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The Advocates' Society

PROMOTING EXCELLENCE IN ADVOCACY

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September 15, 2014

Jeff G. Cowan
Member of the Civil Rules Committee Secretariat
WeirFoulds LLP
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Toronto, ON M5K 1B7

Dear Mr. Cowan,

As President of The Advocates' Society (the "Society"), I write to offer the Society's comments on the definition of "health practitioner" under Section 105 of the *Courts of Justice Act* (the "CJA"). In this regard, I would like to thank you for inviting the Society to make submissions on this important issue and providing the Society with the Civil Rules Committee's helpful Consultation Document.

The Society speaks on behalf of litigation lawyers from across the province. With more than 5,000 members, the Society reflects diverse and considered views of the litigation bar. Our membership includes counsel who act for plaintiffs and defendants in personal injury and health care matters.

The Consultation Document asked stakeholders to address two questions:

1. Should the definition of "health practitioner" under Section 105 of the CJA be expanded?
2. How should the definition be expanded?

The Society struck a Task Force, made up of members of the plaintiff and defence bar, to examine these questions more closely. After reviewing case law, Canada's provincial and territorial legislation and legislation from other common law jurisdictions, the Society makes the following recommendations with regard to the definition of "health practitioner".

The definition of "health practitioner" under Section 105 of the CJA should be expanded.

The current definition of "health practitioner" creates uncertainty. It forces members of the judiciary to rely on their inherent jurisdiction to order examinations by health practitioners who, while not captured by the current definition of "health practitioner", can provide valuable information to the parties and the trier of fact. Moreover, the current definition ignores the current climate of health care. Health care is not provided only by doctors, dentists and psychologists; rather, health care is now provided by members of many more professions.

Expanding the definition to a listed class of professionals would provide further clarity and certainty around what type of professional a Court may order to conduct an examination. This clarity and certainty would, the Society expects, reduce the number of contested motions brought on this issue

and result in decrease costs for all parties.

The definition of “health practitioner” should be limited to a select class of regulated health professionals.

Limiting the definition to regulated health professionals ensures that examinations will be conducted in accordance with the high standards of practice required under the *Regulated Health Professions Act, 1991* (the “RHPA”).

However, the Society believes that not all of the health professions regulated under the RHPA have members who routinely perform CJA examinations and testify to them in court. In preparing these submissions, the Society’s Task Force reviewed and considered each of the Self Governing Health Professions listed in Schedule 1 to the RHPA. Following this review, the Society recommends the following limited expansion of the definition:

“health practitioner” means,

- a) a member of the College of Physicians and Surgeons of Ontario,
- b) a member of the Royal College of Dental Surgeons of Ontario,
- c) a member of the College of Psychologists of Ontario,
- d) a member of the College of Physiotherapists of Ontario,
- e) a member of the Ontario College of Social Workers and Social Service Workers,
- f) a member of the College of Occupational Therapists of Ontario,
- g) a member of the College of Chiropractors of Ontario, or
- h) a member of the College of Audiologists and Speech-Language Pathologists of Ontario.

This definition, the Society submits, includes those health professionals whose assessments and opinions are of most value to the court, as they provide a picture of the current presentation and future care needs of the individual. The Society submits that this definition also properly excludes the other health professions listed in Schedule 1 to the RHPA, whose members do not frequently perform examinations under the CJA. The Society notes that nurses were included in the definition proposed as “Option #2” in the Consultation Document. The Society recommends excluding nurses from the definition because, practically speaking, nurses never perform CJA examinations. However, occupational therapists, chiropractors, and speech-language pathologists are included in the Society’s recommended definition above because they are frequently used by counsel for CJA examinations.

This recommended definition is similar to the definition of “health practitioner” under the current *Statutory Accidents Benefit Schedule*,¹ again with certain differences. The Society’s recommended definition includes social workers (who routinely perform CJA examinations and testify to them in court), but excludes optometrists and registered nurses (professionals who do not routinely perform CJA examinations).

A party may, of course, still seek an order granting leave of the court to have an independent medical examination conducted by someone who is not a member of the health professions included in the Society’s proposed definition of “health practitioner”. The Society believes that greater certainty in this regard would result from the addition of a new subsection to Section 105, following the *Ziebenhaus*² decision, as follows:

¹ *Statutory Accident Benefits Schedule*, O.Reg. 34/10, s. 3(1).

² *Ziebenhaus v Bahlieda*, 2014 ONSC 138.

(6) the Court may also order a physical or mental examination by a person other than a health practitioner but only in circumstances in which it is satisfied that trial fairness and justice requires such an Order.

I would be pleased to answer any questions you have with regard to these submissions.

Yours very truly,

A handwritten signature in black ink, appearing to read "Peter Lukasiewicz". The signature is written in a cursive style with a large initial "P" and a long, sweeping tail.

Peter J. Lukasiewicz