

Court File No. 388/13

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)**

IN THE MATTER OF the *Judicial Review Procedure Act*
RSO 1990, c. J.1 as amended

AND IN THE MATTER OF a decision of the
Human Rights Tribunal of Ontario dated May 27, 2103

BETWEEN:

JO-ANN MacCONNELL

Applicant

- and -

DIRECTOR OF THE ONTARIO DISABILITY SUPPORT PROGRAM, ONTARIO HUMAN
RIGHTS COMMISSION and THE HUMAN RIGHTS TRIBUNAL OF ONTARIO

Respondents

**NOTICE OF APPLICATION
FOR JUDICIAL REVIEW**

TO THE RESPONDENT

A LEGAL PROCEEDING HAS BEEN COMMENCED by the Applicant. The claim made by the Applicant appears on the following page.

THIS APPLICATION for judicial review will come on for a hearing before the Divisional Court on a date to be fixed by the registrar at the place of hearing requested by the Applicants. The Applicant requests that this application be heard in Toronto.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the application or to be served with any documents in the application, you or an Ontario lawyer acting for you must forthwith prepare a notice of appearance in Form 38A prescribed by the Rules of Civil Procedure, serve it on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant, and file it, with proof of service, in the office of the Divisional Court, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your notice of appearance, serve a copy of the evidence on the Applicant's lawyer or, where the Applicant does not have a lawyer, serve it on the Applicant and file it, with proof of service, in the office of the Divisional Court within thirty days after service on you of the Applicant's Application Record, or not later than 2 p.m. on the day before the hearing, whichever is earlier.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date *August 30, 2013*

Issued by 
Registrar, Divisional Court Toronto
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APPLICATION

1. **The Applicant makes application for:**

- a) An Order quashing the decision made by the Human Rights Tribunal of Ontario (the “Tribunal”), dated May 27, 2013 dismissing Jo-Ann MacConnell’s claim that the failure to include the medical condition, Unintended Weight Loss – Dysphagia/Mastication or Swallowing Difficulties, in the schedule set out in O.Reg. 562/05 pursuant to the *Ontario Disability Support Program Act, 1997*, SO 1997 c. 25, sched. B (the “Special Diet Allowance Schedule”), is discriminatory contrary to s. 1 of the Ontario *Human Rights Code* (the “Code”).
- b) An Order remitting the complaint to the Human Rights Tribunal to be re-determined by a differently constituted panel, with such instructions as this Honourable Court may consider just and appropriate;
- c) Such further or other relief as counsel may advise and this Honourable Court may consider just and appropriate.

2. **The grounds for the application are:**

Background

- a) The Special Diet Allowance Schedule allocates a fixed allowance to eligible social assistance recipients to fund certain additional dietary costs that result from disability.
- b) Between 2004 and 2006, hundreds of individuals made complaints to the Tribunal alleging that the Special Diet Allowance Schedule discriminates against them contrary to the *Code*. Those complaints have been organized and adjudicated according to a “lead case” procedure in which the discrimination claims of specific medical conditions have been assessed by way of lead case complainants. The decision under review in this application is the fourth lead case, in which the discrimination claims of 17 complainants/applicants involving 10 different medical conditions were heard at the same time.
- c) Ms. MacConnell was the sole lead complainant with a discrimination claim relating to unintended weight loss resulting from dysphagia/mastication or swallowing difficulties.
- d) In the first lead case decision, *Ball v. Ontario (Community and Social Services)*, 2010 HRTO 360, the Tribunal determined that the Special Diet Allowance Schedule was discriminatory in several respects and it set out a four-step test for

establishing discrimination in future cases (the “*Ball* test”). The *Ball* test requires an individual to prove that:

1. the claim of discrimination is based on a disability or disabilities;
2. there is general recognition in the Ontario medical community that modifications to a regular healthy diet should be made because of the claimant’s disability or disabilities;
3. the diet leads to additional food costs as compared with a regular, healthy diet for a person without the disability or disabilities; and
4. there is no funding for the additional costs, or the funding is significantly disproportionate to the actual costs (up to a maximum of \$250).

The Tribunal’s Decision relating to Unintended Weight Loss (Dysphagia and/or Mastication Difficulties) was Unreasonable

- e) Ms. MacConnell is a 55 year-old disabled woman who receives benefits pursuant to the Ontario Disability Support Program. Among her other disabilities, she has no lower teeth and therefore she suffers from mastication difficulties. For several reasons, she also has difficulty swallowing. These conditions have caused or contributed to Ms. MacConnell’s documented weight loss. Ms. MacConnell is significantly underweight with a documented weight as low as 89 pounds. Malnutrition poses serious health risks. Ms. MacConnell requires additional calories in order to reach a healthy weight.

f) The Tribunal acted unreasonably in dismissing Ms. MacConnell's claim made in respect of Unintended Weight Loss - Dysphagia/Mastication or Swallowing Difficulties. In particular:

- i. The Tribunal refused to consider evidence that it is generally recognized in the Ontario medical community that individuals suffering weight loss due to dysphagia/mastication or swallowing difficulties require liquid nutritional supplements such as Boost and Ensure. Such supplements clearly represent "modifications to a regular healthy diet", and thus this evidence was critical to evaluating step two of the *Ball* test. Contrary to the Tribunal's finding, this aspect of the claim was not "different" than the one defined at the outset. The Respondent had and made use of its ample opportunity to respond;
- ii. The Tribunal applied the wrong test, requiring persons suffering from weight loss to establish "that a person should increase food consumption in excess of a regular healthy diet." Rather, the test requires claimants to establish that "modifications to a regular healthy diet" should be made. Ms. MacConnell provided evidence that met the correct test;

iii. The Tribunal conflated the requirements of Step 2 of the “*Ball test*” with the individualized therapeutic treatment required by Ms. MacConnell. The special diet program is not tailored to the specific needs of particular individuals, but rather, it provides an allowance for those who fit within a broad, given category;

iv. In this regard, the Tribunal also relied upon irrelevant evidence. Ms. MacConnell’s individual medical records are only relevant to determining whether she had lost more than 5% of her body weight due to dysphagia/ mastication or swallowing difficulties. These records are not relevant for determining the modifications to a regular healthy diet that are generally recognized in the Ontario medical community as treatment for that weight loss, and the Tribunal acted unreasonably in relying upon the medical records for that purpose.

g) *Judicial Review Procedure Act*, R.S.O. 1990, c. J.1, as amended;

h) *Rules of Civil Procedure*, including Rules 1.04, 38 and 68;

i) *Human Rights Code*, RSO 1990 c. H.19 as amended;

- j) O.Reg. 562/05 pursuant to the *Ontario Disability Support Program Act, 1997*, SO 1997 c. 25, sched. B and O.Reg. 564/05 pursuant to the *Ontario Works Act, 1997*, SO 1997 c. 25, sched. A (the “Special Diet Allowance Schedule”); and
- k) such further and other grounds as counsel may advise and this Honourable Court may allow.

3. The following documentary evidence will be used at the hearing of the application:

- a) The record of proceedings before the respondent Tribunal;
- b) Such further and other evidence as counsel may advise and this Honourable Court may permit.

Date of Issue:

August 30, 2013

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Court File No. *388/13.*

JO-ANN MACCONNELL v.
Applicant

DIRECTION ONTARIO DISABILITY SUPPORT PROGRAM and HUMAN RIGHTS TRIBUNAL OF ONTARIO Respondents

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

Proceedings commenced at Toronto

**NOTICE OF APPLICATION
FOR JUDICIAL REVIEW**

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