



The Social Benefits Tribunal

Ontario

2007 / 2008 Annual Report

**Ministry of Community
and Social Services**

Minister's Office

Hepburn Block
Queen's Park
Toronto ON M7A 1E9
Tel.: (416) 325-5225
Fax: (416) 325-1498

**Ministère des Services
sociaux et communautaires**

Bureau de la Ministre

Édifce Hepburn
Queen's Park
Toronto (Ontario) M7A 1E9
Tél. : 416 325-5225
Télec. : 416 325-1498



**TO THE LIEUTENANT GOVERNOR
OF THE PROVINCE OF ONTARIO**

MAY IT PLEASE YOUR HONOUR:

For the information of Your Honour and the Legislative Assembly, I have the privilege of presenting the Annual Report of the Social Benefits Tribunal for the 2007-2008 fiscal year.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read 'm meilleur'.

Madeleine Meilleur
Minister of Community and Social Services

**Social Benefits
Tribunal**

Office of the Chair

1075 Bay Street 7th Floor
Toronto ON M5S 2B1
Telephone: 416/326-0978
Facsimile: 416/326-5135

**Tribunal
de l'aide sociale**

Bureau du Président

1075 rue Bay 7^e étage
Toronto ON M5S 2B1
Téléphone: 416/326-0978
Télécopieur: 416/326-5135



To the Honourable Madeleine Meilleur
Minister of Community and Social Services
Province of Ontario

Minister:

It is my pleasure to present the Annual Report of the Social Benefits Tribunal for the fiscal year ending March 31, 2008.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Frank Miclash". The signature is written in a cursive style with a large initial "F".

Frank Miclash
Acting Chair
Social Benefits Tribunal

Table of Contents

Chair's Message	1
Social Benefits Tribunal Membership	2
Interesting Court Decisions	12
Interesting Tribunal Decisions	17
Statistical Tables	20

Chair's Message

I was truly honoured to become the Acting Chair of the Social Benefits Tribunal and Social Assistance Review Board in March of 2008. After the Chair, Chisanga Puta-Chekwe, left on an extended leave of absence Vice Chair Mary Lee served as Acting Chair for two months. I am grateful for all the work that she did and for her assistance to me during my first months in this position. I look forward to my continued work with members, staff and stakeholders as we try to provide the best service for all parties.

Since assuming the role of Acting Chair, I have been extremely impressed with the enthusiasm, dedication and hard work of the staff at the Tribunal. Their diligence and care for the work that we do have been obvious to me and I commend them for their professionalism.

I am pleased to report that as we head into fiscal year 2008-09, we have been given extra funding by the government to work on eliminating our backlog. To this end, for the next two years, we will have an increase in the number of part-time members and in our Tribunal staff. With these additions we are even more determined to decrease the length of time that people have to wait for their hearings as this is in the best interests of all parties.

The Tribunal continues to offer early resolution opportunities to parties in appropriate cases and we look forward to expanding this program in the future. We also continue to develop our procedures in the area of human rights. During this past fiscal year a human rights issue was raised in 187 appeals. Of these, 107 were raised in the context of a disability appeal with 61 in relation to special diet cases. The remaining spanned a wide variety of topics.

During this past year the Tribunal released 7472 decisions, up from 6083 the previous year. The number of disability cases continues to grow. Last year 76% of issues raised under the *Ontario Disability Support Program Act* were concerned with whether individuals could be said to be persons with a disability. This year that figure has risen to 84.5% of ODSP cases.

In my first few months I have begun to meet with stakeholders as I value their input and feedback. I look forward to meeting many more as I travel throughout the province.

Let me close by reiterating the fact that it is truly a rewarding experience to have the opportunity to serve the needs of Ontario citizens with such dedicated people both here at the Tribunal and with our stakeholders throughout the Province.

Frank Miclash
Acting Chair

Social Benefits Tribunal Membership

Chair *

Chisanga Puta-Chekwe, Member

Chisanga Puta-Chekwe attended Sir William Borlase School in Marlow, Buckinghamshire, before studying law at the University of Birmingham in England. A Rhodes Scholar, he received a Master of Laws degree from the University of London, and BA and MA degrees in philosophy, politics and economics from the University of Oxford. Chisanga is a solicitor of the Supreme Court (England and Wales), and an Advocate of the High Court for Zambia. Chisanga was a partner in the firm Lloyd Jones and Collins in Zambia from 1980 to 1986, and litigated a number of human rights cases.

From 1986 until 1989, he was vice-president of Meridien International Bank in London, England. He then worked as an international development consultant, mostly with the Canadian International Development Agency in Ottawa from 1989 until 1994.

In 1994 he served as an adjudication officer and United Nations observer support officer monitoring the South African election, and in 1996 served as election supervisor in Bosnia and Herzegovina.

He spent six years with the Ontario Criminal Injuries Compensation Board, serving as a part-time member from 1991 until 1994, and as Chair of the Board from 1994 until 1997.

He served as Executive Director of Oxfam Canada between 1997 and 1998.

Chisanga was the founding Chair and CEO of the Ontario Rental Housing Tribunal. He served in that capacity until September 2004 when he became Chair and CEO of the Social Benefits Tribunal.

(September 2004 - August 2012)

* Effective January 1, 2008 Chisanga Puta-Chekwe took a leave of absence from his duties as Chair of the Social Benefits Tribunal.

Vice-Chairs

Mary Lee, Member

Mary Lee holds a Master of Laws from Osgoode Hall Law School and a Bachelor of Arts from the University of Toronto. Prior to joining the Tribunal Mary was a Senior Manager with the Ministry of Training, Colleges and Universities Student Assistance Program, GTA Regional Vice Chair at the Ontario Rental Housing Tribunal, and Registrar/ Chief Administrative Officer at the Criminal Injuries Compensation Board.

(January 2007 – January 2009)

Beverly Moore, Member

Beverly Moore graduated with a Bachelor of Arts degree from Wilfrid Laurier University and a law clerk's certificate from Fanshaw College. She worked for over 10 years in community legal clinics. She is an experienced adjudicator who has served as Vice Chair at the Social Assistance Review Board, Vice Chair and Interim Chair at the Ontario Rental Housing Tribunal and Member of the Immigration and Refugee Board before joining the Social Benefits Tribunal in October 2006.

(October 2006 – October 2009)

Robert Murray, Member

Robert Murray received his Bachelor of Arts degree in political science and history from Lakehead University and a Bachelor of Laws degree from the University of Windsor. In addition to practising law, Robert has co-authored a number of texts for the Canadian Financial Services sector. Before joining the Tribunal, Robert was a volunteer and an active board member with a number of social services agencies including Mercury Youth Services, Hope Place and Homewood Health Centre.

(May 2004 – February 2009)

Full Time Members

Brian Brown, Member

Brian Brown graduated from the University of Western Ontario with an Honours English degree and a Masters of Education. Prior to joining the Tribunal, Brian taught High School English for 32 years, and served as volunteer Co-Chair of the United Way in his hometown.

(April 2004 - May 2013)

Helen Buckley-Routh, Member

Helen Buckley-Routh is a bilingual member whose first language is French. She has twenty-six years of experience as a teacher at both the elementary and secondary school levels. Prior to joining the Tribunal, she was employed as a translator for five years. She has been an active community volunteer working with numerous organizations to raise money for a variety of charities.

(September 2003 - September 2011)

Dorte Deans, Member

Dorte has thirty years of experience as an educator at both the elementary and secondary levels. She has a Bachelor of Arts degree in Fine Arts and a Master of Education. Her teaching career began as a Visual Arts teacher and included teaching adults and her fellow teachers. She spent 10 years as a high-school vice-principal and has held many volunteer positions in community groups in her area. She is the author of *In the Mind's Eye*.

(September 2005 - October 2011)

Denise Dudley, Member

Denise Dudley is a Registered Social Service Worker. She graduated Dean's List from Loyalist College and is currently pursuing a Bachelor of Professional Arts in Human Services. Prior to joining the Tribunal she worked in a number of different capacities within the social service field. She has been an active volunteer in her community, including acting as Vice Chair of the Children's Aid Society of Northumberland and Director of the Workforce Development Board.

(March 2005 - March 2013)

Social Benefits Tribunal

Marsha Farnand, Member

Marsha Farnand has a Bachelor of Arts degree from Carleton University and holds certificates in Mediation from the Arbitration and Mediation Institute of Ontario and a Diploma in Family Mediation from McMaster University. Marsha is a former Income Maintenance Officer, Parental Support Worker and Case Presenting Officer of the Ontario Disability Support Program. She has also worked as a Client Service Representative at the Social Benefits Tribunal and as co-editor of the Ontario Public Service newsletter for the Dispute Resolution Society. She resigned when she was appointed as a Justice of the Peace.

(November 2004 – June 2007)

Nathan Ferguson, Member

Nathan Ferguson earned a Bachelor of Arts degree from the University of Guelph in 2000 and a Bachelor of Laws degree from the University of Western Ontario in 2003. Nathan completed his articles in Kitchener, Ontario. After his call to the bar, he returned to London as a litigation lawyer.

(June 2006 – June 2009)

Anna Jurak, Member

Anna Jurak has a Bachelor of Science Degree and Business Diploma. Prior to joining the Tribunal she was self-employed for over 20 years in the retail and service industry. She served as a public school board trustee and continues to serve on a local regional hospital board of directors. She is actively involved in the community and is past president of her local Rotary club.

(May 2004 – June 2013)

Dawn Kershaw, Member

Dawn Kershaw has a Bachelor of Arts degree from the University of Western Ontario – Huron College, a Bachelor of Laws degree from the University of Toronto and a Master of Laws degree from Dalhousie University. Before joining the Tribunal, she practised law for 15 years. She sat on many Boards including L'Arche Stratford, Stratford Community Legal Clinic and the Huron Church News.

(June 2006 – June 2009)

Social Benefits Tribunal

Linda LeBourdais, Member

Linda has enjoyed an eclectic career in the public, private and not-for profit sectors. The bulk of her career has been spent in marketing communications and public relations. In 1987 she was elected to the Ontario Legislature, serving as Parliamentary Assistant to the Premier and as an Advocate for the Clothing and Apparel Industry for the Government of Ontario. Prior to her appointment to the Tribunal, she operated her own public relations and public affairs firm.

(February 2005 - February 2013)

Roslynne Mains, Member

Roslynne Mains graduated from McMaster University with a Bachelor of Arts degree. Roslynne was Director of Communications for United Way for almost ten years. She has also worked for both the provincial and federal governments in various administrative and financial positions. She was an adjudicator with the Unemployment Insurance Commission as a chair of the Board of Referees.

(January 2003 – February 2012)

Carol McDermott, Member

Carol McDermott has extensive experience in all aspects of administrative law, including appearing before Tribunals, teaching law as a sessional lecturer, mentoring and supervising law students representing clients in hearings and as vice-chair of the Health Protection Appeal Board. She also acted as Associate Counsel to the Support and Custody Orders Enforcement Office, did legal research and writing and practiced in the area of insurance law. She holds a Master of Library Science from the University of Western Ontario, a Bachelor of Arts in Psychology from the University of Waterloo and a Bachelor of Laws from the University of Windsor.

(June 2007 – June 2009)

Frank Miclash, Member

Frank Miclash has a Bachelor of Arts degree and a Certificate in Education from the University of Manitoba. He taught for 10 years before serving as a Member of the Ontario Provincial Parliament from 1987 to 1999. Frank has extensive experience in community service.

(October 1999 – November 2011)

Social Benefits Tribunal

Marilyn Mushinski, Member

Marilyn Mushinski comes to the Tribunal with over 20 years of public service at both municipal and provincial levels of government. In addition, Marilyn has demonstrated a commitment to her community at large, having served as a Member of the Board of Governors of Scarborough General Hospital and as a Founding Member of the Scarborough Women's Centre. Marilyn has a Bachelor of Arts degree in Economics.

(July 2004 – July 2013)

Roger R. Presseault, Member

Roger is a bilingual member whose first language is French. He studied Business Administration at the University of Ottawa and received a certificate in Arbitration and Mediation from the Alternate Dispute Resolution (ADR) Institute of Canada. Roger was a chair of the Board of Referees for the Employment Insurance Commission for 10 years. Prior to joining the Tribunal, Roger worked for 23 years in the federal public service for a federal Crown Corporation and the House of Commons of Canada.

(September 2005 - September 2008)

Monica Purdy, Member

Monica is a graduate of the University of Toronto and Ryerson Polytechnic University, obtaining Bachelor and Master of Science degrees in Nursing. Monica spent over 20 years working in the healthcare field in various capacities including Clinical Analyst, Research Associate, Clinical Information Specialist and staff Nurse.

(March 2005 - March 2013)

Margaret Reynolds, Member

Margaret Reynolds is a former adjudicator for the Board of Referees, Employment Insurance Commission. Margaret holds an Honours Bachelor of Arts degree in Modern Languages from the University of Toronto. Her community involvement includes serving as Secretary to the Board of Directors of the Volunteer Centre, Blue Sky Region. She is also a member of the Council of Canadian Administrative Tribunals.

(April 2006 – April 2009)

Social Benefits Tribunal

Antonio Riccio, Member

Antonio received a Bachelor of Arts Degree in Modern Languages and a Graduate Diploma in Business Administration from Lakehead University. He also holds certification as a Professional Manager from the Canadian Institute of Management and as a Long Term Care Administrator from the Ontario Association of Non-Profit Homes and Services for Seniors. He was a Provincial Appointee to the Thunder Bay Police Services Board between 1996 -2002 serving as Chair for four of those years. He was also actively involved in his community serving on various community service boards.

(October 2005 - November 2011)

Sherene Shaw, Member

Sherene Shaw has a Bachelor of Arts Degree from the University of Toronto, a Business Administration Diploma, and a Teacher of Adults Certificate from Centennial College. Sherene has over 18 years experience in the public sector with both the Municipal and Provincial Governments. For 15 years she served as an elected City Councillor in the City of Toronto, and with the former City of Scarborough. Sherene has served as Vice-Chair of the Toronto Transit Commission, Police Commissioner of the Toronto Police Services Board, and Diversity Advocate for the City of Toronto.

(February 2005 - February 2013)

Richard Simpson, Member

Richard was employed as an Operations and Production Manager for the Thomson Gale group, which included network database and content management systems. Previously, he was Project Manager with Gale Canada and Production Editor with Globe Information Services, Thomson Newspapers. Richard holds an Honours Bachelor of Arts degree (Anthropology) from McGill University and a Master of Library Science from the University of Toronto.

(October 2005 - October 2008)

Part Time Members

Kunjana Bahl-Khurana, Member

Kunjana Bahl-Khurana is a Certified Management Accountant. Kunjana holds a Bachelor of Business Management degree in Accounting from Ryerson Polytechnic University. Prior to joining the Social Benefits Tribunal, she held positions as a management reporting analyst with CIBC Wood Gundy and a Canada Coverage Coordinator and HQ Expense Accountant with IBM.

(May 2006 – May 2009)

John Brownlee, Part-time Member

John Brownlee has Masters degrees in School Administration and Special Education. For 25 years he was a high school principal and for 11 years served as the Deputy Mayor of Gravenhurst and Deputy Chair of the District of Muskoka. He has been actively involved in many community volunteer projects including acting as the Chair of the Gravenhurst Wharf Committee. John was initially appointed to the Tribunal as a full-time member and was reappointed as a part-time member February 14, 2006.

(February 2003 - February 2009)

Brian Cohen, Part-time Member

Brian Cohen is a bilingual member. Brian is a Toronto lawyer and graduate of Trent University (B.A. philosophy) and McGill University (LL.B. and B.C.L.). He represents clients with various disabilities such as hearing and visual impairment and childhood cancer. In 2000, Brian received the Canadian Bar Association's "Young Lawyer Pro Bono Service Award."

(June 2005 - June 2008)

Roberta Corey, Part-time Member

Roberta Corey has more than forty years of experience in public relations and communications in all levels of government – most recently the City of Toronto. She is a qualified elementary school teacher. Roberta is a former Vice Chair of the Ontario Film Review Board. She is an active community volunteer for several not-for-profit organizations. Roberta was originally appointed as a full-time member and reappointed as a part-time member September 13, 2005.

(July 2001 – October 2011)

Social Benefits Tribunal

Patrick Doran, Part-time Member

Patrick Doran received a Bachelor's degree in Philosophy from the University of Ottawa, a Master's Degree in Counselling and Education from Niagara University, and spent four years studying Theology at St. Augustine's Seminary in Toronto. As a pastor he ministered to families in three parishes for over 10 years. Prior to joining the Social Assistance Review Board in 1997 he was a member of the Immigration and Refugee Board for nine years. Patrick was initially appointed to the Tribunal as a full-time member and reappointed as a part-time member June 22, 2005.

(May 1998 – August 2012)

Audrey Hummelen, Part-time Member

Audrey Hummelen holds diplomas in Early Childhood Education and Developmental Services Work and has taught in both faculties. She worked for the Association for Community Living and then as the Executive Director of a children's centre for young children with exceptional needs. She was appointed as a full-time adjudicator of the Social Assistance Review Board and Social Benefits Tribunal in 1998 and served for seven years. Audrey has served on the Western Ontario Drama League Board of Directors, the Chatham Economic Development Commission and was Chair of the Committee of the Cultural Centre and its Performing Arts Committee.

(June 2007 – June 2008)

Kaye Joachim, Part-time Member

In January 2007 Kaye Joachim was cross-appointed to the Social Benefits Tribunal from the Ontario Human Rights Tribunal. Kaye is Assistant Dean of Graduate Studies at the Faculty of Law at the University of Toronto. She is a member of the Human Rights Tribunal of Ontario and the University of Toronto Academic Appeals Board. In the past, she served as Tribunal Counsel at the Workers' Compensation Appeals Tribunal, Legal Counsel with the Ontario Human Rights Commission, and Vice President at the Ontario Labour Relations Board. Ms. Joachim holds a Master of Laws from the University of Toronto.

(January 2007 – December 2008)

Social Benefits Tribunal

Sandra Macchione, Part-time Member

Sandra graduated from York University with a Bachelor of Arts Honours Degree in Sociology and Psychology specializing in race and ethnic relations. She has participated in the Trillium Health Center's Community Advisory Council and has held positions with the Canadian Bankers Association, Criminal Injuries Compensation Board and Freedom of Information and Protection of Privacy Branch with the Ministry of the Attorney General.

(November 2006 – November 2008)

Bonnie Patrick, Part-time Member

Bonnie Patrick holds a Bachelor of Laws and a Bachelor of Science in Biology from the University of Windsor. After being called to the Bar in 1997, Bonnie became the Managing Partner of the Goulin & Patrick Law Firm. She has been a Vice Chair of the Health Services Appeal and Review Board, Director and Vice President of the Inn of Windsor, and Counsel to both the Odysseus Victim Services Project and the North American Black Historical Museum. Currently, she is a Director and Secretary of The Windsor Residence for Young Men and Counsel to the Jazzpurr Society for Animal Protection, Windsor Historical Museum and A Book of My Own Literacy Campaign.

(June 2007 – June 2008)

Roy Wood, Part-time Member

Roy is a retired teacher and counsellor with the Peterborough County Board of Education. He has a long history of involvement in local politics, social services and community affairs. He has served as Chair of a number of community agencies including the former Civic Hospital, the Peterborough County City Health Unit, the Otonabee Region Conservation Authority, Fairhaven Home for Senior Citizens and the Kawartha Haliburton Children's Aid Society.

(March 2005 - March 2013)

Interesting Court Decisions

Under Ontario social assistance legislation, the Social Benefits Tribunal's decisions may be appealed to the Ontario Superior Court of Justice (Divisional Court) on questions of law. Leave of the Court is not required to file an appeal.

If a party is not satisfied with the decision of the Divisional Court, then with leave, the party may challenge that decision before the Ontario Court of Appeal. In turn, decisions of the Ontario Court of Appeal may, with leave, be appealed to the Supreme Court of Canada.

In addition, a party to a Social Benefits Tribunal hearing may apply for a judicial review of a Tribunal decision where there is a question relating to the Tribunal's procedures or jurisdiction.

This year both the Divisional Court and Ontario Court of Appeal released a number of very interesting decisions that contributed to the growing jurisprudence governing the work of the Tribunal.

Ontario Court of Appeal

Dependent Child – Joint Custody¹

The issue in this appeal was the Tribunal's interpretation of the dependent child provisions of the Ontario Disability Support Program Regulation² that apply in situations where custody of the child is shared jointly by the parents.

The Appellant shared joint custody of her children with their father. The Canada Revenue Agency determined that she was eligible for the Canada Child Tax Benefit six months of the year. The Director of the Ontario Disability Support Program therefore determined that the children should be included in the Appellant's benefit unit as dependents for the six months of the year that corresponded to the Canada Revenue Agency eligibility determination. The Appellant asked to have her children included in the benefit unit full time. The Tribunal granted the Appellant's appeal in part.

The Tribunal ordered that the children be considered full time members of the benefit unit for the purposes of calculating the shelter and medical care components of budgetary requirements. The reasoning was that the cost for the shelter did not go away just because the children were not in the household for part of each month. For the balance of the budgetary requirements the Appellant's basic needs were to be prorated to reflect the time when the children

¹ *Oliveira v. Ontario (Disability Support Program)*, [2008] O.J. No. 622, (C.A.)

² Ontario Regulation 222/98 as amended, s.2(3)(c)

Social Benefits Tribunal

were with the Appellant – she was to receive 50 per cent of the children's basic needs allowance each month.

The Appellant disagreed and filed an appeal with the Divisional Court challenging the Tribunal's interpretation of the dependent child provisions and its finding that basic needs could be pro rated.

The Divisional Court denied the appeal and held that there was no error on the part of the Tribunal. The Appellant was granted leave to appeal to the Court of Appeal and the matter was argued before the Court of Appeal in January 2008.

The Court of Appeal looked to the purpose of the *Ontario Disability Support Program Act* which was established to effectively serve persons with disabilities. The Court noted that the reality of children living in separate households must be considered and was satisfied that while housing costs would remain constant that it was reasonable to reduce variable expenses such as food. While section 2(3) of the Regulation did not specifically envisage the increasingly popular option of joint custody, the Court was satisfied that the Tribunal had the jurisdiction to give the legislation an interpretation which fairly reflected this reality.

In this case the Tribunal had to make a decision as to eligibility for the legislative scheme to operate. The Tribunal acted with flexibility and fairness to ensure that the appellant's economic reality and particular circumstances were properly taken into account in determining her eligibility.³

Although the Appellant had not raised a human rights argument before the Tribunal she did raise it before the Court of Appeal. She submitted that the Tribunal's decision violated the *Ontario Human Rights Code* because it discriminated against her on the basis of "family status".

The Court dismissed this argument and noted that it was inappropriate to suggest that two such distinct groups as parents with sole custody and parents sharing joint custody should be treated the same. A parent with joint custody must maintain a residence for the child all of the time, however the same cannot be said for basic needs. Half of the child's basic needs would arise when the child was with each parent and therefore the Tribunal's decision fairly reflected the reality of the family situation and did not violate the *Ontario Human Rights Code*.

³ *Oliveira v. Ontario (Disability Support Program)*, [2008] O.J. No. 622, (C.A.)

Ontario Superior Court of Justice (Divisional Court)

Prejudgment Interest on an Award for Damages or Compensation for Pain and Suffering is Exempt from Income⁴

The specific question before the Divisional Court was whether the prejudgment interest portion of an award for damages for pain and suffering was exempt from the treatment of income the Ontario Disability Support Program Regulation⁵.

The Appellant had launched a personal injury lawsuit for injuries sustained in a motor vehicle accident. The lawsuit was eventually settled for an amount which included prejudgment interest. The Director did not apply the income exemption to the prejudgment interest. Instead it was treated as income. The Appellant appealed this decision to the Tribunal.

The Tribunal affirmed the Director's decision on the basis that prejudgment interest is not damages for pain and suffering. Rather it is intended to compensate a person for the *delay* in waiting to receive compensation.

The Divisional Court disagreed and held that prejudgment interest is damages for pain and suffering. It held that even if you accept that prejudgment interest is damages for delay, it is part and parcel of the damages arising out of the car accident. But for the accident, there would be no need to pay prejudgment interest.

Person with a Disability⁶

The issue before the Divisional Court was whether the Tribunal erred when it concluded that the Appellant was not a person with a disability. Although the family doctor commented in the application that the Appellant was "totally and permanently disabled and would never manage any type of gainful employment due to her severe impairment" the Tribunal preferred and relied on other evidence that suggested that the impairments were not so significant.

The Divisional Court granted the appeal, set aside the Tribunal's decision and declared that the Appellant was entitled to income support as a person with a disability effective February 1, 2003. The Court held that the Tribunal erred when it failed to accept uncontradicted evidence from medical witnesses without adequate explanation.

⁴ *Mule v. Ontario Disability Support Program (Director)*, 88 O.R. (3d) 326, Div. Ct.

⁵ Ontario Regulation 222/98 as amended, s.43(1)(4)

⁶ *Sheldrick v. Director, Ontario Disability Support Program*, (2007) 156 A.C.W.S. (3d) 486, Div Ct.

Social Benefits Tribunal

The Court also stated that in assessing whether the Appellant's impairments were substantial the Tribunal was required to consider whether the appellant was unable to function in the workplace within the meaning of section 4(1)(b) of the Act.

Leave to appeal to the Court of Appeal was granted in December 2007.

The Court Should Not Decide Issues of Law That are Not Necessary to the Resolution of an Appeal⁷

The Appellant asked the Divisional Court to consider an Application for declaration under the *Charter of Rights and Freedoms* that the Director's treatment of his farm expenses was discriminatory pursuant to section 15 of the Charter. In addition to seeking this remedy the Appellant also filed an appeal with the Social Benefits Tribunal.

The Tribunal refused to hear the Appellant's Charter issue but proceeded with the hearing on the basis that while it could not consider the Appellant's constitutional challenges to the legislation it could consider the other legal merits of the Appellant's arguments. The Tribunal indicated that if the Appellant was unsuccessful before the Tribunal he could pursue his Charter remedy before a Court with the appropriate jurisdiction. The Tribunal held its hearing, found in favour of the Appellant, and gave specific directions regarding the expenses in dispute. The Director accepted the Tribunal's ruling, both in respect of the year in question and in future years.

The Appellant then moved to have his Charter application brought before the Court on the basis that although the underlying dispute had been resolved by the Tribunal, it was resolved for the wrong reasons and therefore the Court should hear the constitutional issue.

The Divisional Court dismissed the Application on the basis that it was now moot and cited the Supreme Court of Canada's decision in *Phillips v. N.S. (Westray Mine Inquiry)*, [1995] 2 S.C.R. 97:

This Court has said on numerous occasions that it should not decide issues of law that are not necessary to a resolution of an appeal. This is particularly true with respect to constitutional issues and the principle applies with even greater emphasis in circumstances in which the foundation upon which the proceedings were launched has ceased to exist.

⁷ *Thomasson v. Ontario Ministry of Community and Social Services et.al.*, Divisional Court, Divisional Court File No. 07-CV-38779, February 22, 2008

Appeal to Divisional Court of Social Benefits Tribunal Decision Must be Filed Within 30 Days After Receiving the Decision⁸

The Appellant attempted to appeal a decision of the Social Benefits Tribunal that he was not a person with a disability. He was late filing his appeal and the Divisional Court refused to accept the appeal. The Appellant brought a motion to extend the time for appeal under the *Ontario Disability Support Program Act*.

The Director opposed the motion and argued that the only applicable timeline for commencing an appeal from a decision of the Tribunal to the Divisional Court is the 30 days prescribed by section 70 of the Regulation.⁹ The Director further argued that section 70 is a mandatory timeline. In its argument the Director submitted that the case law is clear that the *Rules of Civil Procedure* governing the commencement of appeals and the Court's jurisdiction to extend time provided by the Rules are not applicable where the appeal arises under a statute which does not provide for an extension of the time to appeal. As there is no provision in the *Ontario Disability Support Program Act* or its regulations to extend the time for filing a notice of appeal the Court does not have jurisdiction to extend the time limitations set out in the legislation.

The Court accepted that it lacked jurisdiction to provide the relief sought by the Appellant and dismissed the motion.

Duty of Fairness¹⁰

The Appellant appealed a decision of the Tribunal to the Divisional Court, seeking an order that he was eligible for a retroactive special diet allowance back to June 1, 1998, or alternatively, an order directing a new hearing. The Appellant argued that the Tribunal had breached the principles of natural justice and fairness when it based its decision in part on the Appellant's failure to provide corroborative evidence of his special diet needs and the actual special diet costs for the period he sought to be reimbursed. In particular the Appellant argued that the Tribunal member erred because he was given no notice that evidence would be required on this point since neither the Director's decision nor the internal review mentioned it.

The Court rejected this argument and found that the Appellant was not prejudiced in any way. The onus of proving entitlement lay on the Appellant, and there was no duty on the Tribunal to give him notice that a lack of relevant evidence would be taken into account in deciding his case.

⁸ *McKinnon v. Ministry of Community and Social Services Ontario Disability Support Program and Social Benefits Tribunal*, Divisional Court, Divisional Court File No. 38/08, February 7, 2008

⁹ Ontario Regulation 222/98 as amended, s.70(1)

¹⁰ *Smith v. Ontario (Director, Disability Support Program)* [2008] O.J. No. 302, Div. Ct.

The Court agreed with the Tribunal's determination that even if the regulation "could" be applied retroactively, the Appellant had failed to establish circumstances that would justify backdating the special diet allowance in his case.

Interesting Tribunal Decisions

Mandatory Special Necessities – Cost of Transportation Reasonably Required for Medical Treatment

The Appellant and his spouse are both disabled and receive Ontario Disability Support Program benefits. The Appellant's spouse was hospitalized for two months for a mental health condition. The Appellant asked the Director to reimburse him for his transportation costs to and from the hospital to participate in his spouse's medical treatment. He submitted records of his attendance at the hospital to participate in joint family therapy sessions, to sign day passes and to attend family meetings to discuss his spouse's progress with her medical treatment team.

The Director denied the request on the basis that benefits for medical transportation were only available for "oneself", meaning that the Appellant could not avail himself of medical transportation benefits when it was another member of the benefit unit who required the medical treatment. While the Appellant's spouse was hospitalized the hospital was responsible for her care and treatment and therefore there should be no transportation costs.

The Tribunal did not agree. The fact that the legislation uses the plural term "members" of the benefit unit does not support the Director's interpretation that it is only when the Appellant travels for his own treatment that he would qualify to receive benefits. The spouse's doctor was adamant that the Appellant's attendance was necessary for his spouse's treatment. The Appellant attended to participate in activities that were all mandated as part of a medically prescribed treatment plan.

Eligibility for Childcare Expense Exemption in the Calculation of Net Earnings

The Appellant works and for a number of years had the benefit of the childcare expense exemption when calculating her net earnings from employment. When her child turned 14 the Administrator determined that she no longer qualified for the exemption because she was unable to provide verification from her doctor that the child had a medical issue that meant he could not be left alone.

Social Benefits Tribunal

The Tribunal overturned the Administrator's decision because there is no legislative requirement that in order for a parent to qualify for the exemption that a dependent child over the age of 12 must have special medical needs. The Tribunal was satisfied that this Appellant's circumstances clearly met the requirements of the legislation. It accepted that these child care expenses were reasonable and necessary to permit the Appellant to be employed. She is a sole support parent who had a permanent job as a night cleaner in an office. She had attempted to find day time work and been unsuccessful. The Appellant had significant concerns about leaving her child unsupervised and alone at night in an environment that was prone to violence.

Internal Review Requirements

The Director challenged the Tribunal's jurisdiction to hear the appeal because the Appellant filed her appeal on the same day that she requested an internal review.

The Tribunal determined that the Appellant had complied with the procedural requirements in the *Ontario Disability Support Program Act* and Regulation and that the appeal should proceed.

The Tribunal reasoned that section 22(1) of the Act requires only that no appeal be commenced unless an internal review is requested. In interpreting the legislation to find that there was no mandatory requirement that the internal review be requested before the appeal is filed the Tribunal considered the effect of this interpretation. Giving the provisions a more liberal interpretation and finding that they are intended to be directive rather than prohibitive does not prejudice the Director. The Director had an opportunity to conduct a full internal review and to provide written reasons to support the merits of both the original and internal review decisions. On the other hand the Appellant would suffer great prejudice if the appeal was dismissed because she had failed to wait 10 days to request an internal review. In reaching its decision the Tribunal was guided by the "principle of construction...applicable to social welfare legislation...where there is ambiguity in the meaning of a statute, the ambiguity should be resolved in favour of the applicant seeking benefits under the legislation."¹¹

Board and Lodging

The issue in this case was whether or not the Appellant lived in a board and lodging situation. If he resided in a board and lodging arrangement then he was entitled to less income support than if he was considered to be living in a rental situation. The Appellant is a young physically disabled man living with his mother. Both he and his mother are ODSP recipients. They pool their money

¹¹ *Wedekind v. Ontario (Ministry of Community and Social Services)* (1994), 21 O.R. (3d) 289 (C.A.)

Social Benefits Tribunal

and share expenses, but keep their bank accounts separate. The Appellant is confined to a wheelchair and unable to care for himself. His limited mobility renders him unable to independently bathe, prepare meals, cook or do many other simple activities. His mother assists him with many of these activities.

Board and lodging is not defined in the legislation. There is however a Policy Directive that deals with the nature of board and lodging. The Tribunal acknowledged that while it was not binding on the Tribunal it was the only document that provided a context for assessing the case, and therefore was a useful place to start.

The Directive provides that a board and lodging situation is one in which a recipient receives food and shelter from the same source. If the landlord purchases and prepares the food, then the recipient is a boarder.

The Tribunal concluded that in this instance while the Appellant's mother ostensibly paid the rent as well as purchased groceries and prepared meals, one needed to look beyond these bare facts to the Appellant's individual circumstances. To do otherwise did not allow for the fact that the Appellant lived in this arrangement out of necessity, nor that their incomes are intermingled and used according to convenience.

Statistical Tables

- 1 Appeals by program
- 2 Tribunal decisions by outcome
- 3 Number of appeals processed
- 4 Cases closed without a hearing
- 5 Appeals by program and filing type
- 6 ODSP appeals by issue
- 7 OWA appeals by issue
- 8 Tribunal decisions by program and outcome
- 9 Tribunal ODSP decisions by issue and outcome
- 10 Tribunal OWA decisions by issue and outcome
- 11 Tribunal decisions where appellant represented
- 12 Appeals by county/district/municipality
- 13 Appeals by language
- 14 Interim assistance requests by program
- 15 Tribunal decisions on interim assistance by program

Table 1

Appeals by program for the five-year period 2003 - 2004 to 2007 - 2008

Fiscal Year	ODSP	OWA	Total
2003 - 2004	7977 74%	2787 26%	10764
2004 - 2005	8759 79%	2368 21%	11127
2005 - 2006	7847 80%	1951 20%	9798
2006 - 2007	12253 88%	1673 12%	13926
2007 - 2008	11120 88%	1580 12%	12700

Table 2

Tribunal decisions by outcome for the five-year period 2003 - 2004 to 2007 - 2008

Fiscal Year	Granted	Denied	Denied in absentia *	Referred Back **	Other ***	Total
2003-2004	2924 40%	2090 28%	1607 22%	9 -	718 10%	7348
2004-2005	2684 40%	1802 27%	1594 24%	9 -	615 9%	6704
2005-2006	4053 55%	1743 24%	1132 15%	15 -	466 6%	7409
2006-2007	3124 54%	1407 24%	971 16%	23 -	361 6%	5886
2007-2008	4241 57%	1637 22%	1140 16%	10 -	360 5%	7388

* Cases in absentia are where the appellant is not present for the hearing.

** Cases referred back to the Director or Administrator to reconsider the original decision under appeal in accordance with directions given by the Tribunal.

*** Other decisions include the following: consent order, no appeal before the Tribunal, appeal out of time, no jurisdiction, matter resolved or withdrawn.

Table 3

Number of appeals processed 2007 - 2008

Appeals brought forward, received and processed	
Cases brought forward from 2006 - 2007	10721
Appeals received during 2007 - 2008	12700
<u>Appeals to be processed during 2007 - 2008</u>	<u>23421</u>
Cases closed without a hearing*	4257
Decisions released**	7472
<u>Appeals processed during 2007 - 2008</u>	<u>11729</u>
Cases carried forward into 2008 – 2009***	11692

* Closed by the Tribunal includes the following: appeal resolved (including those cases resolved in early resolution program), reconsideration request not granted, no contact from appellant, no jurisdiction, other administrative reasons.

** Decisions released include decisions released following a reconsideration hearing.

*** Cases carried forward include: hearing held and decision pending, hearing scheduled not yet heard, cases not yet scheduled and cases previously scheduled and rescheduled or adjourned.

Table 4

Cases closed without a hearing 2007 - 2008

Reason case closed	#	%
Withdrawn by appellant *	1115	26%
Withdrawn by representative	2510	59%
Closed by Tribunal**	632	15%
Total	4257	100%

* Includes appeals resolved in the early resolution program

** Closed by the Tribunal includes the following: appeal resolved, reconsideration request not granted, no contact from appellant, no jurisdiction, other administrative reasons.

Table 5

Appeals by program and filing type 2007 - 2008

Program	Refusal	Cancellation & suspension	Amount & reduction	Other	Total
ODSP	9713 87%	263 2%	1096 10%	48 1%	11120
OWA	351 22%	667 42%	550 35%	12 1%	1580
Total	10064 79%	930 7%	1646 13%	60 1%	12700

Table 6

ODSP appeals by issue 2007 - 2008

Issue	#	%
Not disabled	9395	84.5%
Overpayment	600	5.4%
Special Diet	237	2.1%
Income/assets in excess	152	1.4%
Date of grant	66	0.6%
Medical transportation costs	70	0.6%
Failure to provide information	107	1%
Maximum entitlement	11	0.1%
Spousal related	29	0.3%
Shelter costs	15	0.1%
Other	438	3.9%
Total	11120	100%

Table 7

OWA appeals by issue 2007- 2008

Issue	#	%
Overpayment	474	30%
Failure to provide information	305	19.3 %
Job search/loss	50	3.2%
Income/assets in excess	156	9.9%
Community start-up benefit	72	4.6%
Conditions of eligibility	146	9.2%
Spousal related	119	7.5%
Employment assistance	21	1.3%
Maximum entitlement	11	0.7 %
Special diet	17	1.1%
Disposal of assets	6	0.4 %
Qualifying child	10	0.6 %
Other	193	12.2 %
Total	1580	100%

Table 8

Tribunal decisions by program and outcome 2007- 2008

Program	Granted	Denied	Denied in absentia *	Referred Back **	Other ***	Total
ODSP	4120 61%	1416 21%	935 14%	9 -	292 4%	6772
OWA	121 20%	221 36%	205 33%	1 -	68 11%	616
Total	4241 57%	1637 22%	1140 16%	10 -	360 5%	7388

* Cases in absentia are where the appellant is not present for the hearing.

** Cases referred back to the director or administrator to reconsider the original decision under appeal in accordance with directions given by the Tribunal.

*** Other decisions includes consent orders, no appeal before the Tribunal, appeals filed out of time, no jurisdiction, and matter resolved or withdrawn

Table 9

Tribunal ODSP decisions by issue and outcome 2007 - 2008

Issue	Granted	Denied	Denied in absentia *	Referred Back **	Other ***	Total
Not disabled	66%	19%	12%	-	3%	5972
Overpayment	29%	36%	19%	-	16%	203
Assets/income in excess	27%	31%	18%	2%	22%	55
Community start-up benefit	24%	27%	36%	-	13%	55
Date of grant	19%	37%	23%	7%	14%	43
Medical transportation costs	29%	35%	26%	-	10%	31
Failure to provide information	24%	35%	11%	-	30%	37
Maximum entitlement	36%	36%	21%	-	7%	14
Spousal related	29%	38%	9%	-	24%	21
Other	9%	44%	38%	1%	8%	341
Total	61%	21%	14%	-	4%	6772

* Cases in absentia are where the appellant is not present for the hearing.

** Cases referred back to the director or administrator to reconsider the original decision under appeal in accordance with directions given by the Tribunal.

*** Other decisions include the following: consent order, no appeal before the Tribunal, appeal out of time, no jurisdiction, matter resolved or withdrawn.

Table 10

Tribunal OWA decisions by issue and outcome 2007- 2008

Issue	Granted	Denied	Denied in absentia *	Referred Back **	Other ***	Total
Overpayment	27%	32%	27%	-	14%	208
Job search and loss	5%	51%	42%	-	2%	43
Failure to provide info	26%	30%	25%	-	19%	84
Assets/income in excess	19%	43%	29%	-	9%	76
Employment assistance	10%	30%	40%	-	20%	10
Community start-up	6%	24%	62%	4 %	4%	29
Spousal related	26%	33%	38%	-	3%	39
Conditions of eligibility	9%	44%	38%	-	9%	64
Maximum entitlement	33%	45%	11%	-	11%	9
Other	8%	35%	48%	-	9%	54
Total	20%	36%	33%	-	11%	616

* Cases in absentia are where the appellant is not present for the hearing.

** Cases referred back to the director or administrator to reconsider the original decision under appeal in accordance with directions given by the Tribunal.

*** Other decisions include the following: consent order, no appeal before the Tribunal, appeal out of time, no jurisdiction, matter resolved or withdrawn.

Table 11

Tribunal decisions where appellant represented 2007 - 2008

Program	Granted	Denied	Denied in absentia *	Referred Back **	Other ***	Total
ODSP	3634 78%	835 18%	77 2%	1 -	105 2%	4652
OWA	72 47%	56 37%	10 6%	0 -	15 10%	153
Total	3706 77%	891 18%	87 2%	1 -	120 3%	4805

* Cases in absentia are where the appellant is not present for the hearing.

** Cases referred back to the director or administrator to reconsider the original decision under appeal in accordance with directions given by the Tribunal.

*** Other decisions include the following: consent order, no appeal before the Tribunal, appeal out of time, no jurisdiction, matter resolved or withdrawn.

Table 12

Appeals by county/district/municipality 2007 – 2008

County, District Municipality	Appeals	ODSP	OWA	% of Total Appeals
Algoma	196	180	16	2
Brant	247	222	25	2
Bruce	51	49	2	1
Chatham-Kent	183	166	17	1
Cochrane	143	120	23	1
Dufferin	15	14	1	-
Durham	304	278	26	2
Elgin	82	59	23	1
Essex	524	449	75	4
Frontenac	215	186	29	2
Grey	104	89	15	1
Haldimand-Norfolk	120	103	17	1
Haliburton	20	18	2	-
Halton	110	96	14	1
Hamilton-Wentworth	770	684	86	6
Hastings	355	324	31	3
Huron	34	31	3	-
Kenora	39	34	5	-
Lambton	157	148	9	1
Lanark	118	107	11	1
Leeds & Grenville	122	105	17	1
Lennox & Addington	48	40	8	-
Manitoulin	12	12	-	-
Middlesex	390	330	60	3
Muskoka	60	46	14	1
Niagara	414	399	15	3
Nipissing	152	140	12	1
Northumberland	105	75	30	1
Ottawa-Carleton	931	811	120	7
Oxford	96	81	15	1
Parry Sound	48	46	2	-
Peel	704	605	99	5
Perth	53	51	2	1
Peterborough	258	169	89	2
Prescott & Russell	90	66	24	1
Prince Edward	35	32	3	-
Rainy River	18	13	5	-
Renfrew	84	77	7	1
Simcoe	364	294	70	3
Stormont Dundas & Glengarry	176	150	26	1
Sudbury	232	211	21	2
Thunder Bay	288	232	56	2
Timiskaming	60	50	10	1
Toronto	3160	2852	308	25
Victoria	82	69	13	1
Waterloo	364	296	68	3
Wellington	123	111	12	1
York	444	400	44	3
Total	12700	11120	1580	100%

Table 13

Appeals by language 2007 – 2008

Language	#	%
English	10193	80%
French	216	2%
Interpreter for appellant speaking other language	2291	18%
Total	12700	100%

Table 14

Interim assistance requests by program for the five-year period 2003 - 2004 to 2007 - 2008

Fiscal Year	ODSP	OWA	Total
2003 - 2004	2079 51%	2033 49%	4112 100%
2004 - 2005	2010 54%	1721 46%	3731 100%
2005 - 2006	1791 57%	1369 43%	3160 100%
2006 - 2007	2487 70%	1051 30%	3538 100%
2007 - 2008	2359 68%	1106 32%	3465 100%

Table 15

Tribunal decisions on interim assistance by program 2007 - 2008

Program	Granted	Denied	Total
ODSP	404 16%	2083 84%	2487
OWA	884 81%	213 19%	1097
Total	1288 36%	2296 64%	3584