

Top Ten Cases

Amigo R. Wade, Virginia Division of Legislative Services
Richard Steinecke and Bernard C. LeBlanc, Steinecke Maciura LeBlanc



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**Jestina Clayton v. Mark Steinagel,
Director Utah Department of Commerce**

- Performed hair braiding; required to obtain cosmetology license
- Claimed regulatory program violated Due Process and Equal Protection clauses of the Fourteenth Amendment of U.S. Constitution
- Right to pursue chosen livelihood free from arbitrary, excessive and irrational government regulation

2
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Clayton - Board Position

- Public safety, health and welfare are valid purposes for the regulation of cosmetology and hair styling
- Cosmetology requires knowledge of sanitation, sterilization as well as diseases of the skin and scalp, business laws and public health requirements
- The practice of cosmetology includes hair braiding

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Clayton - Decision

- May not treat persons performing different skills the same
- Insufficient rational relationship between public health/safety and the cosmetology regulatory scheme as applied to hair braiding
- The right to work for a living is the essence of the personal freedom and opportunity
- Cosmetology Act and licensing regulations unconstitutional as applied to hair braiding

4

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Rathe v. CPSO

- When does the personal become professional?
- Conduct at a school concert
 - Loud, profane exchange with another parent
 - Other families and children present
- Ground of misconduct alleged; "conduct unbecoming a physician"

5

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Rathe v. CPSO

- Defence Position:
 - Conduct was "off duty"
 - No patient directly affected
 - Limits to regulator's ability to review private life

6

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Rathe v. CPSO

- Decision
 - Verbal assault in a public place with children present; not *Charter* protected free speech
 - *As a physician*, under a duty to control anger; not subject public to verbal abuse
 - Unlike “disgraceful, dishonourable and unprofessional” ground of misconduct, conduct need not be “relevant to the practice of medicine”
 - Lesson: obvious (?)

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Stephanie Enyart v. National Conference of Bar Examiners

- Legally blind law school graduate sought to take portions of the California Bar Exam using computer equipped with assistive technology
- Offered choice between a live reader or audio CD of exam with the use of a closed circuit television
- Claimed violations of the federal *Americans with Disability Act (ADA)* and the state’s civil rights law

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Enyart - Opposition

- The subject previously used accommodations comparable to those offered
- The testing components requested are not provided in electronic format
- Because it offered to provide auxiliary aids identified in the *ADA*, regulations and other relevant documents, no more should be required

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Enyart - Decision

- Licensing examinations must be administered to best ensure results reflect aptitude and skill
- Must provide aids unless doing so would fundamentally alter the measurement of skills or knowledge or result in an undue burden
- Accommodations offered would result in the disability severely limiting performance on the test thereby altering the measurement

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Famous Flesh Gordon's

- Full patch member of Hell's Angels operated a bar for a decade
- Had no criminal convictions or liquor rule breaches during that time
- Registrar proposes to revoke licence because Hell's Angels is a criminal organization whose main purpose is to commit serious criminal offences

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Famous Flesh Gordon's - Issues

- Appeal tribunal refused to revoke licence - no evidence of bad character of owner
- Registrar appeals to Ontario Divisional Court
 - Tribunal used wrong standard of proof
 - Tribunal applied wrong test (i.e., test supposed to be reasonable grounds to believe licensee will not act in accordance with law, integrity and honesty)

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Famous Flesh Gordon's - Decision

On standard of proof

- FH v. McDougall (SCC)
 - Two standards, balance of probabilities and beyond a reasonable doubt
- But legislative provision created a lower standard of proof
 - Reasonable grounds to believe
 - More than suspicion, less than balance of probabilities
 - Legislative standard must be applied

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Famous Flesh Gordon's - Decision

- On law, integrity and honesty test
- Includes conduct where not a licensee
 - Can rely on any past conduct
- Includes non-criminal conduct
- Includes future compliance with any law, not just compliance with liquor licence rules
- Case sent back for reconsideration
 - Revocation, though likely, is not only option

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Famous Flesh Gordon's - Lessons

- Burden of proof depends on legislation
- Test is commonly used in registration
 - Can rely on any past conduct
 - Issue is future compliance with any law
- *Chauhan v. HPARB* (case on related point)
 - Can consider serious pending criminal charges
 - No presumption of good character in registration cases

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**In the Matter of the License of
Jeanette Marasco to Practice in the
State of New Jersey**

- Misconduct; physical abuse of patient
- Disciplinary hearing by employer; evidence included written statements from two purported eyewitnesses
- Hearing officer determined the allegations were substantiated; added intentional misstatement of material fact

16

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Marasco - Board Action

- BON disciplinary proceeding based on incident and hearing officer's report
- Interim final order
- Final order of discipline - public reprimand
- Appeal: BON arbitrary and capricious by not affording testimonial hearing and improperly considering hearsay

17

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Marasco - Decision

- Scope of review limited - substantial deference afforded to agency's expertise
- Appellant never requested right to present witnesses
- Hearsay is admissible in administrative proceedings; however, a finding cannot be based solely on hearsay evidence

18

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Ontario College of Pharmacy v. Global Pharmacy Canada

- Telepractice case
- Internet pharmacy selling meds to Americans sourced in India through “dedicated staff of friendly customer service agents” in Ontario
- Call centre receives orders and cash
- Seller of drugs a Belize company
- Canadians could not purchase drugs

19

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OCP v. Global Pharmacy

- Issue 1: Where are drugs sold?
 - In regulatory context, words like “sold” may not necessarily be given strict commercial meaning
 - Purposive approach: substance, not form, or transaction
 - Order form, order confirmation, invoice, processing sales all in Ontario

20

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OCP v. Global Pharmacy

- Issue 2: Jurisdiction of College
 - Q: whether there is a sufficient connection between appellants and Ontario
 - Territorial limits of authority prevent application of laws to matters not sufficiently connected to it
 - “Sufficient” connection depends on relationship among the jurisdiction, subject matter of the law and the people/entities sought to be regulated

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OCP v. Global Pharmacy

- Call centre staff only ones who deal with customers
- College's reach not limited to the Ontario public
- Regulators may act to protect persons outside Ontario when the conduct occurs within the jurisdiction
- Key: trading on "Ontario's reputation for quality and strong regulatory standards"
- Lessons: structure important but so is intent behind the activity
- Courts increasingly look to integrated intent of regulatory scheme when interpreting legislation for professional regulators

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OCP v. Global Pharmacy

- Sufficient connection test could mean someone is accountable to both the regulator in the jurisdiction where they operate and where the client is

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Virginia Board for Branch Pilots v. Walter H. McCrory

- Licenses pilots responsible for safe passage of ships in the state's major shipping lanes
- McCrory ordered to take a random drug test; required to report within two hours for testing but arrived 5½ hours later
- Two days later test taken; tested positive for controlled substance
- Subsequently surrendered license

24

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McCrory - Board Action

- Applied for re-licensure after completing a rehabilitation program
- Application denied; McCrory appealed
- Lower court reversed denial; (i) decision not based on substantial evidence, (ii) positive drug test not shown to be a threat, and (iii) decision failed to take into account the evidence of rehabilitation

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McCrory - Decision

- Lower court failed to recognize the applicable standard of review
- Agency's factual findings should be rejected only, if considering the record as a whole, a reasonable mind would necessarily come to a different conclusion
- Must view facts in the light most favorable to sustaining the agency's actions and take into account the presumption of agency regularity

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Grant-Kinnear v. LSUC

- Registration case
- Two year law degree, Kent England
 - Third class standing (scores of 38-49%)
- LSUC uses third party agency (National Committee on Accreditation)
 - NAC refused to recognize degree at all
 - Would not allow G-K to write exams to demonstrate competency

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Grant-Kinnear - Issues

- Unfair not to recognize training at all
- Should be permitted to demonstrate competence through exam
- Registration requirement was not transparent, objective, impartial and fair as required by *Fair Access to Regulated Professions Act*

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Grant-Kinnear - Decision

- NCA authorized to assess what recognition to give to foreign credential
 - Applicant assessed individually
 - Poor overall academic performance entitled rejection of credential
 - Standard of review is reasonableness because of highly expert panel in specialized area
 - Applied reasonable and objective criteria
 - Considered G-K's circumstances, reasons OK

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Grant-Kinnear - Decision

- FARPA compliance with TOIF principles
 - NCA process was a "registration practice"
 - Was subject to TOIF
 - Reservations as to whether Court should evaluate whether this practice was TOIF
 - Highly policy-laden process
 - Administrative issue rather than judicial one
- By implication - matter for the Office of the Fairness Commissioner, not courts

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Grant-Kinnear - Lessons

- First significant FARPA decision
 - Courts prepared to assess reasonableness and procedural fairness of decision
 - Even if by agent of the regulator
 - Criteria must be applied reasonably
 - Process must be fair and reasons given
 - But not prepared to evaluate the merits of the registration requirement itself
 - That is a political issue

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Delaware Board of Nursing v. Michele Gillespie

- Nurse learned of child sexual abuse in role as grandmother
- Statute imposing reporting requirement applied to “any person licensed to render services in medicine”
- Board suspended Nurse’s license for two years

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Gillespie - Procedural Background

- Nurse appealed; Court reversed
- Nurse’s failure to report child sexual abuse could not serve as grounds for finding nurse engaged in unprofessional conduct
- Court held statute’s applicability to specific class - medical service providers

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Gillespie - Decision

- Affirm Lower Court Decision. Board erred as matter of law in its interpretation of the statute
- Legislative intent to target persons to learn of abuse in course and scope of employment
- No substantial evidence to support Board's decision

34

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Reyhanian v. HPARB

- Dentist guilty of professional misconduct complains against psychiatrist (Dr. H) who performs IME
- Dr. H finds dentist unfit to practise
- Among grounds of complaint: Dr. H's report replete with inaccuracies
- Standard of review: reasonableness
- Role of ICRC

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Reyhanian v. HPARB

- Issue: Did the ICRC make improper findings of fact, basically siding with Dr. H?
 - ICRC's role: investigate and determine if reasonable grounds for misconduct allegation
 - "some limited weighing of facts is required"
 - But cannot make factual findings
 - Here, observed that written notes more reliable than memory

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Reyhanian v. HPARB

- ICRC cannot determine credibility but need not refer all disputes to discipline hearing
- ICRC must take “critical look at the facts underlying the complaint” along with the evidence, the respondent’s record, policy concerns, etc.
- Lessons: Screening committees have considerable discretion (if it’s put the right way)
- Evolution of test for referral

37

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38

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39

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40

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