CITATION: *Canada (Community and Social Services) v. Martel*, 2012 ONSC 6680
DIVISIONAL COURT FILE NO.: 292/12
DATE: 20121128

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

PARDU, LAX and MACKINNON JJ.

BETWEEN:	
HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO as represented by the MINISTER OF COMMUNITY AND SOCIAL SERVICES	*Robert E. Charney and Courtney Harris*, for the Applicant
Applicant	
– and –	
ROBERT MARTEL and GLEN POLOZ, ONTARIO HUMAN RIGHTS COMMISSION, HUMAN RIGHTS TRIBUNAL OF ONTARIO	*Leslie Bisgould and Cindy Wilkey* , for the Respondents, Robert Martel and Glen Poloz *Cathy Pike*, for the Respondent, Ontario Human Rights Commission
Respondents	*Margaret Leighton*, for the Respondent, Ontario Human Rights Tribunal
	HEARD at Toronto: November 2, 2012

REASONS FOR DECISION

Mackinnon J.

Nature of Proceeding

[1] This is an application for judicial review of the Ontario Human Rights Tribunal's ("the Tribunal") decision, dated April 12, 2012. The Tribunal held that the Special Diet Allowance Schedule, which provides funding to eligible recipients under the *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sched. B. [*ODSPA*] and the *Ontario Works Act, 1997*, S.O. 1997, c. 25, Sched. A [*OWA*], infringes the *Human Rights Code*, R.S.O. 1990, c. H.19, because it does not provide a Special Diet Allowance for persons with chronic hepatitis C. The Tribunal

ordered the applicant to provide a special diet allowance to Ontario Disability Support Program ("ODSP") and Ontario Works ("OW") recipients, with this condition.

[2] The applicant seeks an order quashing the decision or, in the alternative, remitting the decision back to the Tribunal for reconsideration with directions.

Background

[3] The special diet allowance is a component of the Income Support Program provided under the *ODSPA* and the *OWA*. As of November 2005, the legislation provides that ODSP or OW recipients are eligible to receive set amounts of additional income support for their diet if they can establish that they have one of the medical conditions set out in the Special Diet Regulations under the *ODSPA* or the *OWA*, being Schedule 1 of O. Reg. 562/05 or O. Reg. 564/05, respectively. Each condition listed in the Schedule authorizes the payment of a specific monthly amount. If a recipient has more than one of the medical conditions listed in Schedule 1, the regulations provide that the cumulative amount of the recipient's special diet allowance cannot exceed $250.00.

[4] The changes to the special diet program in November 2005 resulted in nearly 200 complaints of discrimination being filed with the Ontario Human Rights Tribunal ("HRTO") and over 500 complaints being filed with the Social Benefits Tribunal. These complaints fall into two categories: (1) complaints made by individuals who felt their medical conditions were unfairly excluded from the Schedule; and (2) complaints made by individuals who felt their medical conditions were not provided sufficient funding under the Schedule. All parties agreed, for efficiency purposes, these cases would be adjudicated through a series of lead cases.

[5] In 2009, the Tribunal heard the first lead special diets case: *Ball v. Ontario (Ministry of Community and Social Services)*, 2010 HRTO 360, 69 C.H.R.R. D/300.[1] The complainants in *Ball* suffered, respectively, from hypercholesterolemia, hypertension, and extreme obesity. In its decision, the HRTO established a four-step framework for determining all the outstanding special diet allowance complaints. According to *Ball*, at para. 89, a complainant must prove the following in order to establish disability-based discrimination related to the special diet allowance:

(a) The claim of discrimination is based on a disability or disabilities;

(b) 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;

(c) The diet leads to additional food costs as compared with a regular, healthy diet for a person without the disability or disabilities; [and that]

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[1] Rev'd on other grounds (application of test to one complainant) *Ontario (Minister of Community and Social Services) v. W. (Litigation guardian of)*, 2011 ONSC 288, 280 O.A.C. 45 (Div. Ct.). In these reasons, the case is referred to as *Ball* in reference to the four stage test, and to *W.* in reference to the Divisional Court decision in the judicial review application.

(d) There is no funding for the additional costs, or the funding is significantly disproportionate to the actual costs (up to the maximum of $250).

[6] The present application arises from the second lead special diets case that was heard by the HRTO. These complainants suffer from what the parties have labelled as "hepatic disorders". Mr. Martel has chronic hepatitis C and Mr. Poloz had chronic hepatitis C, which progressed to cirrhosis in 2000. Both submitted their application for a special diet allowance in 2006 and received the $10.00 allowance that was in place at the time for "liver failure/hepatic disorders". On March 31, 2011, this category was removed from the Schedule. Both Mr. Martel and Mr. Poloz's complaints were originally underfunding complaints, but as of March 31, 2011, they also became exclusion complaints.

The Tribunal's Decision

[7] The Tribunal found that the first step in the test, set out in *Ball*, was met. There was no dispute between the parties that the claims are based on a disability, being chronic hepatitis C.

[8] The central dispute between the parties was whether there is general recognition in the Ontario medical community that modifications to a regular healthy diet should be made because of chronic hepatitis C. The Tribunal found that there was. In so doing, it primarily relied on the Dieticians of Canada, *Hepatitis C: Nutrition Care, Canadian Guidelines for Health Care Providers* (2003) ("*Hepatitis C Guidelines*"). The Tribunal found a general conclusion in the *Guidelines* that protein and energy needs, per kilograms of body weight, are above normal levels when individuals have chronic hepatitis C.

[9] At steps three and four, the Tribunal found that increased protein and energy requirements lead to additional food costs as compared with a regular healthy diet, for which no funding is now available. Moreover, the Tribunal found that the $10.00 per month allowance on the previous Schedule was significantly disproportionate to the actual costs. Accordingly, the Tribunal was satisfied that both the third and fourth steps were met.

[10] The Tribunal allowed the government a period of six months to comply with its order to provide the complainants with retroactive and ongoing special diet allowance for chronic hepatitis C and to provide special diet benefits for other eligible recipients with chronic hepatitis C.

Standard of Review

[11] The standard of review to be applied is reasonableness. However, the applicant submits that the ambit of reasonable outcomes depends on context which, in this case, includes medical questions in which the Tribunal has no specialized expertise. The suggestion is that the Tribunal should be given less latitude due to the factual determinations in issue, which involve medical matters. Reliance is placed on *Audmax Inc. v. Ontario (Human Rights Tribunal)*, 2011 ONSC 315, 273 O.A.C. 345 (Div. Ct.). In that case, the Divisional Court agreed that context is important, and stated:

> There is but one reasonableness standard. However, again as noted in *Shaw v. Phipps*, context is important. In *Khosa*, Binnie J. stated at para. 59 that

> reasonableness "takes its colour from the context." The Divisional Court in *Shaw v. Phipps* also referred at para. 40 to an article by Professor Gerald Heckman who suggests that the range of possible, acceptable outcomes may expand or contract depending on factors such as the nature of the question and the expertise of the decision maker.

[12] Context, as used in *Audmax*, does not support the conclusion that the presence of a medical question before the Tribunal narrows the range of possible, acceptable outcomes or changes the principle that the Tribunal's decision must be rationally supported and defensible in fact and law. The reference in *Audmax* is taken from *Shaw v. Phipps*, 2010 ONSC 3884, 325 D.L.R. (4th) 701 (Div. Ct.), which derives from *Mills v. Ontario (Workplace Safety and Insurance Appeals Tribunal)*, 2008 ONCA 436, 237 O.A.C. 71, which stated, at para. 22:

> My conclusion does not signal that factors such as the nature and mandate of the decision-maker and the nature of the question being decided are to be ignored. Applying the reasonableness standard will now require a contextual approach to deference where factors such as the decision-making process, the type and expertise of the decision-maker, as well as the nature and complexity of the decision will be taken into account. Where, for example, the decision-maker is a minister of the Crown and the decision is one of public policy, the range of decisions that will fall within the ambit of reasonableness is very broad. In contrast, where there is no real dispute on the facts and the tribunal need only determine whether an individual breached a provision of its constituent statute, the range of reasonable outcomes is, perforce, much narrower.

[13] In my view, the examples provided in *Mills* do not support the applicability of a circumscribed ambit of reasonableness here.

[14] A somewhat similar submission was made by the applicant in *Ontario (Community and Social Services) v. W. (Litigation Guardian of)*, 2011 ONSC 288, 280 O.A.C. 45 (Div. Ct.). The court stated at paras. 24-25:

> The principal issue in this application is factual - whether there is any evidentiary support for the Tribunal's finding that there is general recognition in the medical community that eating more protein from food sources is an appropriate treatment for a medical condition referred to as hypoproteinemia. As mentioned in *Dunsmuir* at paras. 51 and 55, questions of fact, discretion and policy generally attract a standard of reasonableness. In the present circumstances, one must also have regard to the privative clause in section 45.8 of the *Code*, which mandates the highest level of deference toward decisions of the Tribunal, even if that clause is not by itself determinative. Given these considerations, special circumstances are required to displace this standard in favour of a correctness standard.
>
> The fact that factual determination of the Tribunal at issue in this application involves a medical question in which the Tribunal has no special expertise is not sufficient to justify a correctness standard. We note, further, that the Applicant's principal submission in this regard is that the Tribunal made this finding in the

> absence of supporting evidence. The fact that an absence of supporting evidence on this factual issue would constitute an error of law also does not warrant a correctness standard. Such a determination in respect of a critical finding of fact renders a tribunal decision unreasonable.

[15] In *Mills*, the Ontario Court of Appeal stated, at para. 23, that, "[t]he concept of reasonableness does not turn on a detailed analysis of whether the Tribunal's decision is subject to a high or low degree of deference." Instead, the court in *Mills* relied on the judgment of the majority of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47:

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[16] The Divisional Court in *Audmax*, at para. 31, has said that *Mills* rejects the notion that there is "a spectrum or continuum of deference" within the reasonableness standard. In *Shaw* the Court of Appeal reiterated at para 10:

> An Adjudicator's decision is not subject to appeal, but only to judicial review: see s. 45.8 of the *Human Rights Code*, R.S.O. 1990, c. H.19 (the *Code*). All counsel agree that the Divisional Court properly identified "reasonableness" as the appropriately deferential standard of review on an application for judicial review of the Adjudicator's conclusion of discrimination: see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. In recognition that the Adjudicator "has a specialized expertise" in the area, the Divisional Court explained that the reasonableness standard accords "the highest degree of deference ... with respect to [the Adjudicator's] determinations of fact and the interpretation and application of human rights law" (at para. 41). Deference is maintained unless the decision is not rationally supported. The ultimate question is whether the result falls within the *Dunsmuir* "range of possible, acceptable outcomes which are defensible in respect of the facts and the law", as the Divisional Court determined that it did (at para. 85).

[17] I see no reason to depart from these principles where, as here, the factual determinations involve medical matters. The requirement that medical or other expert testimony be heard and weighed does not detract from the Tribunal's expertise. As stated in *Ontario v. W.*, the

Tribunal's decision is rendered unreasonable where it makes a material finding of fact in the absence of supporting evidence.

Issues Raised

[18] The applicant submits that the Tribunal made a number of errors that either cumulatively or individually render the Tribunal's decision unreasonable and outside the range of possible, acceptable outcomes. The errors alleged are:

- the Tribunal misapplied the *Ball* test in relation to the meaning of "regular, healthy diet" in steps two and three of that test;
- the Tribunal erred by finding a general recognition in the Ontario medical community of a special diet for chronic hepatitis C patients;
- the Tribunal misapprehended the evidence of experts and erred by interpreting medical texts and journal articles on its own; and
- the Tribunal considered irrelevant conditions on the Special Diet Allowance Schedule regarding chronic wounds and burns, and disregarded the relevant condition of unintended weight loss – cirrhosis.

[19] In my view, each of these issues are a different way of challenging the Tribunal's essential finding of fact that dietary protein and energy needs are above normal limits when individuals have chronic hepatitis C.

Step Two of *Ball*

- **Modifications to a Regular Healthy Diet**

[20] The applicant submits that the Tribunal erred in failing to first determine the meaning of "regular healthy diet". It submits that this is an essential determination in order to properly address steps two and three of *Ball*. The applicant states that both experts who testified before the Tribunal agreed that the diet they were recommending fell within the parameters of the *Canada Food Guide*. Accordingly, the Tribunal should have determined that this was the definition of "regular healthy diet" and dismissed the application.

[21] In my view, the Tribunal was required to determine whether 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. In this particular case, the answer turned on the daily dietary protein and energy requirements for individuals with chronic hepatitis C in comparison to those of healthy individuals. The Tribunal correctly identified the issue in para. 24 of its reasons where it stated: "What is important, in my view, at this stage of the analysis, is that the evidence supports an individual person's protein and energy intake requirements are generally recognized as higher if they have chronic hepatitis C than if they do not." In so stating, the Tribunal did not misapply the test in *Ball*.

[22] The Tribunal in *Ball* described the purpose of the special diet allowance, at paras. 88 and 98:

> The special diet allowance recognizes that the basic dietary requirements of certain persons lead to higher costs than others. It is designed to assist in alleviating the disadvantage of persons with disabilities and to support substantive equality by funding certain additional dietary costs that result from disability.
>
> ...
>
> I find that the purpose or underlying rationale of the program is to fund additional food costs in addition to those of a regular healthy diet. ... It is undisputed that the program is designed to fund costs above those of a regular, healthy diet.
>
> [Emphasis in original.]

[23] These conclusions are consistent with the approach the Tribunal took here, namely, to identify whether individuals with chronic hepatitis C require modifications to a general healthy diet, and if so, to go on to consider whether this is generally recognized in the Ontario medical community. The emphasis is on "modifications". Here, the Tribunal adopted the approach of considering the evidence before it as to the needs of those with chronic hepatitis C for additional dietary protein and energy in excess of that required for a healthy person without chronic hepatitis C.

[24] This was the approach taken by the Tribunal in *Ball*. The Divisional Court in *Ontario v. W.*, did not disapprove the approach taken in *Ball*. That application for judicial review was successful because the medical condition giving rise to the alleged disability was not established and the evidence did not support a finding that additional dietary protein was an appropriate treatment for the medical condition. The Divisional Court in *Ontario v. W.* stated, at para. 48:

> The Tribunal expressly states that claimants in future cases should introduce more specific evidence showing that the recommendation to eat more high protein food sources would be a generally recognized response to the disability. There cannot, however, be one standard of evidence for establishing the factual finding in the Decision and another in subsequent decisions by other claimants. If more specific evidence is required for future cases, it is also required for W's case. Implicit in the statement in paragraph 132 is, in effect, a recognition that W has not satisfied the onus on her to establish the second requirement of the test articulated by the Tribunal. [Emphasis added.]

[25] This emphasis on the particular additional dietary requirement is also evident at para. 131 of the Tribunal's decision in *Ball*:

> The next question is whether W. has shown that there is general recognition in the Ontario medical community that a particular diet helps treat this disability. I must admit to significant concern about the lack of expert evidence on this point. Although the complainants and the Commission entered reports from three

experts ... none of them commented on whether an increased serving of protein is generally recognized as a treatment for protein deficiency. [Emphasis added.]

[26] Accordingly, the Tribunal did identify the correct question for consideration at paras. 18, 22 and 25. Establishing a requirement to consume more protein and energy through dietary sources than would be needed by a healthy person without chronic hepatitis C would enable a claimant with chronic hepatitis C to meet step two of *Ball* if it was also established that the modifications were generally recognized in the Ontario medical community as required by the claimant's particular disability or disabilities.

[27] In this judicial review application, the next question for the court to consider is whether there was any admissible evidence before the Tribunal upon which it could rely, in reaching the conclusions that it did with reference to step two.

[28] The Tribunal received expert evidence from Elke Sengmueller, a clinical Registered Dietician, and from Dr. Eric Hurowitz, a gastroenterologist. Ms. Sengmueller's opinion was that individuals with chronic hepatitis C have energy needs 10-40 per cent higher than average and 20-50 per cent higher protein needs. She testified that nutritional supplementation is frequently required and that dietary intervention focuses on increased vegetables and fruits, increased whole grains and adequate fibre, increased consumption of meat and alternatives, and increased consumption of dairy and alternatives.

[29] Ms. Sengmueller is an expert in food and nutrition, who uses nutritional therapy to improve a range of medical conditions based on current scientific evidence, best practice guidelines, and on the person's individual needs. She deposed a lengthy affidavit in support of the complaints to which she attached numerous exhibits consisting of related literature. She adopted and relied upon them as authoritative sources supporting her opinion. The Tribunal considered the literature and relied primarily on the *Hepatitis C Guidelines*. With respect to protein, those *Guidelines* state that the recommended daily amount of protein for healthy adults is 0.8 g/kg/day, whereas for those with chronic hepatitis C it is estimated minimally at 1.0 to 1.2 g/kg/day and may range up to 1.5g/kg.

[30] The *Hepatitis C Guidelines* also express that the average energy needs are higher in those with hepatitis C than in the general healthy population. A higher energy diet is said to be normally recommended for hepatitis C infected persons. The *Guidelines* suggest applying a factor of 1.1-1.4 of the Basal Energy Expenditure estimates for a person with hepatitis C. Ms. Sengmueller's testimony was that application of this factor is supportive of her opinion that persons with hepatic disorders have energy needs that are 10-40 per cent higher than those of a healthy person.

[31] The *Hepatitis C Guidelines* were endorsed by the Canadian Association for the Study of the Liver. It is a national association of liver specialists and gastroenterologists. The expert called by Ontario, Dr. Hurowitz, acknowledged it as an authoritative source of clinical advice to Ontario physicians providing treatment for liver disease.

[32] As a gastroenterologist, Dr. Hurowitz's practice includes the diagnosis and treatment of conditions related to the digestive system. In the course of his practice, he sees hundreds of

patients per year with liver disorders. Dr. Hurowitz testified, based on his own experience, the experience of colleagues as known to himself, and his review of the relevant medical literature. Dr. Hurowitz's opinion was that dietary modifications were not required for persons with hepatitis C, except possibly for those with a very advanced disease. His view was that persons with hepatitis C can eat a normal, well-balanced diet, without modification. Dr. Hurowitz testified that the diet for those with chronic hepatitis C falls within the ranges of servings covered by Canada's *Food Guide*, and that this is within his definition of "regular healthy diet".

[33] In his report, dated November 4, 2011, Dr. Hurowitz excerpted several references to diet and liver disease, set out in the *Hepatitis C Guidelines*, to indicate an absence of consensus with regards to advisable dietary modifications for hepatitis C patients. Dr Hurowitz also testified that the studies recommending increased protein and energy for people with hepatitis C were referring to those with very advanced liver disease. It was his opinion that only 10 to 15 per cent of those with hepatitis C fell into this category and required dietary modifications. The applicant submits that the Special Diet Allowance for unintended weight loss, cirrhosis stages 3 and 4, responded appropriately to this condition and was in accordance with the Special Diets Expert Review Committee's (SDERC) recommendation to the Ontario government.

[34] The Tribunal dealt with the conflicting opinions at paras. 15, 21-22 and 24:

> As I outline in greater detail below, the literature filed by the complainants and relied upon by Ms. Sengmueller makes clear that there are increased energy and protein requirements for individuals with chronic hepatitis C in comparison with a regular healthy diet. In my view, the clearly expressed nutritional recommendations contained there are more convincing than the statements of Dr. Hurowitz about his practice and his informal survey, and also more convincing than Ms. Sengmueller's conclusions and evidence about her practice. They support a finding that there is a general recognition of a need for dietary modification in individuals with chronic hepatitis C such as Mr. Martel and Mr. Poloz because of their need for increased protein and energy.
>
> ...
>
> Dr. Hurowitz disagrees with the statements in the Hepatitis C Guidelines, the *Manual of Clinical Dietetics* and elsewhere about increased protein and energy requirements; however, he provided no literature that takes issue with them. He suggests that the studies upon which the recommendations in these sources are based relate only to people at the severe end of the spectrum in terms of liver disease and these are the only circumstances in which dietary changes may be required. He bases his opinion on his academic training, 24 years of clinical experience dealing with liver disorders, discussion of treatment practices with colleagues, and his interpretation of the peer-reviewed literature, including that relied upon by the authors of the guidelines. ...
>
> However, these statements must be considered in light of the clear statements and directions about the level of protein and energy needs of people with the complainants' condition. None of the statements highlighted by the respondent

> contradict the general conclusion clearly expressed in the Hepatitis C Guidelines and elsewhere that protein and energy needs per kg of body weight are above normal levels when individuals have chronic hepatitis C.
>
> ...
>
> In finding discrimination, I am not relying upon or giving weight to the complainant's suggestion that a regular healthy diet consists of the minimum servings in Canada's Food Guide or that the appropriate dietary modification for all individuals with hepatitis C is to eat the maximum servings in Canada's Food Guide. ... I do not find that Ms. Sengmueller's assertion that every person with hepatitis C should eat the maximum servings in Canada's Food Guide is proven on the evidence. Instead, the literature she relies upon suggests that for some people, the amount should be more than that maximum while for others it may be less. What is important, in my view, at this stage of the analysis, is that the evidence supports and individual person's protein and energy intake requirements are generally recognized as higher if they have chronic hepatitis C than if they do not. While the conversion of the recommendations to servings in Canada's Food Guide may be useful in giving patients advice and in making costing assumptions to develop castings for the special diet program, it is unhelpful in analyzing this stage of the test.

[35] The Tribunal was entitled to base its conclusion on the authoritative literature relied upon and adopted by RD Sengmueller, as part of the foundation for her opinion. The Tribunal did not rely on secondary articles that had not been adopted by an expert as authoritative. It was reasonable for the Tribunal to rely on what was before it, for example, in the *Manual of Clinical Dietetics*, despite Dr. Hurowitz's testimony that the literature footnoted in the *Manual*, which he did not produce, provided a limited context for the protein recommendations. Similarly, Dr. Hurowitz pointed to passages in the *Hepatitis C Guidelines* that noted that people with hepatitis C did not have dietary restrictions, or in general should eat a variety of foods from all four groups in *Canada's Food Guide*. These observations are not inconsistent with the summary chart included in the *Hepatitis C Guidelines* nor with the Tribunal's findings. The applicant and Dr. Hurowitz also submitted that it was telling that the literature review conducted and referred to in the *Guidelines* indicated no articles pertaining specifically to hepatitis C and nutritional requirements. This finding underlines the important work done in the *Guidelines* in filling that gap. It was not necessary for the Tribunal to refer to each and every point raised by Dr. Hurowitz. The reasons are sufficient to identify the basis of the decision.

[36] The Tribunal did explain why it did not accept the applicant's submission that the daily protein and energy provided by the range of servings set out in *Canada's Food Guide* (58 GM to 87 GM and 1620 to 2370 kcal) were not persuasive as to whether the protein and energy needs of individuals with hepatitis C are generally recognized as higher than for healthy individuals. *Canada's Food Guide* does not equate either to kilogram of body weight which is the standard measure. The literature relied upon by Ms. Sengmueller, and accepted by the Tribunal, contradicted Dr. Hurowitz's conclusion that protein and energy needs can only be calculated individually and not by reference to ranges. The Tribunal found that individual calculations may

be most accurate, but formulas can be used and are acceptable in designing a large scale social benefit program.

[37] The Tribunal was entitled to either accept or reject the expert testimony it received, in full or in part. It was not bound to define a regular healthy diet as that encompassed by the range of servings set out in *Canada's Food Guide* because both experts recommended diets within those parameters. The explanation given at para. 24, set out above, is reasonable.

[38] The applicant submits that the Tribunal misdirected itself to the SDERC report at step two of the *Ball* test. The SDERC recognized that protein needs of 1.0 g/kg/day or more represent an increase over a regular healthy diet in its evaluation of another condition, chronic wounds and burns. The SDERC also recognized that energy requirements of 25-30 kcal/kg/day represent an increase above a regular healthy diet in reference to its recommendations for stage I, II, and III wounds. These recommendations were made in the context of advising the government on costing special diet allowances and were based on an assumption that the basic amount paid by ODSP and OW would enable the recipient to purchase the minimum servings in Canada's *Food Guide*. The Tribunal was entitled to consider those recommendations and the fact that the government accepted them as providing support for its finding that this type of increase in protein and energy consumption constitutes a <u>modification</u> to a regular healthy diet. This is consistent with the purpose of the special diet allowance as described in paragraphs [21] to [23] of this judgment. The applicant submits that the Tribunal should have also considered the fact that SDERC did not include hepatitis C in the schedule of conditions for which it recommended a special diet. I do not agree that there is an inconsistency here; the Tribunal was relying on SDERC to support its finding with respect to the "modification of diet" and not with respect to the "general recognition" aspect of step two.

[39] Taken as a whole, the information in the *Hepatitis C Guidelines* provides adequate evidentiary support for the Tribunal's conclusion that the daily protein and energy intake requirements for persons with chronic hepatitis C are generally higher than for the healthy population. This finding is sufficient to address the "regular healthy diet" component of the second step in the *Ball* test.

- **General Recognition in the Ontario Medical Community**

[40] The Tribunal found that the *Hepatitis C Guidelines* reflect a general consensus of the Ontario medical community. This conclusion is reasonable. The development of the *Guidelines* was funded by Health Canada's Community Acquired Infections Division. An advisory committee included representatives from a variety of health organizations related to the study and care of liver disease. The *Guidelines* are founded on an extensive literature review, scientific evidence, and best practices. They were reviewed by health professionals practicing in the area and are endorsed by the Canadian Association for the Study of the Liver, the Canadian Liver Foundation and Hepatitis C Society of Canada, among others.

[41] In addition, the Tribunal considered the testimony provided by each of the two experts and concluded, at para. 21:

> However, in my view the clear expression of consensus on diet by the multidisciplinary group that developed the hepatitis guidelines, and that is relied upon by Ms. Sengmueller, is more convincing and I find, on a balance of probabilities, that it reflects what is generally recognized in the Ontario medical community.

[42] The Tribunal also considered Dr. Hurowitz's evidence with respect to his own practice, his informal survey of some of his professional colleagues, and various statements in the literature that suggest eating a balanced diet, without specifically referring to a need for increased protein or energy. He preferred "the clear expression of consensus on diet," relied upon by Ms. Sengmueller. He found that the general statements with respect to a balanced diet were not contradictory to the conclusion in the *Hepatitis C Guidelines* that protein and energy needs per kg of body weight are above normal levels when individuals have chronic hepatitis C.

[43] The Tribunal's conclusion that there is a general recognition in the Ontario medical community that modifications to a regular healthy diet should be made because of the claimant's disability, namely chronic hepatitis C, is reasonable.

Step Three of *Ball*

[44] The third step in *Ball* required the Tribunal to consider whether providing increased protein and energy involved extra costs over and above those of a regular healthy diet. So doing did not require the Tribunal to determine the cost of a regular healthy diet. The Tribunal adopted a reasonable approach in addressing this issue on a comparative basis and with a view to the overall issue of whether disability based discrimination related to special diet allowance has been established.

[45] There is no inconsistency in the Tribunal's rejection of Ms. Sengmueller's assertion that every person with hepatitis C should eat the maximum servings in *Canada's Food Guide* under its stage two analysis, and the Tribunal's reliance on her evidence of the cost differential to provide the maximum number of servings over and above the minimum *Canada's Food Guide* servings under its stage three analysis. The Tribunal stated, at para. 24:

> While the conversion of the recommendations to servings in Canada's Food Guide may be useful in giving patients advice and in making assumptions to develop costings for the special diet program, it is unhelpful in analysing this stage of the test.

[46] Ms. Sengmueller offered her opinion that the additional cost of providing increased protein and energy is $87.90 per month. This amount derives from the SDERC calculation of the special allowance to be paid to persons with stage I and II wounds and burns; a group with comparable protein and energy requirements as persons with chronic hepatitis C. The SDERC's approach assumes that the amount provided to OW and ODSP recipients for basic needs is sufficient to purchase the minimum *Canada's Food Guide* servings, as the starting point for calculating the extra costs associated with special diets. This is a reasonable approach for the Tribunal to adopt for the purpose of considering whether there are additional food costs under step three of *Ball*.

[47] It is noted that the applicant did not offer any evidence on this issue of whether providing increased protein and energy involved extra costs over and above those of a regular healthy diet. The Tribunal concluded that it was not disputed that the increased protein and energy requirements lead to additional food costs as compared with a regular healthy diet. Further, the purpose of the inquiry was only to consider the third step of the *Ball* analysis, not to bind the province to any particular dollar figure by way of a special diet allowance. The Tribunal expressly noted, at para. 30, that the government will have to decide on the appropriate level of cost.

Step Four of *Ball*

[48] The fourth step in *Ball* was clearly met. The former funding of $10.00 per month was disproportionate to the actual costs. Under the present regime, there was no funding available for the additional costs.

Disposition

[49] The applicant raised no issues with respect to the remedy imposed by the Tribunal.

[50] Based on the foregoing reasons, the application for judicial review is dismissed.

[51] Costs were not requested and are not awarded.

J. MACKINNON J.

PARDU J.

LAX J.

Released: November 28, 2012

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SUPERIOR COURT OF JUSTICE

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PARDU, LAX and MACKINNON JJ.

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HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO as represented by the MINISTER OF COMMUNITY AND SOCIAL SERVICES

Applicant

– and –

ROBERT MARTEL and GLEN POLOZ, ONTARIO HUMAN RIGHTS COMMISSION, HUMAN RIGHTS TRIBUNAL OF ONTARIO

Respondents

REASONS FOR DECISION

J. MACKINNON J.
PARDU J.
LAX J.

Released: NOVEMBER 28, 2012