

# BACKGROUND: SPECIAL DIET ALLOWANCE HUMAN RIGHTS DECISION – FEBRUARY 17, 2010

## What is the significance of the Ontario Human Rights Tribunal's decision?

On February 17, the Tribunal released its decision in the lead complainant hearings into the Special Diet Allowance Program. The Tribunal found that, for each of the three lead complainants, the Special Diet Allowances (SDA) they received violated the *Ontario Human Right Code* because the amounts they received discriminated on the basis of disability.

This decision is an important step in addressing the claims of hundreds of ODSP and OW recipients that changes made to the Special Diet Schedule in 2005 unfairly and arbitrarily eliminated allowances for medically necessary diets.

## What does the Tribunal decision say?

The Tribunal decision deals with the claims of only three lead complainants. The complaints of two other lead complainants were settled in early 2009 when the government conceded that multiple sclerosis and lupus should be on the schedule.

For the remaining three, the Tribunal said that the allowance amounts for hypertension (\$10), hypercholesterolemia (\$22) and extreme obesity (\$20) were disproportionately low relative to the actual costs of the recognized diet *and* relative to the proportion of actual costs that the program covered for other medical conditions. The Tribunal also found that hypoproteinemia (protein deficiency) met the program objectives and should be covered.

The Tribunal relied on the evidence of three nutritional experts called by the complainants. It also relied on the Final Report of the government's own "Special Diets Expert Review Committee" (see below).

## What happens next?

The Ministry has been ordered to pay the three lead complainants retroactive and ongoing benefits for the conditions at a level that is not discriminatory. The Tribunal has also ordered that, within three months, the same increased amounts must be paid to everyone on the SDA program who has the same medical conditions.

The decision also laid out the legal and evidentiary analysis that will apply to rest of the complaints (almost 200) that had been adjourned waiting for this decision. To be successful, complainants will have to show:

1. They have a medical condition;
2. There is a dietary treatment for that condition that is "recognized by the Ontario medical community"; and,
3. The dietary treatment results in costs above the cost of a basic healthy diet.

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The Tribunal rejected the idea that the cost of vitamin and mineral supplements had to be included as part of a special diet allowance. The Tribunal found that the program was intended to cover “food” products only.

The Tribunal also rejected the idea that the SDA program should include extra costs for food preparation where individuals had disabilities that interfered with their ability to prepare their own meals.

A case conference has been scheduled for April 13 to decide the procedure for deciding the rest of the complaints at the Human Rights Tribunal.

You can read the full decision at:

<http://www.canlii.org/en/on/onhrt/doc/2010/2010hrto360/2010hrto360.html>

### **What about special diet appeals at the Social Benefits Tribunal?**

There are also over 800 SDA appeals at the Social Benefits Tribunal. Most of these appeals have been adjourned until the Human Rights Tribunal lead case was decided. The Social Benefits Tribunal is studying the Human Rights Tribunal decision. It is expected that there will be some coordination between the two Tribunals in the handling of the remaining complaints and appeals.

### **How has government responded to the decision of the Tribunal?**

To date, the Ministry of Community and Social Services has said that it is reviewing the Tribunal’s decision to assess its implications. An internal memo was circulated dated February 25 that indicates that no changes will be made until the review is complete.

It also responds to a rumour that the Ministry is considering eliminating the Special Diet Allowance Program altogether. Significantly, the memo does not deny the rumour. Instead, it merely reiterates the statement that the Ministry is reviewing the Tribunal’s decision.

### **What is the Special Diet Allowance?**

The Special Diet Allowance is an allowance available to people receiving Ontario Disability Support Program (ODSP) and Ontario Works (OW) benefits. It is part of the basic benefit structure for both programs and provides additional financial assistance to people who have additional food costs as the result of a medical condition.

To qualify, people on ODSP or OW must have the need for a diet prescribed by a qualified health care practitioner.

Currently, a Special Diet Schedule in the ODSP and OW regulations determines the medical conditions for which diet funding can be authorized by a health care practitioner, and the amount of allowance for each of those medical conditions.

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### Why did it go before the Tribunal?

In November 2005, the provincial government changed the Special Diet Allowance Program rules, significantly reducing access to benefits for many individuals. As a result, hundreds of complaints were filed at the Social Benefits Tribunal and the Ontario Human Rights Commission claiming discrimination.

In 2008, the Ontario Human Rights Commission referred almost 200 individual complaints against the Special Diet Allowance Program to the Human Rights Tribunal of Ontario; of these, five lead cases went forward for adjudication.

### What changes were made in 2005?

Prior to the changes, the Special Diet Schedule consisted mainly of diets that gave the patient's health care practitioner the flexibility to apply diets to a range of appropriate medical conditions. The practitioner also had the discretion to add a diet that was not included on the list.

In 2005, the Schedule was changed from a list of diets to a list of 43 medical conditions. Allowance amounts were only payable for those 43 conditions. There was no longer any discretion to add a condition or diet that was not included.

Many medical conditions, for which special diets had formerly been available, were arbitrarily excluded from the new Schedule. Multiple sclerosis and lupus were two examples, along with cerebral palsy, muscular dystrophy and chronic obstructive pulmonary disease. In addition, many of the allowance amounts in the new Schedule were significantly less than the extra costs of the recognized diet for the condition.

As a result of these changes, many people who had been getting Special Diet Allowances saw their allowances severely reduced. Some, even those with serious illnesses such as multiple sclerosis saw their allowances reduced to zero.

### What did the Special Diets Expert Review Committee say in its review of the Special Diet Schedule?

In the spring of 2006, in response to widespread concerns about the changes to the Special Diet Allowance Program, the Ministry of Community and Social Services created an independent committee of health care professionals to advise the Ministry on whether medical conditions should be added to the Schedule, and what allowances should be associated with each condition.

The Committee reported in April 2008 and recommended a number of improvements. With the exception of adding lupus and multiple sclerosis to the Schedule in response to the lead complainant hearing, government has not acted on the recommendations.

The Special Diets Expert Review Committee's report can be found at:

[http://www.mcscs.gov.on.ca/documents/en/mcscs/social/publications/special\\_diet\\_en.pdf](http://www.mcscs.gov.on.ca/documents/en/mcscs/social/publications/special_diet_en.pdf)