6
© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Human Rights in Canada

- Bona fide occupational requirement
 - Purpose or goal that is rationally connected to the functions of the position;
 - Adopted in good faith, in the belief that they are necessary to fulfill the purpose or goal; and
 - Reasonably necessary to accomplish the purpose or goal
- Not just employment context

7

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Human Rights in Canada

- Accommodation duty
 - To the point of undue hardship
 - Especially health and safety
 - Can be economic as well
- Common occurrence in the examination context

8

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Human Rights in Canada

- Enforcement - one or more of:
 - Human rights commission (policy)
 - Human rights tribunal (adjudicates complaints)
 - Human rights legal support centre (free assistance to those who have suffered discrimination)

9

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Clicker Survey #1

- In what context do you receive most of your human rights challenges:
 - a. Registration / licensing including examinations
 - b. Rule and regulation making
 - c. Quality assurance and continuing education
 - d. Access issues (e.g., to regulatory publications or facilities)
 - e. Discipline proceedings?

10
© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Clicker Survey #2

- To the extent you have had experience with human rights issues at discipline, have they primarily been in the area of:
 - a. Process and procedure (i.e., how you run your hearings) or
 - b. Substantive or on the merits (i.e., validity of the provisions the regulator is relying on)?

11
© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Hearing Process - *Riad*

- *Riad v. HPARB*, 2012 ONSC 2728
- Review of dismissed complaint
 - Reviews usually oral but can be written
- Requested FM hearing system and that respondent be required to attend
- At hearing FM system did not work
 - HPARB directed there be a written hearing
- Complainant objects

12
© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Clicker Survey #3

- The Court ruled:
 - a. So long as the hearing is fair, HPARB can reasonably choose to hold the hearing in writing
 - b. Having agreed to provide the FM system and since most hearings are oral, it was discriminatory to now require a written hearing?

13
© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Hearing Process - *Riad*

- Court ruling:
 - In our view, the Board's decision did not constitute a breach of Mr. Riad's *Charter* rights nor did it amount to a failure to accommodate his disability under the Ontario *Human Rights Code* or otherwise amount to a breach of procedural fairness. The Board clearly has the discretion to conduct its reviews in writing, unless Mr. Riad satisfied the Board that there was good reason not to do so.

14
© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Hearing Process - *Riad*

- Court ruling:
 - As to the question of whether Dr. McDonald was required to attend, the Board is not empowered to compel a party's participation in the review process under the *Act* or the *Code*. Its only obligation is to provide the parties with the opportunity to comment on the adequacy of the ICRC's decision. Even at that, Dr. McDonald is under no obligation to comment, much less attend.

15
© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Hearing Process - *Riad*

Significance:

- Duty to accommodate does not have to meet requester's preference
- Must consider human rights aspects
- Issue is the fairness of the hearing and the party's ability to participate effectively
- Accommodation must relate to protected ground and be within one's jurisdiction

16
© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Hearing Process - *R v NS*

- *R. v. N.S.*, 2012 SCC 72
- Criminal preliminary inquiry
 - Complainant in sexual assault case wishes to wear her niqab, which covers her face
 - Defendants object on basis that it would limit their ability to effectively cross-examine her and the trier's ability to assess her credibility

17
© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Clicker Survey #4

- The Court ruled:
 - a. It depends on the circumstances; courts have to balance freedom of religion and an accused's right to a fair trial
 - b. Better to have a clear rule that cannot wear niqab in criminal trials in order to protect open trial process and safeguard its integrity
 - c. Absent an issue like disputed identity, forcing a witness to remove niqab effectively forces them to choose between religion and access to the courts

18
© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Hearing Process - *R v NS*

- Majority suggested four part test:
 - Does removal interfere with religious belief
 - Would wearing niqab create serious risk of trial unfairness
 - If so, can the two interests be accommodated
 - If not, which interest is outweighs the other on the facts of this case

Hearing Process - *R v NS*

- Minority decision:
 - A clear rule that niqabs may not be worn would be consistent with the principle of openness of the trial process and would safeguard the integrity of that process as one of communication. It would also be consistent with the tradition that justice is public and open to all in our democratic society. This rule should apply at all stages of the criminal trial, at the preliminary inquiry as well as at the trial itself.

Hearing Process - *R v NS*

- Dissenting decision:
- And since, realistically, not being able to see a witness' whole face is only a partial interference with what is, in any event, only one part of an imprecise measuring tool of credibility, we are left to wonder why we demand full "demeanour access" where religious belief prevents it.

Hearing Process - *R v NS*

- Dissenting decision:
 - In my view, therefore, the harmful effects of requiring a witness to remove her niqab, with the result that she will likely not testify, bring charges in the first place, or, if she is the accused, be unable to testify in her own defence, is a significantly more harmful consequence than not being able to see a witness' whole face.

22
© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Hearing Process - *R v NS*

Significance

- Duty to accommodate process covers much more than just disabilities
- Where competing human rights, have to do a balancing analysis
- Not everyone is going to agree on the balance you select

23
© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Merits - *Wright*

- *Wright v CARNA*, 2012 ABCA 267
- Admitted theft of narcotics by nurses
- Nurses argued contrary to the *Human Rights Code* to discipline nurses for conduct that flowed from their addiction
- Conduct should be dealt with through either alternate dispute resolution (ADR) or the incapacity route

24
© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Clicker Survey #5

- The Court ruled:
 - a. The nurses can be disciplined for their conduct (i.e., stealing narcotics) which is not sufficiently related to their disability to be discriminatory. The disability is a mitigating factor when dealing with penalty.
 - b. The conduct is caused by the disability and therefore the nurses suffer a disproportionate impact compared to nurses who are not disabled by being disciplined.

25
© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Merits - Wright

- Majority ruling:
 - There are a great many addicts who do not commit criminal acts, and it is not discriminatory to hold those who do accountable for their actions. The decision to lay professional disciplinary charges, and the subsequent finding of misconduct, were not motivated by the appellants' addiction, but rather by their conduct.

26
© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Merits - Wright

- Majority ruling (cont.):
 - There may be a connection between the appellants' actions and their disability, but there is no sufficient connection to make the College's actions discriminatory. The fact that the appellants' conduct was motivated or caused at some level by the addiction does not raise the College's proceedings to the level of discrimination in law.

27
© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Merits - Wright

- Dissenting reasons:
 - ... the evidence establishes a causal connection between the conduct and the disability. Misconduct that is causally connected to the disability, and which results in adverse treatment of an individual, is *prima facie* discrimination. As a result of the Appellants' disability, the standard or rule being equally applied, imposes "penalties or restrictive conditions not imposed on other members"

28

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Merits - Wright

Significance

- Other courts might take different approach
 - *Stuart v. BCCT*, 2005 BCSC 645
 - Teacher with bi-polar affective disorder
 - Disturbing interference with student and others
 - Disciplined without regard to mental element
 - Suspended until successful treatment
 - Court converted discipline finding to a competence one

29

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Merits - Wright

Significance

- Should conduct a human rights analysis
- Favour incapacity when available
- Consider discipline where:
 - An isolated incident, not an ongoing condition
 - Serious moral turpitude / harm to others
 - Nexus between disability and conduct is less

30

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Merits - *Whatcott*

- *Whatcott v. SALPN, 2008 SKCA 6*
 - Practical nurse pickets Planned Parenthood office
 - Signs accuse PP of murdering babies, corrupting women and conveying AIDS
 - Professional misconduct finding
 - 45 day suspension
 - \$15,000 fine
 - Cannot practise till fine paid
 - Argues freedom on expression infringed

Clicker Survey #6

- The Court ruled:
 - a. Freedom of expression does not protect false or defamatory statements
 - b. No misconduct since conduct occurred in private without reference to professional status
 - c. Freedom of expression infringed, but infringement justified in circumstances
 - d. Freedom of expression infringed and it cannot be justified in the circumstances

Merits - *Whatcott*

- Constitutes professional misconduct
 - Standard of review is reasonableness
- But decision itself infringed *Charter*
 - Standard of review is correctness
 - Statements convey meaning therefore protected by freedom of expression
 - Imposition of penalty infringes protection

Merits - *Whatcott*

- Infringement not saved by s. 1 *Charter*
 - Preserving respect and status of profession is a pressing and substantial goal
 - But discipline decision is not
 - Rationally connected to objective
 - Whatcott was not using his professional status
 - A proportionate and balanced measure
 - Committee did not discuss balancing of harm against right to free speech, or
 - Whether civil injunction was sufficient measure

34

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Merits - *Whatcott*

- Significance
 - Protection contained in *Charter*
 - Importance of doing the analysis / balancing
 - Decision might have been different if evidence of harm to patients and interference in health care, especially if penalty less severe
- PS human rights complaint against him for hate speech against gays upheld by SCC
 - He raised freedom of religion defence

35

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Merits - *Abi-Mansour*

- *Abi-Mansour v. OCT*, 2011 HRT0 601
 - Referred to discipline for rude and demeaning behaviour towards students
 - Made complaint to HRT against regulator and their lawyers on grounds of race, ancestry, place of origin, citizenship, ethnic origin and reprisal
 - Said College would not have acted against others
 - All allegations summarily dismissed
 - Lawyers advising own clients not covered by Code
 - No reasonable prospect of proving complaint

36

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Merits - Abi-Mansour

- Tribunal ruling:
 - ... the applicant makes only bald allegations of racism and reprisal, and there is no reasonable prospect that they will succeed. There is no reason to believe that the College’s actions were affected by anything other than the fulfillment of its statutory responsibilities in light of the serious allegations of misconduct against the applicant that were made by the School Board.

Merits - Abi-Mansour

- The validity of those allegations will be determined following a hearing at the College. The applicant has pointed to nothing specific that suggests that there is any reason to believe that he has been treated differently by the College because of any of the claimed prohibited grounds. There is no reasonable prospect that the applicant can prove a link between the events and the alleged prohibited grounds.

Merits - Abi-Mansour

- Moreover, I find that the Application is an abuse of process and vexatious.... the applicant made clear that the filing of this Application, together with other legal proceedings, was intended as a strategy to “bombard” the College with legal proceedings and increase its costs in order to encourage it to withdraw the discipline proceedings against him. It is self-evident that the applicant has filed this Application to vex the respondents and to encourage them to withdraw the discipline proceedings against him.

Systemic Discrimination

- E.g., selective prosecution gender, race, etc.
 - Could be non-intentional
 - Could largely be supported by statistical evidence
 - *Brar v. BCVMA* (up to 21 court applications)
 - *Bhullar v. BCVMA*; *Bajwa v. BCVMA*
 - Selective prosecution
 - Discriminatory rules re low cost services
- Be alert to trends within your profession
 - Consider proactive measures

40

© CLEAR 2013

Council on Licensure, Enforcement & Regulation

www.clearhq.org

Clicker Survey #7

- Avoid human rights (HR) issue at discipline by:
 - a. Having rules screened by HR lawyer when made
 - b. Have a human rights policy for the regulator
 - c. Train adjudicators in HR law
 - d. Focus process on professionalism rather than HR
 - e. Call in your lawyer at first whiff of HR issue?

41

© CLEAR 2013

Council on Licensure, Enforcement & Regulation

www.clearhq.org

Suggestions

- Like registration, take requests seriously
- Get immediate legal advice
 - Explaining issues (e.g., accommodation)
 - Wording of response
 - Marshalling evidence of undue hardship
- Training of staff and adjudicators
- Reasons need to conduct human rights / *Charter* analysis

42

© CLEAR 2013

Council on Licensure, Enforcement & Regulation

www.clearhq.org

Speaker Contact Information

Richard Steinecke
Steinecke Maciura LeBlanc
Barristers & Solicitors
rsteinecke@sml-law.com
Direct Line (416) 626-6897
401 Bay Street
Suite 2308, P.O. Box 23
Toronto, ON M5H 2Y4

43
© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Human Rights Issues at Discipline

Amigo R. Wade, Virginia Division of Legislative Services



United States and Human Rights

- Human Rights = Civil Rights
- Fundamental principles
- United States Constitution
- Federal laws
- State provisions



© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org 45

Federal Constitution



- **Fifth Amendment**

- “[N]or shall any person . . . be deprived of life, liberty, or property, without due process of law . . . “

- **Fourteenth Amendment**

- “[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Civil Rights Act of 1964

- Protected Classes
- Race and Color
- National Origin
- Sex/Gender
- Religion



© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Americans with Disabilities Act



© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

American with Disabilities Act

“...no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by any such entity.”

© CLEAR 2013 Council on Licensure, Enforcement & Regulation www.clearhq.org

American with Disabilities Act

- Professional and occupational licensing
- Definition of “disability”
- Reasonable accommodation

© CLEAR 2013 Council on Licensure, Enforcement & Regulation www.clearhq.org

State Laws

- Virginia Human Rights Act
 - Unlawful discriminatory practice
 - “Conduct that violates any Virginia or federal statute or regulation governing discrimination on the basis of race, color, religion, national origin, sex, pregnancy, childbirth or related medical conditions, age, marital status, or disability...”

© CLEAR 2013 Council on Licensure, Enforcement & Regulation www.clearhq.org

State Laws

- Washington Law against Discrimination
- “(1) The right to be free from discrimination because of race, creed, color, national origin, sex, honorably discharged veteran or military status, sexual orientation, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability is recognized as and declared to be a civil right...”

© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Illegal Discrimination

- Treated differently from others in a similar situation; and
- Harmed by the treatment; and
- Treated differently because of membership in a protected class; or
- The request for a reasonable accommodation due to a disability is refused without a valid business reason

© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Olsen v. Idaho Bd. of Medicine

- Registered as a physician assistant
- Overdosed on a combination of prescription and over-the-counter drugs
- Supervising physician withdrew sponsorship; registration terminated automatically

© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Olsen

- Board initiated a complaint alleging Olsen continued to practice as physician's assistant and prescribed medication
- Settlement- allowing reinstatement if Olsen agreed to random drug testing monitored by supervising physician

© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Olsen

- Subsequently attempted to re-register with the Board
- Alleges that in interview with Board of Professional Discipline inappropriate questions were asked about her religion and lifestyle
- Reinstatement denied

© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Olsen

- Sued the Board and individual Board members
- Alleged that decisions and actions relating to revoking and denying the license motivated by religious discrimination
- Conspiracy to violate her constitutional rights.

© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Olsen - Decision

- A claim for conspiracy to violate constitutional rights must state specific facts to support the existence of the conspiracy
- Numerous factual allegations made concerning conduct of board members, but none specific to an agreement among such members
- Failed to allege sufficiently that the board members conspired to violate her civil rights

© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

James v. NE Board of Medicine

- Diagnosed as having bipolar disorder and neurocardiac syncope
- Applied for a temporary permit
- Granted a probationary permit but decision labeled as a “disciplinary action”
- Appealed

© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

James

- Application made for full license
- Again offered a license on disciplinary probationary basis
- Alleges violations of the ADA, right to due process, and equal protection of the law

© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

James - Decision

- “A person who poses a significant risks to others will not be qualified if reasonable modifications ...will not eliminate that risk”
- Determination that a person poses a threat to others may not be based on stereotypes or generalizations

© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

James - Decision

- The Board asserts that James is not a qualified individual under the ADA because she posed a significant risk to others
- Failed assess what risk she posed or whether reasonable modifications would eliminate the risk

© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Guttman v. Khalsa

- History of depression and post-traumatic stress disorder
- Reports of problems interacting with patients and other health care providers
- Board determined Guttman posed an imminent danger to the public; license revoked

© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Guttman - Decision

- Conditions were disabilities protected under the ADA
- No evidence to indicate attempt to accommodate the physician's disability prior to the revocation of license

© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Guttman- Sovereign Immunity

- Congress did not abrogate the sovereign immunity of states for claims involving professional licensing
- Professional licensing decisions are subject to only rational basis review
- significant discretion professional licensing processes.

© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Avoiding Problems

- Start with perspective
- Not about special kinds of rights reserved for members of the protected classes
- Rather, equal enjoyment by all of their individual human or civil rights
- Balancing interests

© CLEAR 2013

Council on Licensure, Enforcement & Regulation
www.clearhq.org

Avoiding Problems

- Prohibit any hint of stereotyping at all decision junctures in the disciplinary process
- Concentrate on behavior or activity applied to the profession's Standard of Care or Standard of Practice
- Fairness and professionalism

© CLEAR 2013 Council on Licensure, Enforcement & Regulation www.clearhq.org

Avoiding Problems

- Established procedures
 - Objectivity
 - "Zone of judgment"
- Training
- Periodic review

© CLEAR 2013 Council on Licensure, Enforcement & Regulation www.clearhq.org

Speaker Contact Information

Amigo R. Wade
 Virginia Division of Legislative Services
 General Assembly Building
 910 Capitol Street
 Richmond, VA 23219
 (804) 786-3591
 awade@dls.virginia.gov

69 Council on Licensure, Enforcement & Regulation www.clearhq.org

• Please leave your remote on the back table at the conclusion of the session

70
© CLEAR, 2013 Council on Licensure, Enforcement & Regulation www.clearh.org
