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## CMA GUIDELINES ON JUDICIAL ADVOCACY

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### CMA Guidelines on Judicial Advocacy

The CMA's stance on intervention and judicial advocacy is to bring an evidence-based perspective to assist in relation to the decision-making of issues at hand.

CMA's strategic plan and guiding principles<sup>1</sup> opens the possibility that there may be circumstances when **legal advocacy**, and in particular **judicial advocacy**,<sup>2</sup> may be leveraged strategically and proactively as a further tool in CMA's advocacy toolbox to bring a non-partisan, evidence-based perspective to the courtroom that would further the organization's vision for "a vibrant professional and a healthy population".

### Purpose and Scope of Policy

Given CMA 2020, and informed by knowledge of past experiences, the purpose of this policy is to provide guidelines to assist with decision making as to whether CMA should use legal action, as part of its advocacy toolbox, to move CMA's work forward on a cause or issue.

### Cases Deemed Appropriate for CMA Judicial Advocacy – General Principles

#### 1. Stage and Venue of Proceedings

- a) Generally, CMA will only engage in a proposed case at an appellate level or in the highest forum in which a matter is likely to be finally decided.
- b) Exceptionally, the CMA may engage in a proposed case at a lower court or a court of first instance where:
  - i) circumstances justify engagement, such as an invitation from the court or where physicians' expertise is necessary to create a trial record that supports the CMA's policy position(s) or provides added relevant information that is not otherwise being provided or would highlight a critical issue that requires attention or would attract the attention of relevant parties.

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1 CMA's Guiding Principles are: accountability, transparency, engagement and impact.

2 In these *Guidelines*, "legal advocacy" refers to the law or spectrum of legal tools, reasoning, processes and mechanisms (e.g., brief submissions to Parliamentary committees) that may be used to advance CMA's advocacy goals. As a subset of "legal advocacy," "judicial advocacy" is the process of initiating, intervening or otherwise engaging in a legal case (e.g., by serving as an expert witness) that has the potential to effect significant change in the law, interpretation of the law or legal practice as it relates to issues and causes of particular importance for the CMA.

- c) Exceptionally, CMA may leverage international fora (e.g., United Nations treaty bodies) where involvement could help advance a specific cause or issue being championed by the CMA.

## 2. CMA's Role in Proceedings

With some rare exceptions<sup>3,4</sup>, the CMA will only assume the role of intervener<sup>5</sup> in a proposed case. The CMA will intervene where the CMA may bring a non-partisan, evidence-based analysis to an issue and where there are compelling reasons for doing so, considering the evaluation criteria contained in the **Reference Guide** in **Appendix 1** of this policy.

## 3. Relevance to Existing CMA Policy

- a) The CMA may engage in a proposed case where engagement would constitute a significant contribution to the consideration of the issue or issues involved and only when the position sought to be advanced is:
  - i. supported by and consistent with previously adopted policy of CMA; or
  - ii. a matter of compelling public or professional interest which the Board of Directors then adopts as CMA policy following appropriate consultation.
- b) Where there is CMA policy that is clear, relevant to the proposed case and a matter of record, the policy should be cited and explained (e.g., in factum or affidavit).
- c) If the CMA's proposed stance in a case proceeding supports a position which the CMA has not previously adopted as policy, the CMA Board of Directors must adopt the position as policy before authorizing the activity.

## 4. Issue of National, Special and/or Unifying Significance to Profession

- a) The CMA will generally only engage in a proposed case of special and unifying significance to the medical profession.
- b) The CMA will not engage in a proposed case where the matter is only of local or regional concern or of a private nature with no public interest or compelling professional or public policy component.

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<sup>3</sup> The CMA may initiate or engage in a proposed case as an applicant, appellant or other party where there are strong and exceptional justifications for doing so, considering the factors (i.e., risks and opportunities) set out in this policy and the particular facts of the proposed case. Given the investment of time and effort, proposals to initiate or engage in a proceeding as a party must (at minimum) be evaluated as "strongly favours" in each criterion in the **Reference Guide** found in **Appendix 1** to this policy.

<sup>4</sup> Where it is appropriate and called upon to do so, the CMA may provide expert testimony as per the criteria set out in this policy. Given the investment of time and effort, proposals inviting the CMA to serve as an expert witness must (at minimum) be evaluated as "strongly favours" in each criterion in the **Reference Guide** found in **Appendix 1** to this policy.

<sup>5</sup> Where the CMA decides to act as an intervener, it must apply for intervener status with the Court. The Court in its discretion can choose to grant intervener status if it believes that an intervener has an interest in the issues before the Court and has a unique and useful perspective on the legal issues. CMA would file an affidavit in support of its application to intervene which would set out CMA's interest in the issues and proposed arguments if intervener status were granted. The affidavit is filed in the name of a particular individual.

Second, if intervener status is granted, CMA must file a document of written arguments called a "factum" on the issues before the Court. Interveners generally do not file new evidence before the Court but take the record before the Court as presented by the main parties to the proceeding. The Court may decide to grant an intervener the right to present oral arguments, but these are generally shorter than for the main parties. Throughout the application for intervention process and most particularly in the time period between the actual Court hearing and the Court's decision, interveners are generally cautioned to be discrete and circumspect in their public comments on the issues before the Court.

## 5. Potential Case Outcome(s) and Effect(s)

Prior to engagement, the CMA must consider the potential impact(s) (both favourable and unfavourable) of the legal precedent that may set by the proposed case on members of the medical profession and patients.

## 6. Collaboration with Provincial/Territorial Associations, Affiliates and other Organizations

- a) In the spirit of community building and collaborating with those who share our vision, the CMA welcomes opportunities to collaborate with provincial or territorial associations, affiliates and other organizations provided that these Guidelines are followed and that the other organizations
  - i. share positions on the issues at stake in the case that are consistent with CMA policy.
  - ii. can follow through on tasks, deadlines and communication needs related to collaboration.
- b) While not mandatory, CMA would expect mutual assistance in funds and in kind when it collaborates with another organization (in relation to a judicial proceeding) or is asked to intervene.

## 7. Reputational Risk and Stakeholder Relations Implications

The CMA will consider as a general principle whether involvement in a proposed case:

- a) may present the CMA with reputational risk(s) (e.g., inconsistent with mission and values, controversial, too political).
- b) may impact relations with other stakeholders, including provincial/territorial medical associations, associates, affiliates and other organizations.

## 8. Financial and Resource Implications

The CMA will consider as a general principle the financial and resource implications of involvement in a proposed case such as the affordability of the proceeding, or competing demands for limited resources and staff availability. To the extent possible, the CMA will seek pro bono external legal assistance.

## Authorization to Engage in Judicial Advocacy

CMA's Senior Management Team will generally perform a preliminary analysis of the proposal to engage in a proposed case and may use the **Reference Guide** appended to these guidelines as a decision-making tool (see **Appendix 1**). The decision to engage in a proposed case must be ultimately authorized by the CMA Board of Directors. Once the Board has authorized the application, CMA staff will follow established internal protocol and procedures in the preparation of the required documentation according to the appended Working Draft Protocol (see **Appendix 3**). CMA staff will regularly provide the CMA Board with updates of the Court proceeding.

**Appendix 1: Reference guide for determining if appropriate for CMA to engage in judicial advocacy on a matter, in accordance with CMA Guidelines on Judicial Advocacy**

	<i>Degree to which criterion favours proposed judicial advocacy initiative</i> (please provide reasons for choice)			
	<i>Strongly favours<sup>6</sup></i>	<i>Somewhat favours</i>	<i>Mildly favours</i>	<i>Does not favour</i>
<b><i>Stage and venue of proceedings</i></b>				
Court of highest level? If yes, mark as “strongly favours”				
Appellate level? If yes, mark as “somewhat favours”				
If not court of highest level or other appellate court, indicate jurisdiction				
<b><i>Relevance of matter to existing CMA policy</i></b>				
Is matter consistent with previously adopted policy?				
Is matter of compelling public interest that may be adopted as policy?				
Is matter of compelling professional interest that may be adopted as policy?				
<b><i>Issue of National, Special or Unifying Significance to the Profession</i></b>				
Does matter have impact beyond local/regional level?				
Does matter have special or unifying significance for medical profession?				

<sup>6</sup> At minimum, “strongly favours” must be checked off on all criteria in the **Reference Guide found in Appendix 1 to this policy** for proposed cases where the CMA is considering the role of applicant, appellant, other party or expert witness.

<i>Collaboration or Request for Involvement</i>				
Co-intervention?				
Other request for involvement?				
<i>Practical Considerations</i>				
Financial implications				
Reputational risk				
Stakeholder relations implications				

## **Appendix 2: Contents of Request for CMA to Intervene<sup>7</sup>**

1. Requests for CMA to intervene in court proceedings can arrive from multiple sources (internally – CMA Board, CMA provincial or territorial associations, affiliates, another organization, an individual member, etc.). CMA’s Legal Services Department may also monitor judicial developments and identify cases of special interest to CMA.
2. Unless there are exceptional circumstances, the request for CMA to intervene in a court proceeding shall contain the following:
  - (i) The style or caption of the case, identification of the last court to render a decision in the case and the court in which it is proposed to intervene. A copy of the decision or order appealed from, any accompanying reasons and other relevant documentation must be attached to (or linked from) the proposal;
  - (ii) The date by which the proposed application for leave to intervene and factum must be filed;
  - (iii) The issues before the Court and potential outcomes, dissenting views and likelihood of success, including policy implications for CMA depending on the various outcomes;
  - (iv) The position sought to be advanced on CMA’s behalf and how this position is consistent with existing CMA policy. If there is no existing CMA policy, the request should state why CMA should adopt the policy prior to intervention;
  - (v) If the request relates to a local or regional matter, an explanation of how the position to be taken is not inconsistent with CMA policy and the broader interests and concerns of CMA;
  - (vi) Consultations undertaken, if any, on why the matter warrants CMA intervention as a compelling issue of public policy and special interest to the medical profession;
  - (vii) A list of other organizations that might have an interest in the intervention or co-intervening with CMA;

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<sup>7</sup> This guideline on the contents of a proposal/request is specific only to interventions. If CMA contemplates expanding its role in judicial advocacy to that of an applicant or other party, separate proposal guidelines for these roles will have to be drafted.

- (viii) Disclosure of any personal or professional interest, in the matter on the part of any individual or organization participating in the decision to seek the Board of Directors' authorization to intervene; and
  - (ix) Budget development.
3. Where the request to intervene arises in a case where there is no existing CMA policy on the issue, the party making the request should demonstrate the urgency and importance of adopting the policy position to be advanced.

### **Appendix 3: Working Draft Protocol and Procedures for Court Intervention Document Preparation**

- CMA staff will prepare the application documents for leave to intervene in concert with expert litigation legal counsel.
- Depending on the issues before the Court, the President or Chair or the CMA Board may review the contents of the application documents for leave to intervene and the actual factum prior to filing with the Court. Alternatively, the application documents and factum will be shared as information items with the CMA President and Board after filing. The decision to obtain the President and/or Chair and/or Board approval or not prior to filing lies with the CMA CEO.
- CMA staff may also consult with the President and Chair on the choice of individual filing the affidavit (called the "affiant") on CMA's behalf. The affiant will in most circumstances be a physician, usually at the elected level, with experience and expertise on the issues before the Court.
- All CMA Departments will consult with and co-ordinate with the CMA Legal Department. For example, the content of any Communication Strategy documents (e.g. press releases, media alerts, news articles, etc.) as part of the court proceeding must be consistent with the contents of CMA's application for leave to intervene documents and factum.

Approved by the CMA Board of Directors Dec 2018