

CONSULTATION DOCUMENT

Definition of “Health Practitioner” under Section 105, *Courts of Justice Act*

A. BACKGROUND AND ISSUE

The Civil Rules Committee:

The Civil Rules Committee makes rules for the Court of Appeal and the Superior Court of Justice in relation to the practice and procedure of those courts in all civil proceedings (see the *Rules of Civil Procedure*). The *Rules of Civil Procedure* (RCP) is a regulation under the *Courts of Justice Act* (CJA). The Civil Rules Committee may also make recommendations to the Attorney General of Ontario on amendments to the CJA. The Committee is composed of members from the judiciary, the bar and the Ministry of the Attorney General.

Issue for Consultation:

The Civil Rules Committee is interested in hearing from stakeholders on whether to recommend an expansion to the definition of “health practitioner” under section 105 of the CJA.

Section 105 of the CJA indicates that a court may order a party to an action to undergo a physical or mental examination by a “health practitioner”. There is concern from some members of the judiciary about the scope of the definition of “health practitioner” under this section. Section 105 states:

Physical or mental examination

- 105.(1) In this section, “health practitioner” means a person licensed to practise medicine or dentistry in Ontario or any other jurisdiction, a member of the College of Psychologists of Ontario or a person certified or registered as a psychologist by another jurisdiction.
- (2) Where the physical or mental condition of a party to a proceeding is in question, the court, on motion, may order the party to undergo a physical or mental examination by one or more health practitioners.
- (3) Where the question of a party’s physical or mental condition is first raised by another party, an order under this section shall not be made unless the allegation is relevant to a material issue in the proceeding and there is good reason to believe that there is substance to the allegation.
- (4) The court may, on motion, order further physical or mental examinations.

(5) Where an order is made under this section, the party examined shall answer the questions of the examining health practitioner relevant to the examination and the answers given are admissible in evidence.

Some judges suggest that the definition of “health practitioner”, which is currently limited to those licensed to practise medicine, dentistry or psychology, is too narrow. As a result, some judges have relied on the inherent jurisdiction of the Court to order examinations by professionals who fall outside the definition. Other judges, however, have refused to do so, citing the definition in the section.

Recent Case Law:

The Superior Court (Divisional Court) recently affirmed its inherent jurisdiction to order physical or mental examinations by non-health practitioners under the CJA in *Ziebenhaus v. Bahlieda*, 2014 ONSC 138.

In this case the Court considered two separate appeals of interlocutory orders which considered whether a judge of the Superior Court has the authority to order that a party be examined by a non-health practitioner.

In both cases, the plaintiffs had been ordered to be examined by non-health practitioners. In the *Ziebenhaus* Order, the plaintiff had been ordered to undergo an assessment by a certified vocational evaluator. In the parallel order (“the Jack Order”), the plaintiff, Scott Jack, had been ordered to attend a functional abilities evaluation by a chiropractor.

The Court held that it has inherent jurisdiction to order examinations by a non-health practitioner to further trial fairness and justice (that is, to allow the defendant to meet the plaintiff’s case), and that such an exercise of jurisdiction fills a gap in the current legislative framework. The Court indicated, however, that the Court’s authority to invoke its inherent jurisdiction is to be used sparingly, and only in a clear case in which justice and fairness compel such recourse.

The Court upheld the order for a vocational assessment because the report was necessary for the defendant to address the plaintiff’s case, whereas the order for the functional abilities evaluation was set aside because the defendants failed to demonstrate that such an assessment would be necessary for trial fairness and justice.

The Court of Appeal has received a motion seeking leave to appeal the decision. If leave is granted, the Court of Appeal may provide further guidance on the Court’s inherent jurisdiction to order examinations by non-health practitioners.

In the interim, given interest from members of the judiciary to examine this issue, the Civil Rules Committee would like to consult with stakeholders on whether to expand the definition of “health practitioner” under section 105, and if so, how to expand the definition.

B. CONSULTATION QUESTIONS

Question 1:

Should the definition of “health practitioner” under Section 105 of the CJA be expanded?

Expanding the definition may make it easier for parties in a civil action to obtain orders for physical or mental examinations by a wider range of professionals. On the other hand, an expansion of the definition could result in increased costs for parties. There is also the question of whether expanding the definition to capture additional professionals would, directly or indirectly, place additional costs or demands on the health care system.

For the purposes of comparison, definitions of “health practitioner” or the equivalent in other jurisdictions are provided in an appendix to this memo. Several provinces have similar definitions to Ontario’s, for example, Prince Edward Island and the Northwest Territories. Other provinces, including Alberta and British Columbia, have definitions which appear to capture a broader range of professionals who could perform court-ordered examinations.

The Civil Rules Committee would appreciate hearing views on whether to expand the definition in the CJA, and what issues should be considered if the definition is expanded.

Question 2:

How should the definition be expanded?

If stakeholders recommend expanding the definition, the Civil Rules Committee would appreciate receiving feedback from stakeholders on how this could be done. There are several different options for expanding the definition. Some of these options are featured below.

Option #1: Include all regulated health professions under the *Regulated Health Professions Act, 1991*

One option could be to include all health professions that are regulated under the *Regulated Health Professions Act, 1991*, similar to the approach taken in the *Health Care Consent Act, 1996* (see section 2(1) of that Act):

“health practitioner” means a member of a College under the *Regulated Health Professions Act, 1991*...

This definition includes health practitioners captured by the definition in section 105(1) of the CJA, as well as members of over 20 other regulated health professions. These regulated professions are:

- Audiology and Speech-Language Pathology
- Chiropractic
- Chiropractic
- Dental Hygiene
- Dental Technology
- Dentistry
- Denturism
- Dietitians
- Kinesiology
- Massage Therapists
- Medical Laboratory Technology
- Medical Radiation Technology
- Medicine
- Midwifery
- Nursing
- Occupational Therapy
- Opticianry
- Optometry
- Pharmacy
- Physiotherapy
- Psychology
- Respiratory Therapy
- Speech-Language Pathology
- Traditional Chinese Medicine

Adopting this approach would expand the current definition of health practitioner considerably. However, even with such an expanded definition, it would appear that some professionals, such as a certified vocational evaluator, as considered in *Ziebenhaus*, would be excluded.

Option #2: Define the scope of the definition (expand CJA definition, but do not include all regulated health professions)

Another approach would be to expand the current CJA definition but include a more limited list of practitioners or professionals. This would involve specifying which professions would be included under an expanded definition. For example:

“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 Nurses of Ontario who holds a certificate of registration as a registered nurse in the extended class,
- (d) a member of the College of Psychologists of Ontario,
- (e) a member of the College of Physiotherapists of Ontario,
- (f) a member of the Ontario College of Social Workers and Social Service Workers.

An example of this approach can be found in Alberta’s *Rules of Court*, which apply to the Court of Queen’s Bench and the Court of Appeal of Alberta (see Appendix for the

full rule). The rule states that the Court may order that a person submit to a physical or mental examination by a “health care professional,” which is defined in an appendix to the rules as:

A person entitled to practise a profession as:

- (i) a member of the College of Physicians and Surgeons of Alberta under the *Health Professions Act*,
- (ii) a chiropractor under the *Health Professions Act*,
- (iii) a dentist under the *Health Professions Act*,
- (iv) an occupational therapist under the *Health Professions Act*,
- (v) a physical therapist under the *Physical Therapy Profession Act*,
- (vi) a psychologist under the *Health Professions Act*, or
- (vii) a registered nurse under the *Health Professions Act*,

If stakeholders recommend this option, the Civil Rules Committee would appreciate input on the following questions:

- Which professions/practitioners should be included in a defined list of “health care practitioners”?
- Or, how could this list be determined? Are there principled criteria on which to assess who should be included or excluded?
- Should this list be specified in the CJA or in the RCP?

An example of a list being prescribed in the rules, rather than in the statute, can be found in Alberta. The definition of “health care professional” is defined in Alberta’s *Rules of Court* rather than in the statute (the *Judicature Act, RSA 2000*) (see appendix for the definition).

An approach for Ontario could be to specify in the RCP, rather than the CJA, who would be considered a “health practitioner” for the purposes of section 105. For example, it could be specified in section 105 that a “health practitioner” under the section is defined as someone “prescribed under the Rules of Civil Procedure”. Listing the included professions under the RCP would provide greater flexibility to the Civil Rules Committee to amend the list in the future.

Option #3: Specify that the Court may order examination by a “qualified person”

Another approach could be to introduce an amendment that would allow the Court to order an examination under section 105 by a “health practitioner *or other qualified person*” (italicized would be added).

This approach is taken in British Columbia’s *Supreme Court Civil Rules*, which specifies that an examination may be done by a “medical practitioner or other qualified person”.

The Court would have discretion to determine who would be a “qualified person” to conduct an examination.

If this approach is taken, it may be necessary to specify the circumstances under which the Court may order an examination by another “qualified person”. For instance, in line with the *Ziebenhaus* decision, it could be specified that, an examination by another “qualified person” may be ordered if the Court determines that it is in the “interests of trial justice and fairness” to do so, (e.g. without the examination, the defendant could not adequately meet the plaintiff’s case at trial).

If stakeholders recommend this option, the Civil Rules Committee would appreciate feedback on the following question:

- In addition to amending the definition of “health practitioner” in section 105, should the section be further amended to provide guidance on when a court may order an examination by a “qualified person” (e.g. in cases where trial justice and fairness requires it)?

APPENDIX

COMPARISON CHART: ORDERS FOR PHYSICAL OR MENTAL EXAMINATIONS AND DEFINITIONS OF HEALTH PRACTITIONER (OR EQUIVALENT)

Jurisdiction	Legislation	Provision
ON	<i>Courts of Justice Act, RSO 1990, c. C43</i>	<p>Physical or mental examination Definition 105.(1) In this section,</p> <p style="padding-left: 40px;">“health practitioner” means a person licensed to practise medicine or dentistry in Ontario or any other jurisdiction, a member of the College of Psychologists of Ontario or a person certified or registered as a psychologist by another jurisdiction</p>
BC	<i>Supreme Court Civil Rules B.C. Reg. 168/2009 (under the Supreme Court Act, RSBC 1996, c. 443)</i>	<p>Rule 7-6: Order for medical examination</p> <p>(1) If the physical or mental condition of a person is in issue in an action, the court may order that the person submit to examination by a medical practitioner or other qualified person, and if the court makes an order under this subrule, the court may also make</p> <p style="padding-left: 20px;">(a) an order respecting any expenses connected with the examination, and</p> <p style="padding-left: 20px;">(b) an order that the result of the examination be put in writing and that copies be made available to interested parties of record.</p> <p>*Note: no definition of “medical practitioner” provided</p>
	<i>Medicare Protection Act, RSBC 1996, c 286</i>	<p>Section 1 - Definitions</p> <p>“health care practitioner” means a person entitled to practise as</p> <p style="padding-left: 20px;">(a) a chiropractor, a dentist, an optometrist or a podiatrist in British Columbia under an enactment, or</p> <p style="padding-left: 20px;">(b) a member of a health care profession or occupation that may be prescribed</p>
AB	<i>Alberta Rules of Court, Alta Reg 124/2010 (under the Judicature Act)</i>	<p>Medical examinations</p> <p>5.41(1) The parties may agree that the mental or physical condition of a person is at issue in an action and agree on a health care professional to conduct a medical examination.</p> <p>(2) On application, the Court may in an action in which the mental or physical condition of a person is at issue do either or both of the following:</p>

		<p>(a) order that a person submit to a mental or physical medical examination;</p> <p>(b) appoint a health care professional to conduct a medical examination.</p> <p>(Defined in Appendix)</p> <p>“health care professional” means</p> <p>(a) a person entitled to practise a profession as</p> <p>(viii) a member of the College of Physicians and Surgeons of Alberta under the <i>Health Professions Act</i>,</p> <p>(ix) a chiropractor under the <i>Health Professions Act</i>,</p> <p>(x) a dentist under the <i>Health Professions Act</i>,</p> <p>(xi) an occupational therapist under the <i>Health Professions Act</i>,</p> <p>(xii) a physical therapist under the <i>Physical Therapy Profession Act</i>,</p> <p>(xiii) a psychologist under the <i>Health Professions Act</i>, or</p> <p>(xiv) a registered nurse under the <i>Health Professions Act</i>,</p>
NS	<i>Nova Scotia Civil Procedure Rules, Royal Gaz, Nov 19, 2008</i>	<p>Medical Examinations and Testing</p> <p>Rule 21</p> <p>21.02(1) A party who, by a claim, defence, or ground, puts in issue the party’s own physical or mental condition may be ordered to submit to a physical or mental examination by a medical practitioner.</p> <p>Definitions</p> <p>“medical practitioner” has the same meaning as in the Medical Act as regards a person registered under that legislation and includes a person registered under similar legislation in another jurisdiction;</p>
	<i>Medical Act, SNS 1995-96, c 10</i>	<p>Section 3: Interpretation of “medical practitioner”</p> <p>The words “duly qualified medical practitioner”, “duly qualified practitioner”, “legally qualified medical practitioner”, “legally qualified physician”, “physician” or any like words or expressions implying a person recognized by law as a medical practitioner or member of the medical profession in the Province, when used in any regulation, rule, order or by-law made pursuant to an Act of the Legislature enacted or made before, at or after the coming into force of this Act, or when used in any public document, includes a person registered in the Medical Register, Temporary Register, Defined Register or the Medical Education Register who holds a licence.</p>
MAN	<i>Court of Queen’s Rules, Man Reg 553/88</i>	<p>Motion for medical examination</p> <p>33.01 A motion by an adverse party for an order under section 63 of <i>The Court of Queen’s Bench Act</i>, for the physical or mental examination of a party whose physical or mental</p>

		<p>condition is in question in a proceeding shall be made on notice to every other party.</p> <p>Contents of order 33.02 The order may specify the time, place and purpose of the examination and shall name the practitioner or practitioners by whom it is to be conducted.</p>
	<i>Court of Queen's Bench Act, CCSM, c C280</i>	<p>"Health care practitioner" 63(1) In this section, "health care practitioner" means a person licensed, certified or registered to practise in the health sciences field whether in Manitoba or elsewhere.</p> <p>Physical or mental examination 63(2) Where the physical or mental condition of a party is in question, the court, on motion, may order the party to undergo a physical or mental examination by one or more health care practitioners.</p>
SAS	<i>The Queen's Bench Act, 1998, c Q-1.01</i>	<p>Examination of party by medical practitioner 36(1) In an action brought to recover damages or other compensation with respect to bodily injuries sustained by any person, a judge may order the injured person to be examined by one or more duly qualified medical practitioners who are not being called by a party as witnesses at the trial of the action.</p>
	<i>Queen's Bench Rules, Sask Gaz, December 27, 2013, 2684</i>	<p>Part 5: Disclosure of Information Division 4 Medical Examinations and Reports 5-49 In an action brought to recover damages or other compensation with respect to bodily injuries sustained by any person, a judge may order the injured person to be examined by one or more duly qualified medical practitioners who are not being called by a party as witnesses at the trial of the action.</p> <p>Part 17: Definitions "duly qualified medical practitioner" means a person registered pursuant to <i>The Medical Profession Act, 1981</i>, other than a person registered pursuant to section 42.1 of that Act, whose registration is not under suspension.</p>
QC	<i>Civil Code of Procedure, CQLR, c C-25</i>	<p>§ 2. — Medical Examination</p> <p>399. In any case susceptible of appeal, when there is in issue the physical or mental condition of any party or of the person who suffered the injury which has given rise to the action, a party may summon at his expense such person by writ of <i>subpoena</i> to have a medical examination. Such writ must indicate the place where, and the day and hour when the person summoned must attend and the names of the experts entrusted with making the</p>

		<p>examination; it must be served at least 10 days before the date fixed for the examination, with a notice to the attorney of the person summoned.</p> <p>If the person examined so wishes, experts chosen by him may attend such examination.</p> <p>The judge may however, on motion, for reasons considered valid, quash a writ issued under this article or amend its content.</p> <p>416. The judgment appointing an expert must state clearly the duties of the person appointed and the time within which he must file his report.</p> <p>The clerk must, without delay, send to the person appointed a copy of the judgment</p> <p>Note: more information on the process for appointing an expert is provided in ss. 417-424. No definition of expert provided.</p>
QC (cont'd)	<i>Code of Ethics of Physicians, RRQ 1981, c M-9, r 4</i>	<p>Rule 1: Definitions</p> <p>1.01. In this Regulation, unless the context indicates otherwise, the following words mean:</p> <p>(a) «Corporation»: the Collège des médecins du Québec;</p> <p>(b) «physician»: whoever is entered on the roll of the Corporation.</p>
	<i>Medical Act, CQLR, c M-9</i>	<p>Section 1: Definitions</p> <p>(c) “physician” or “member of the Order”: any person entered on the roll</p> <p>(g) “roll”: the list of the members in good standing of the Order, prepared in accordance with the <u>Professional Code</u> and this Act</p>
PEI	<i>Judicature Act, RSPEI 1988, c J-2.1</i>	<p>Rules of Court</p> <p>35(1) Subject to the approval of the Lieutenant Governor in Council, the Rules of Court Rules Committee may make rules of court in relation to the practice and procedure of the Court of Appeal and the Supreme Court, and may make rules, even though they alter, or conform to, the substantive law</p> <p>(x) ordering a party to undergo a physical or mental examination by a medical practitioner</p> <p>48. (1) In this section, “health practitioner” means a person licensed to practise medicine or dentistry in Prince Edward Island or any other jurisdiction, a psychologist registered under the psychologists Act R.S.P.E.I. 1988, Cap. P-27.1 or a person</p>

		<p>certified or registered as a psychologist by another jurisdiction.</p> <p>(2) Where the physical or mental condition of a party to a proceeding is in question, a court, on application, may order the party to undergo a physical or mental examination by one or more health practitioners.</p>
NB	<i>Rules of Court, NB Reg 82-73</i>	<p>Discovery - Rule 36</p> <p>36.01 Definition For the purposes of this rule, medical practitioner means a person licensed to practice medicine or dentistry in the jurisdiction where he practices and includes a medical or dental officer of the Canadian Armed Forces</p> <p>36.02 Who May be Examined (1) Where the physical or mental condition of a party is in issue, the court may order him to submit to a physical or mental examination, or both.</p>
NFLD	<i>Rules of the Supreme Court, 1986, SNL 1986, c 42, Sch D (under the Judicature Act)</i>	<p>Rule 34 Medical Examination</p> <p>34.01. (1) Where the physical or mental condition of a party is in issue, the Court may, at any time on the application of an opposing party or on its own motion, order the party to submit to a physical or mental examination by a qualified medical practitioner.</p> <p>Note: no definition of “qualified medical practitioner” is provided in the Rules or the Judicature Act.</p>
	<i>Medical Act, SNL 2011, c M-4.02</i>	<p>Definitions</p> <p>2 (g) “medical practitioner” means a person who is registered under this Act or who holds or has held a licence.</p> <p>Note: there was no reference to the Medical Act in the Rules, however, this may be one possible interpretation</p>
YK	<i>Rules of Court, YOIC, 2009/65, Part 2 (under the Judicature Act)</i>	<p>Rule 30 – Physical Examination and Inspection</p> <p>Order for medical examination</p> <p>(1) Where the physical or mental condition of a person is in issue in a proceeding, the court may order that the person submit to examination by a medical practitioner, a psychologist, physio-therapist, occupational therapist or other similarly qualified person, and if the court makes an order, it may make</p> <ul style="list-style-type: none"> (a) an order respecting any expenses connected with the examination, and (b) an order that the result of the examination be put in writing and that copies be made available to interested parties.

<p>NWT</p>	<p><i>Rules of the Supreme Court of the Northwest Territories, NWT Reg 010-96 (under the Judicature Act)</i></p>	<p>Part 17 – Medical Examination</p> <p>271. In this part “health practitioner” means a person licensed to practice medicine or dentistry in any jurisdiction or a person certified or registered as a psychologist in any jurisdiction.</p> <p>272. (1) Where the physical or mental condition of party to a proceeding is in question, the Court, on application, may order the party to undergo a physical or mental examination by one or more health practitioners.</p> <p>Note: this legislation distinguishes between health practitioners for the purpose of an order, and medical practitioners who are called as expert witnesses in section 128. Medical practitioners are those persons who fall within the Medical Profession Act.</p>
<p>NUN</p>	<p>(Same as Northwest Territories)</p>	