

**DISCIPLINE COMMITTEE OF THE
COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO**

BETWEEN:

COLLEGE OF PHYSICIANS AND SURGEONS OF ONTARIO

-and-

ROLAND CHEE KONG WONG

WRITTEN SUBMISSION

On a motion by the Income Security Advocacy Centre to participate in the hearing

PART ONE: OVERVIEW

1. This is a motion by the Income Security Advocacy Centre (“ISAC”) for an order granting leave to participate in the hearing pursuant to s. 41.1 of the *Health Professions Procedural Code*. ISAC seeks leave to present written and oral argument at the hearing of this appeal.

2. The hearing before this Honourable Discipline Committee raises the question of a physician’s professional obligations when completing applications on behalf of low-income patients for a Special Diet Allowance. The Special Diet Allowance is a benefit that provides additional income to Ontario Works and Ontario Disability Support Program (ODSP) recipients who could not otherwise afford to pay for the food they require as a result of particular medical conditions. This is a benefit designed to improve the health of impoverished Ontarians.

3. None of the individuals for whom Dr. Wong completed Special Diet Allowance applications are participating as parties in the hearing.

4. ISAC is a provincially incorporated, specialty legal clinic that is funded by Legal Aid Ontario to advance the rights, interests and systemic concerns of low-income Ontarians with respect to income security programs. ISAC is the only legal clinic wholly devoted to systemic advocacy on income security issues and has developed particular expertise in respect of the Special Diet Allowance.

5. The outcome of this proceeding could have significant unintended consequences for low-income patients across the province, many of whom are highly dependent upon medical professionals to complete application forms in order to access necessary social benefits. Thus, it is important that the perspective of social assistance recipients – the patients – be taken into consideration. ISAC wishes to participate in this proceeding in order to ensure that the Panel considers the potential impact of its decision upon its client community: social assistance recipients in Ontario. ISAC is uniquely placed to provide assistance to the Discipline Committee in this respect.

PART TWO: FACTUAL OVERVIEW

A. Facts and issues in the proceeding that pertain to the proposed intervention

6. The Special Diet Allowance is a benefit available to eligible recipients of Ontario Works and the Ontario Disability Support Program. The allowance provides additional funding to individuals with proscribed medical conditions who require supplementary funding for the costs of a special diet, over and above the costs of a standard healthy diet.

O. Reg 222/98, s. 30(1)(4) (General Regulation to the Ontario Disability Support Program Act, S.O. 1997, c 25, Sch B).

O. Reg 562/05, Schedule 1 (Prescribed Regulation to the Ontario Disability Support Program Act, S.O. 1997, c 25, Sch B).

O. Reg 134/98, s. 41(1)(4) (General Regulation to the Ontario Works Act, S.O. 1997, c 25, Sch. A).

O. Reg 564/05, Schedule 1 (Prescribed Regulation to the Ontario Works Act, S.O. 1997, c 25, Sch. A).

7. Dr. Wong is alleged to have committed acts of professional misconduct with respect to the completing of Special Diet Allowance forms for patients between approximately 2004 and 2009. In particular, it is alleged that Dr. Wong committed the following acts of misconduct:

- a. Failed to maintain the standard of practice of the profession and was incompetent in his care and treatment of 15 patients, between January 2008 and February 2009, in terms of his record-keeping, failure to take proper histories and failure to perform appropriate medical examinations, including diagnostic testing.

- b. Completed and signed Special Diet Allowance forms between approximately 2004 and 2009 without confirming dietary restrictions, allergies, etc., as reported by patients, and continues to do so.
- c. Submitted billings to OHIP for completing Special Diet Allowance forms between approximately 2004 and 2009 without confirming dietary restrictions, allergies, etc., as reported by patients, and continues to do so.

See Notice of Hearing, p. 4.

8. This proceeding was initiated by a letter from the Assistant Deputy Minister of Community and Social Services requesting an investigation. A physician's professional obligation in terms of completing social benefit application forms is the central issue in this proceeding.

B. The Expertise of the Income Security Advocacy Centre

9. ISAC is a provincially incorporated, specialty legal clinic funded by Legal Aid Ontario to advance the rights, interests and systemic concerns of low-income Ontarians with respect to income security programs. ISAC is the only legal clinic wholly devoted to systemic advocacy on income security issues. It carries out this law reform mandate through test case litigation, policy advocacy, community development and public education.

Affidavit of Mary E. Marrone, para. 4.

10. As summarized in the affidavit of ISAC's Director of Advocacy and Legal Services, Mary E. Marrone, ISAC has developed unique knowledge and expertise on the purpose, implementation and systemic issues arising in the provision of social assistance within the province of Ontario. ISAC has been granted intervenor status in other significant legal proceedings on the basis of this expertise.

Affidavit of Mary E. Marrone, paras. 5-15.

11. ISAC has particular expertise in the Special Diet Allowance. Since 2007, a significant proportion of ISAC's litigation and advocacy resources have been devoted to the Special Diet Allowance.

Affidavit of Mary E. Marrone, para. 16.

12. When eligibility for the allowance shifted to a condition-based approach in 2005, many recipients saw their Special Diet Allowance significantly reduced or eliminated. Community legal clinics across the province were inundated with requests for legal assistance from social assistance recipients.

Affidavit of Mary E. Marrone, para. 20.

13. As the legal clinic specializing in test case litigation involving social assistance, ISAC took on a central role in the Special Diet litigation that resulted from the changes to the program. In partnership with Legal Aid Ontario's Clinic Resource Office ("CRO"), ISAC took four "lead" cases to the Human Rights Tribunal of Ontario, arguing that the new Special Diet schedule discriminated on the basis of disability by excluding and/or under-funding medical conditions that required a special diet.

Affidavit of Mary E. Marrone, para. 21.

14. In February 2010, the Human Rights Tribunal released the "Lead" case decision in *Ball v. Ontario*, concluding that the Special Diet Allowance discriminatorily under-funded diets for hypertension, hyperlipidemia, hypercholesterolemia and obesity.

Affidavit of Mary E. Marrone, para. 22.

15. As a result, a new Special Diet Allowance schedule was introduced in April 2011. That schedule implements many of the recommendations of the government's own Special Diets Expert Review Committee (a 14 member group of external experts convened to advise the MCSS) and corrects discriminatory funding for a number of included conditions.

Affidavit of Mary E. Marrone, para. 23.

16. Despite the recent changes, litigation concerning the Special Diet Allowance is ongoing. ISAC is coordinating all of the human rights applications for the approximately 100 clinic-

represented clients that remain to be litigated at the Human Rights Tribunal. This litigation is proceeding on a condition-by-condition basis with the next lead cases to be heard in early 2012. These lead cases will be presented and argued by ISAC and the CRO. ISAC and the CRO are also providing advice and assistance to the clinic system in respect of the 500 Special Diet appeals still to be heard at the Social Benefits Tribunal.

Affidavit of Mary E. Marrone, para. 25-26.

C. The physician's role in the social benefits system

17. There are a number of social assistance benefits and programs that can only be accessed by way of forms completed by medical professionals. The Special Diet Allowance is just one of many. Other key programs include the Canada Pension Plan (Disability), Workplace Safety and Insurance benefits, and the Ontario Disability Support Program ("ODSP").

Affidavit of Mary E. Marrone, para. 30.

18. Access to these benefits can drastically increase the quality of life and health for some of Ontario's most vulnerable people. Having access to a treating physician who is prepared to complete social benefit applications in a timely and comprehensive manner is absolutely essential for many impoverished Ontarians.

Affidavit of David Balderston, para. 13.

19. There are a number of barriers that can make it difficult for low-income Ontarians to access medical professionals to complete social benefit application forms, including:

- a. Shortages of physicians in parts of Ontario, particularly the south-east and north.
- b. Distance and lack of transportation to physicians in parts of Ontario, particularly rural and northern Ontario.
- c. Variations in access to medical professionals for individuals based on factors such as socio-economic status, sex, age, race, language and residence.

- d. Complexity and/or lack of understanding of the forms by physicians, leading to inaccurate or incomplete forms being submitted to decision-makers.
- e. Some physicians refuse to complete these types of forms.

Affidavit of Mary E. Marrone, Exhibit G: Statistics Canada, "Access to a regular medical doctors, 2010" (82-625-X)

Affidavit of Mary E. Marrone, Exhibit H: "Regular medical doctor 2007/2008 by health region" (82-583-XIE).

Affidavit of Mary E. Marrone, Exhibit I: Nabalamba & Millar (2007), "Going to the doctor" (Statistics Canada, Catalogue 82-003).

Affidavit of Mary E. Marrone, Exhibit J: Commission for the Review of Social Assistance in Ontario (June 2011), "A Discussion Paper: Issues and Ideas".

Affidavit of Mary E. Marrone, Exhibit K: Anglican Social Services Centre 454 (2007), "ODSP Application Support Worker Pilot Project – Outcomes and Recommendations".

Affidavit of Mary E. Marrone, Exhibit L: ISAC (2003), "Denial by Design".

Affidavit of Mary E. Marrone, Exhibit M: ODSP Action Coalition (June 27, 2011), "Dignity, Adequacy, Inclusion: Rethinking the Ontario Disability Support Program".

Affidavit of David Balderston, para. 19.

20. Even in circumstances in which a physician is available and prepared to complete social benefit forms, applicants have experienced difficulties in having social benefit forms completed in a timely and complete fashion. Common problems encountered by the legal clinic system in respect of ODSP application forms include: a) delay in completing the forms, including missing deadlines, resulting in delay in accessing benefits; b) sections seeking narrative accounts left blank or completed in only a cursory fashion; c) failure to list all of the patient's medical conditions; d) failure to list any or all of the patient's limitations and restrictions; e) failure to complete all sections on the forms; f) inconsistent or contradictory medical information. These types of difficulties reflect a reluctance on the part of some physicians to engage in the administrative work of completing such forms, and are not unique to the ODSP application process.

Affidavit of David Balderston, para. 22-23.

Affidavit of Mary E. Marrone, para. 34.

21. When the new Special Diet Allowance forms were introduced in April 2011, there was little guidance provided from the MCSS. ISAC provided assistance to the health professions through the publication of an Information Sheet for health professionals, which was endorsed by a number of key health professional institutions, including the Association of Local Public Health Agencies, the Association of Ontario Health Centres, the Association of Ontario Midwives, Dietitians of Canada, Health Providers Against Poverty, the Ontario College of Family Physicians, the Ontario Public Health Association and the Registered Nurses' Association of Ontario..

Affidavit of Mary E. Marrone, para. 24.

22. Nonetheless, areas of concern and confusion remained and in August 2011, the MCSS issued a "supplementary fact sheet" to health care professionals in order to give greater clarity. In particular, MCSS has had to give direction to health care professionals in respect of how to complete the forms for individuals who are entitled to a diet in respect of unintended weight loss. Prior to this clarification, it was not clear whether a patient had to be experiencing weight loss at the time the forms were completed. The "supplementary fact sheet" clarifies that a physician can check off an unintended weight loss condition for patients who experienced weight loss in the past and who requires dietary modifications in order to maintain their weight.

Affidavit of Mary E. Marrone, para. 25.

23. A narrow interpretation of the forms would have denied the allowance to many individuals with wasting disease who require the allowance in order to maintain their weight. This example demonstrates the importance of clear communication with health professionals in order to ensure that the intended recipients of social benefits can receive them. It also demonstrates the potential harm a too narrow approach can have for patients who depend upon social benefits.

PART THREE: ISSUES

24. The issue to be determined on this motion is whether ISAC should be permitted to participate in the hearing.

PART FOUR: LAW AND ARGUMENT

A. Principles governing participation by non-parties in CPSO hearings

25. Pursuant to section 41.1 of the *Health Professions Procedural Code*, the Discipline Committee may allow a person to participate in a hearing where their participation would be of assistance to the panel:

41.1 (1) A panel, on application by a person who is not a party, may allow the person to participate in a hearing if,

...

(b) the participation of the person, would, in the opinion of the panel, be of assistance to the panel.

Health Professions Procedural Code (Schedule 2 to Regulated Health Professions Act, 1991, S.O. 1991, Chapter 18), s. 41.1.

26. ISAC is not aware of any Discipline Committee or other jurisprudence that has considered this particular provision in the *Procedural Code*. However, the public interest intervenor jurisprudence from the higher courts provides a number of useful principles that can guide this Honourable Discipline Committee in its determination of whether ISAC's participation would "be of assistance to the panel."

27. The Supreme Court of Canada has observed that "public interest organizations are, as they should be, frequently granted intervenor status" because "the views and submissions of interveners on issues of public importance frequently provide great assistance to the courts."

Canadian Council of Churches v. Canada (Minister of Employment and Immigration), [1992] 1 S.C.J. No. 5 at para. 43.

28. The general principles to be considered on a motion to intervene were set out by the Court of Appeal of Ontario in *Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada*. The Honourable Chief Justice Dubin, as he then was, stated as follows:

Although much has been written as to the proper matters to be considered in determining whether an application for intervention should be granted, in the end, in my opinion, the matters to be considered are the nature of the case, issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.

Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada [1990] O.J. No. 1378 (C.A.) at p. 3.

29. In order to make a useful contribution, proposed intervenors must be able to offer a unique or different perspective that goes beyond that offered by the parties. Experience, expertise and the ability to assist the court on legal issues are key factors in determining whether an intervention is appropriate.

Peel (Regional Municipality) v. Great Atlantic and Pacific Co. of Canada [1990] O.J. No. 1378 (C.A.).

R. v. M(A), 2005 CanLII 33773 (Ont. C.A.).

Childs v. Desormeaux (2003), 67 O.R. (3d) 385 (Ont. C.A.) at para. 10.

Halpern v. Canada (Attorney General), [2003] O.J. No. 720, para. 9, 16, 29, 32, 34.

Stadium Corp. of Ontario Ltd. v. Toronto (City) (1992), 10 O.R. (3d) 203 at 207-208 (Div. Ct.)

30. In cases of societal importance, proposed intervenors need not show a “direct interest in the appeal.” For example in *Halpern*, a case involving same-sex marriage, the Court of Appeal of Ontario granted the Canadian Human Rights Commission intervenor status in order to assist the court in “considering the interplay of competing interests” arising in the case, even though the court concluded that the Commission did not have a direct interest in the appeal.

Halpern v. Canada (Attorney General), [2003] O.J. No. 720, para. 9.

31. Where a case has implications beyond the immediate parties and raises issues of public interest, the participation of intervenors with appropriate expertise can assist by bringing a broader context to the attention of the court.

Peel, supra.

Halpern, supra at para. 10.

Ontario Human Rights Commission v. Christian Horizons, 2008 CanLII 68129 (ON SCDC) at paras. 3, 5.

Childs, supra at para. 10.

B. ISAC's proposed participation

32. ISAC takes no position on whether Dr. Wong's conduct constituted professional misconduct. Rather, ISAC seeks to play a public interest role by ensuring that this Honourable Panel considers the potential impact of its decision upon social assistance recipients in Ontario.

33. There can be no doubt that this proceeding raises issues of significant public interest and importance. The proceeding involves access to a significant social benefit that is essential for thousands of low-income Ontarians in order to maintain their health. The Special Diet Allowance is only one of many social benefits that can only be accessed with supporting evidence from a medical professional. A ruling in this proceeding could have implications well beyond the Special Diet Allowance.

34. The perspective of the Ministry of Community and Social Services (MCSS) is before this Honourable Panel. However, the perspectives of Dr. Wong's patients and the many low-income Ontarians who could be affected by a ruling in this proceeding are not.

35. It is submitted that the facts outlined above establish that ISAC has experience and expertise on the purpose, implementation and systemic issues arising in the provision of social assistance within the province of Ontario and with the Special Diet Allowance in particular. Arising from its unique expertise, ISAC proposes to make arguments that are distinct from the other parties to this proceeding.

36. If permitted to participate in this proceeding, ISAC will make submissions that address the following issues:

- a. Physicians are the gatekeepers to a number of social benefits that are necessary for the survival and well-being of many low-income disabled persons. Social benefit administrators must be able to rely upon physician certification in order to make decisions about program eligibility.

- b. There are already barriers to the timely and accurate completion of forms for low-income Ontarians.
- c. Any chilling effect upon a physician's willingness to complete social benefit application forms could exacerbate the already existing problem of the denial of benefits for Ontario's most vulnerable populations.
- d. The imposition of a burden upon physicians to conduct medically unnecessary testing could cause physicians to avoid or refuse to complete these types of applications forms.
- e. Fear of discipline could also cause physicians to refuse to complete social benefit application forms.
- f. Concerns of a chilling effect are increased if there is no corresponding obligation upon physicians to complete forms for their patients or to assist individuals who do not otherwise have access to family physicians.
- g. Professional standards in respect of the completion of social benefit application forms should not compromise access to social benefits. If discipline can flow from the manner in which social benefits forms are completed, corresponding guidance should be given in respect of a physician's positive obligations to complete the forms. If there is no obligation upon physicians to complete forms for their patients, vulnerable and impoverished Ontarians will be disadvantaged in accessing social benefits that they require for their very survival.

37. It is therefore respectfully submitted that in the unique circumstances of this proceeding, there is scope for ISAC to assist this Honourable Panel in providing an enhanced perspective on certain aspects of the public interest at stake. ISAC can make a useful contribution in respect of the weighing of the compelling public interest in preventing the creation of any additional barriers to accessing social benefits.

38. None of the parties would suffer an injustice should this request to participate be granted. ISAC does not seek to add to the evidentiary record. ISAC's participation would not cause delays in the hearing.

39. ISAC respectfully submits that it has the experience and expertise to bring a distinct public interest perspective to this proceeding that will be of assistance to this Honourable Panel.

PART FIVE: ORDER SOUGHT

40. It is therefore respectfully requested that ISAC be permitted to participate in the hearing by way of oral and written submissions.

Date: September 16, 2011

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SCHEDULE A: AUTHORITIES CITED

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