



Social Benefits Tribunal

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2008 / 2009 Annual Report

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## Chair's Message

It has been a very rewarding and educational experience to have filled in as the Acting Chair over this past year. I cannot stress enough the fact that we have an extremely dedicated group in both the field and in the offices of the Social Benefits Tribunal. The Members along with the staff in our offices continue to work hard to make the process an effective one for the clients that we serve.

The past year I met with stakeholder groups across the Province. This has been extremely helpful to me in getting feedback on the work of the Tribunal throughout the Province. Many of our training issues have come from these meetings and discussions.

Over this past year we initiated a program where both additional part-time Members and staff have joined the Tribunal on a temporary basis to help us address our backlog. Great strides have been made in this area. As well, the time from the request for a hearing to the date of hearing has been reduced significantly. I must thank those who have joined us for this period. During this past year the Tribunal released 8898 decisions, up from 7388 the previous year.

One of the significant changes implemented over this past year is in the area of providing interpretation services for Appellants appearing before the Tribunal who do not speak English or French. We have become much more flexible in terms of allowing Appellants to bring their own translation services. This change in policy has enabled Members to continue on with a greater number of hearings where in the past these may have been adjourned for lack of an interpreter. This change in policy with the resulting reduction in adjournments has also had a significant effect in reducing our backlog.

The time from the request for a hearing and the actual date of the hearing has been reduced significantly. This has brought new challenges for some of our stakeholders and I thank them for adapting to these new pressures. Professional and timely service to Appellants and Respondents remains a priority with the Tribunal and we will continue to strive to meet these objectives.

In closing may I again reiterate the true dedication that I saw among both staff and Tribunal Members in their efforts to meet the needs of the parties that come before the Tribunal. It has truly been a privilege to be a part of this ongoing team effort.

Frank Miclash  
Acting Chair



# **Social Benefits Tribunal Members**

## **Acting Chair**

### **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.

## **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.

### **Beverly Moore, Member**

Beverly Moore graduated with a Bachelor of Arts degree from Wilfrid Laurier University and a law clerk's certificate from Fanshawe 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.

### **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.

## **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.

### **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.

### **Denise Dudley, Member**

Denise Dudley is a Registered Social Service Worker. She graduated 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.

### **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.

### **Audrey Hummelen, 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 first 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.

**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.

**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.

**Linda LeBourdais, Member**

Linda LeBourdais 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.

**Janice MacGuigan, Member**

Janice MacGuigan was an adjudicator with the Ontario Rental Housing Tribunal (now Landlord and Tenant Board) from 2002 to 2006. Prior to this she was a Law Clerk with a Toronto law firm. Janice volunteered with Heart to Hand, a community organization collecting and distributing food to families in need. She is a member of the Society of Adjudicators and Regulators and the Council of Canadian Administrative Tribunals.

**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.

**Sandra Margerrison, Member**

Sandra Margerrison joined the Social Benefits Tribunal as Manager of the Appeals Resolution Unit in 2007. Ms. Margerrison has an extensive background in the social assistance field, previously serving as a member of the Social Assistance Review Board/Social Benefits Tribunal from 1998 to 2004. She worked with various non-profit and community organizations, and has training in dispute resolution.

**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 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.

**William Murray, Member**

William Murray was a management and marketing consultant and recently worked in retail store management. Previously, he was co-owner of a restaurant. Earlier in his career, William was the Director of Operations in the Office of the Premier. Mr. Murray's community involvement includes the Red Cross of Canada, Canadian Cancer Society and the United Way.

**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.

**Roger R. Presseault, Member**

Roger Presseault 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 Alternative 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.

**Monica Purdy, Member**

Monica Purdy 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.

**Margaret Reynolds, Member**

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

**Antonio Riccio, Member**

Antonio Riccio 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, and served as Chair for four of those years.

**Sherene Shaw, Member**

Sherene Shaw has a Bachelor of Arts Degree from the University of Toronto, and Business Administration Diploma. Sherene has over 18 years experience in the public sector with both the Municipal and Provincial Governments. For 15 years she served as 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.

**Richard Simpson, Member**

Richard Simpson 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.

**Part-time Members****Kunjana Bahl-Khurana, Part-time 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.

**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.

**Éric Cabana, Part-time Member**

Éric Cabana was a lawyer with the Clinique juridique francophone de l'Est d'Ottawa. Mr. Cabana was a member and Chair of the clinique juridique populaire de Prescott et Russell Inc., and is a member of the Association des juristes d'expressions françaises de l'Ontario. He has an LL.B. and LL.L from the University of Ottawa and is a member of the Law Society of Upper Canada.

**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.

**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.

**Dorte Deans, Part-time Member**

Dorte Deans 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*.

**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.

**Kelly Gaon, Part-time Member**

Kelly Gaon is a bilingual member. She has extensive experience in the private and not-for-profit sectors. She was Executive Vice President of a medium-sized enterprise for 15 years and was Director of Sponsorship and Corporate Partnerships at United Way/Centraide Ottawa and the Canadian Cancer Society. Kelly is very involved in her home community and has a long history of volunteerism.

**Sydney Gladstone, Part-time Member**

Sydney Gladstone was a member of the Office of the Commissioner of Review Tribunals, where he heard appeals under the Canada Pension Plan legislation. Sydney has served his community as Director at Large and Vice-President of Ryerson University's L.I.F.E. Institute and as volunteer for various charitable organizations.

**Sandra Macchione, Part-time Member**

Sandra Macchione graduated from York University with a Bachelor of Arts Honours Degree in Sociology and Psychology. She has participated in the Trillium Health Centre'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.

**Lynn Neil, Part-time Member**

Lynn Neil retired from the Ontario Public Service after 28 years of service - serving in senior management positions in Toronto and Sudbury. She has been a member of the Landlord and Tenant Board (formerly the Ontario Rental Housing Tribunal) since 2003. Lynn holds a Masters of Correctional Administration from the University of Ottawa.

**Bonnie Patrick, Part-time Member**

Bonnie Patrick holds a Bachelor of Laws and a Bachelor of Science in Biology from the University of Windsor. 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.

**James Robinson, Part-time member**

James Robinson is in private practice specializing in family and commercial litigation. James is also a part-time Deputy Judge of the Superior Court for Richmond Hill Small Claims Court. He served as supporting member of the C.G. Jung Foundation of Ontario and member at large of the Rotary Club of Don Mills. He is a member of the Law Society of Upper Canada, member of the Deputy Judge's Association of Ontario, member of the Metropolitan Toronto Lawyers Association, and member of the American Society of Trial Consultants.

**Neal Schoen, Part-time member**

Neal Schoen has a Bachelor of Science degree from McMaster University. He is a former Mayor and regional councillor for the city of Port Colborne. Neal had previously been appointed as a full-time adjudicator of the Social Assistance Review Board and Social Benefits Tribunal in 1998 and served for six years. Neal is a licensed Paralegal and was recently employed as Tenant Duty Counsel for a community legal clinic.

**Rosemary Walden-Stephan, Part-time Member**

Rosemary Walden-Stephan has a Bachelor of Administrative Studies and Bachelor of Laws. She was called to the Bar in Ontario in 2000. Rosemary practiced law in a general family practice that included appearing before administrative tribunals and working in the area of public guardianship. Previously, she served as a full-time member of the Social Benefits Tribunal from 2001 to 2005. Ms. Walden-Stephan has worked as a volunteer with the local Children's Aid Society, County Community Care and Arts Foundation.

**Roy Wood, Part-time Member**

Roy Wood 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.

**Karol Wronecki, Part-time member**

Karol Wronecki has degrees in law and public administration from universities in Poland and Canada. After teaching constitutional law at the University of Wroclaw and at York University in Ontario, he joined the Ontario government in 1982. For 24 years he worked in the administrative justice system as an adjudicator and a civil servant. He adjudicated in and managed programs dealing with rent control and landlord and tenant legislation. Since 2007 Karol has been a part-time member of the Landlord and Tenant Board.

## 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

#### ***Person with a Disability<sup>1</sup>***

The Tribunal determined that the Appellant did not meet the test for "person with a disability". Although there were two medical opinions that the Appellant was disabled and not employable the Tribunal was not persuaded by this evidence, and preferred and relied on other evidence that suggested that the impairments were not so significant. On appeal to Divisional Court the Court set aside the Tribunal's decision and found that the Appellant was a person with a disability on the basis that the Tribunal erred in law because it failed to apply highly relevant medical evidence in the form of medical opinions that the Appellant was disabled and unable to work.

The Court of Appeal overturned the Divisional Court decision and determined that the Tribunal had provided full and adequate reasons for why the medical opinion evidence, when viewed in the context of all the evidence before it, including the evidence of activities of daily living and the Appellant's own testimony, was not determinative of the "substantial impairment" requirement. The Court also stated that it disagreed with the Divisional Court that the Tribunal was required "to accept" the medical opinion evidence.

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<sup>1</sup> *Sheldrick v. Director, Ontario Disability Support Program*, 2008 ONCA 509, Docket C48147, June 24, 2008.

## Ontario Superior Court of Justice (Divisional Court)

### ***Section 5(2) of the Ontario Disability Support Program Act discriminated against two individuals who were disabled solely by alcoholism<sup>2</sup>***

In April 2006 the Supreme Court issued its landmark decision in *Tranchemontagne v. Ontario (Director, Disability Support Program)*<sup>3</sup>. That decision clarified that the Tribunal has jurisdiction to hear challenges to its legislation under the Ontario *Human Rights Code*. Having clarified the Tribunal's human rights code jurisdiction the Supreme Court then sent the case back to the Tribunal to consider the human rights challenges raised by Mr. Tranchemontagne and Mr. Werbeski and to rule on whether section 5(2) of the *Ontario Disability Support Program Act* violated their human rights. This hearing, held in September 2006, was the Tribunal's first hearing to consider a human rights code challenge. The three member panel of the Tribunal determined that section 5(2) violated the *Code*. That Tribunal decision was appealed to the Divisional Court.

On April 20, 2009 the Divisional Court issued its decision and unanimously upheld the Tribunal's interpretation and application of the *Code*. The Court agreed with the Tribunal's decision that in this case the statutory exclusion from eligibility for benefits of individuals solely disabled by alcoholism discriminated because it withheld and limited access to income support and advantages available to other disabled persons. The Director had failed to satisfy, on a balance of probabilities, that this distinction did not create a disadvantage by perpetuating prejudice or stereotyping, nor did it establish a statutory defence under the *Code*. Leave to appeal this decision to the Court of Appeal has been granted.

### ***Person with a Disability – New Medical Evidence – Medical Reports are Presumed to Outline a Person's Condition at the Date on Which they are Written Unless There is Specific Indication to the Contrary<sup>4</sup>***

The Appellant submitted two new medical reports to the Tribunal. The two supplementary medical reports were dated six and nine months after the Director's decision and outlined a significant deterioration in the Appellant's condition. The Tribunal did not rely on this evidence and concluded that the Appellant was not a "person with a disability".

<sup>2</sup> *Ontario (Director, Ontario Disability Support Program) v. Tranchemontagne*, 95 O.R. (3d) 327.

<sup>3</sup> *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513, 2006 SCC 13.

<sup>4</sup> *Jemiolo v. Director, Ontario Disability Support Program*, Divisional Court, Divisional Court File No. 122/07, March 2, 2009.

The Divisional Court considered and upheld the Tribunal's decision. The Divisional Court applied the principles in *Omar*<sup>5</sup> where the Court had earlier ruled in 2007 "if there is new medical evidence that relates to a new medical condition or an aggravation of an individual's conditions since the Director's decision, an applicant can reapply for Ontario Disability Support."

The primary difficulty with the Appellant's case was that neither of the new reports confirmed that the medical analysis related to the period of time when the Director's decision was made. The Court ruled that "reports are presumed to outline the Appellant's condition at the date on which they are written unless there is specific indication to the contrary."

### ***Special Diet Allowance – No Vested Right to Receive Ongoing Allowance***<sup>6</sup>

The Appellants received letters from the Director prior to November 2005 granting the maximum amount of special diet allowance, and based on the physician's assessment that the medical conditions were permanent the special diet eligibility did not require review.

After the law regarding special diet changed in November 2005 both Appellants' special diet allowances were reduced. The question for the Tribunal to consider was whether the appellants acquired a vested right to continue to receive a special diet allowance pursuant to the grant letters that indicated that the allowance was permanent and would not require a review.

In two decisions, and for slightly different reasons, the Tribunal ruled that the appellants did not acquire a vested right and that the Director was correct to require them to reapply under the newly amended regulation.

The Divisional Court dismissed the appeals and ruled that the Tribunal was correct in both cases to find that the Appellants had not acquired a vested interest to a special diet allowance.

The Court accepted that special diet is a part of budgetary requirements and as such is calculated on a monthly basis. Applying the Federal Court reasoning in *Canada (Attorney General) v. Kowalchuk*<sup>7</sup> the Court then found that where benefits are calculated at certain intervals a claimant cannot expect that the rules for calculating that benefit will remain fixed after the moment he makes his claim.....any change in those rules will be applicable to him.

<sup>5</sup> *Omar v. Director, Ontario Disability Support Program*, 156 A.C.W.S. (3d) 509.

<sup>6</sup> *Bigras and Daigle v. Director, Ontario Disability Support Program*, Divisional Court File No. 07-DV-01289-07-DV-01288, October 10, 2008.

<sup>7</sup> *Canada (Attorney General) v. Kowalchuk*, [1990] 114 N.R. 275.

***Health Benefits – Cost of Transportation for Medical Treatment<sup>8</sup>***

The issue before the Divisional Court was whether or not the Appellant's attendance in an adult day treatment program constituted "reasonably required medical treatment" within the meaning of section 44(1) of the Regulation.

The Tribunal determined that the severely disabled Appellant's attendance in the day program did constitute medical treatment. The Tribunal acknowledged that the traditional interpretation of "medical treatment" meant attending a physician's appointment or receiving treatment from such a professional. The Tribunal gave a broader and more liberal interpretation to "medical treatment" in this case and found that given the severe extent of the appellant's developmental challenges – that the program was a major factor in the ongoing overall health of the appellant.

The Divisional Court disagreed. The Court held that the Tribunal was incorrect in law in finding that the voluntary attendance of the Appellant at the adult day program constituted medical treatment. The Court acknowledged that attendance at the program was an important benefit to the disabled Appellant however held that the activities in which he participated at the centre could not be viewed as medical treatment.

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<sup>8</sup> *Director, Ontario Disability Support Program v. Billotte*, Divisional Court, Divisional Court File No. 535/08, March 11, 2009.

## **Interesting Tribunal Decisions**

### ***Sponsor lacks status to appeal to Social Benefits Tribunal regarding recovery of social assistance paid to sponsored immigrant while valid sponsorship agreement in force***

The Appellant and her husband entered into a 10-year sponsorship agreement in support of her parents' application for permanent residency in Canada. While the sponsorship agreement was still in effect the Appellant's husband died and her parents applied for and were granted Ontario Works financial assistance. The Administrator wrote to the Appellant and forwarded a Notice of Default to Sponsor issued by Citizenship and Immigration Canada reminding her of her support obligations with the Government of Canada. The letter further advised the Appellant that as she was failing to fulfil her sponsorship obligations that she would be fully responsible for repaying any of the social assistance paid to her parents.

The Appellant appealed the decision of the Administrator to refer a sponsorship debt for collection to the Government of Canada to the Tribunal. The Tribunal ruled that it lacked jurisdiction to consider the appeal, notwithstanding the fact that on the basis of the parties' submissions it appeared that no other avenue of appeal existed for the Appellant. The Tribunal is a statutory tribunal and it shall only conduct hearings assigned to it under the *Ontario Works Act, 1997*. The Appellant was not an applicant or recipient. She was not and never had received social assistance.

### ***Dependent School Age Child – Attending School and Making Satisfactory Progress with Studies***

The Appellant's 16 year old child returned home for two months and during that time was included as a dependant in the Appellant's benefit unit. In July of that year the Director reviewed the child's report card and determined that she had not been in regular attendance during the year and not made satisfactory progress in school - she failed to obtain any school credits for the academic year.

The Tribunal agreed with the Director that if one considered the entire academic year the child's attendance and progress could not be considered satisfactory. It was not however the entire school year that was in issue. The Tribunal determined that the relevant period was the time when the child was included in her mother's benefit unit. The Tribunal concluded on the basis of evidence from

the Appellant and a youth support worker at the school that during this period the child was attending school. The Tribunal also concluded that “satisfactory progress” needed to be considered in the context of this particular child’s learning challenges. The mother and child had regular interaction with teachers and support workers regarding attendance, homework and other performance issues during the period under review and this constituted satisfactory progress for this child.

### ***Special Diet Allowance – What is the Effect of the Physician Confirming Overlapping Medical Conditions on the Schedule 1***

The Appellant’s physician completed an application for special diet on behalf of the Appellant and confirmed that the Appellant required special diet allowance for five separate conditions listed on the Schedule 1. The Director determined that two of the separately enumerated conditions – “Hypertension” and “Hypertension and Congestive Heart Failure” - overlapped and therefore did not pay the \$44 special diet amount allocated for the second condition. This decision was made following the instructions provided in a Ministry Q & A Memo which provided direction on how to handle cases where an approved health professional had indicated a number of apparently overlapping medical conditions.

The Tribunal determined that the Q & A Memo was a guideline only and did not have the force of law. Nowhere in the Regulation did it provide that an approved health professional was limited in the number of conditions that are identified, nor that the Director or Tribunal could discount apparently overlapping conditions. The Tribunal determined that neither the Director nor the Tribunal could arbitrarily decide that there was an overlap in the special diet provisions and ignore the Regulation.

### ***Application for Assistance - Failure of Spouse to Sign***

The Appellant applied for Ontario Works on his own behalf and declared that he had a spouse and children residing in another country. The Administrator denied the application for assistance because the Appellant failed to provide information – his spouse did not complete the application for assistance. The Administrator’s position was that where an applicant for assistance declares a spousal relationship the Administrator requires the spouse to verify, in person, information that may impact the applicant’s eligibility for assistance.

The Tribunal determined that the Administrator was wrong to deny the Appellant’s application. The Appellant did not apply for assistance on behalf of his spouse and children, he applied only on his own behalf. Sections 19 and 20 of the Regulation provide that an application for basic financial assistance and all

accompanying forms shall be signed by the applicant and the applicant's spouse included in the benefit unit. Although the Administrator relied heavily on the inclusion of the spouse by virtue of section 1 which defines a dependant as including a spouse who is "absent from the dwelling place for a reason other than a breakdown in the relationship with no reasonable prospect of reconciliation", the Tribunal disagreed. In this case the spouse was not included in the benefit unit. The spouse resided in another country, was not present in Ontario and most significantly she had no legal status in Canada. The reunion of the family in Canada was entirely dependent on a successful refugee claim – which at the time of the hearing was still pending.

### ***Reconsideration Request by Party More Than One Year After Decision Issued***

In late 2006 the Appellant requested a reconsideration of a decision issued by the Tribunal in 2002. The 2002 decision of the Tribunal upheld the Director's decision to cancel the Appellant's income support because his private insurance benefits rendered him ineligible. At that time the Tribunal ruled that it lacked jurisdiction to consider the Appellant's *Human Rights Code* and *Canadian Charter of Rights and Freedoms* challenges. The Appellant then pursued these matters before the Divisional Court. The Divisional Court dismissed the appeal.

In April 2006 the Supreme Court ruled that the Tribunal has jurisdiction to hear challenges under the *Code*.<sup>9</sup> In response the Tribunal issued a Practice Direction to clarify the administrative process to be followed for raising *Code* issues in appeals before the Tribunal.

The Appellant then requested a reconsideration of the Tribunal's 2002 decision – the decision which had refused to consider the Appellant's *Code* challenges. The Tribunal agreed with the position advanced by the Director and denied the request for reconsideration.

The Tribunal determined that the Appellant's request for reconsideration was out of time by more than five years. There is a clear one year time limit in the Regulation which fetters the Tribunal's jurisdiction to consider a party's application for reconsideration. The Tribunal rejected the Appellant's argument that the new Practice Direction regarding *Code* issues gave rise to a new one year opportunity to request a reconsideration hearing on the basis of the new jurisprudence. The Tribunal observed that it is well established that it is inappropriate for courts and indeed tribunals to reconsider earlier decisions in light of new jurisprudence that arises subsequent. Allowing for reconsideration on the basis of jurisprudence arising subsequent to a judgment or order is irreconcilable with the doctrine of *res judicata*.

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<sup>9</sup> *Tranchemontagne v. Ontario (Director, Ontario Disability Support Program)*, [2006] SCC 14.

The Tribunal also determined that in any event the Appellant lacked status to claim the relief that he sought from the Tribunal. The issues he sought to raise were identical to those named in the claims that the Divisional Court had dismissed on the basis that they were without any legal basis.

### ***Income – Payments of Any Kind or Nature – Exemption for War Veterans Allowance***

The Appellant was severely injured while on active military duty. He eventually received a War Veterans Allowance and the Director determined that these payments were income which disqualified him from ongoing eligibility for ODSP income support and also resulted in an overpayment. The Appellant argued that the payments were a disability award to compensate him for the non-economic effects of a service related disability, and therefore should be exempt from the treatment of income.

The Tribunal agreed with the Appellant and concluded that the War Veterans payments were payments that were intended to compensate the Appellant for pain and suffering due to an injury that he sustained in the course of his employment - these payments were not intended to be considered as an amount for income replacement. This type of payment is what was intended to be exempted in section 43(1)(4) of the Regulation. The Policy Directive provides that income is to be exempt if it is an award intended to compensate for pain and suffering. The uncontradicted evidence from Veterans Affairs was that these payments were, in large part, for pain and suffering to compensate for the non-economic effects of the injury. The fact that the payments were exempt from income tax added further support for the Tribunal's finding that these payments had all the requisite hallmarks of a pain and suffering award.

## Statistical Tables

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# Table 1

## Appeals by program for the five-year period 2004 - 2005 to 2008 - 2009

| Fiscal Year | ODSP      | OWA      | Total |
|-------------|-----------|----------|-------|
| 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 |
| 2008 – 2009 | 10113 87% | 1556 13% | 11669 |

## Table 2

### Tribunal decisions by outcome for the five-year period 2004 - 2005 to 2008 - 2009

| Fiscal Year | Granted  | Denied   | Denied in absentia * | Referred Back ** | Other *** | Total |
|-------------|----------|----------|----------------------|------------------|-----------|-------|
| 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  |
| 2008-2009   | 4479 52% | 2017 23% | 1565 18%             | 15 -             | 566 7%    | 8642  |

\* 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 2008 - 2009

#### Appeals brought forward, received and processed

|                                                   |              |
|---------------------------------------------------|--------------|
| Cases brought forward from 2007 - 2008            | 11692        |
| Appeals received during 2008 - 2009               | 11669        |
| <u>Appeals to be processed during 2008 - 2009</u> | <u>23361</u> |
| Cases closed without a hearing*                   | 4818         |
| Decisions released**                              | 8898         |
| <u>Appeals processed during 2008 - 2009</u>       | <u>13716</u> |
| Cases carried forward into 2009 – 2010***         | 9645         |

\* 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 2008 - 2009

| Reason case closed          | #    | %    |
|-----------------------------|------|------|
| Withdrawn by appellant *    | 1016 | 21%  |
| Withdrawn by representative | 3138 | 65%  |
| Closed by Tribunal**        | 664  | 14%  |
| Total                       | 4818 | 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 2008 - 2009

| Program | Refusal  | Cancellation<br>&<br>suspension | Amount<br>&<br>reduction | Other | Total |
|---------|----------|---------------------------------|--------------------------|-------|-------|
| ODSP    | 8900 88% | 255 2%                          | 880 9%                   | 78 1% | 10113 |
| OWA     | 398 22%  | 655 42%                         | 488 35%                  | 15 1% | 1556  |
| Total   | 9298 80% | 910 8%                          | 1368 11%                 | 93 1% | 11669 |

## Table 6

### ODSP appeals by issue 2008 - 2009

| Issue                          | #     | %     |
|--------------------------------|-------|-------|
| Not disabled                   | 8520  | 84.3% |
| Overpayment                    | 560   | 5.5%  |
| Special diet                   | 113   | 1.1%  |
| Income/assets in excess        | 173   | 1.7%  |
| Date of grant                  | 43    | 0.4%  |
| Medical transportation costs   | 66    | 0.7%  |
| Failure to provide information | 96    | 0.9%  |
| Maximum entitlement            | 13    | 0.1%  |
| Spousal related                | 26    | 0.3%  |
| Shelter costs                  | 25    | 0.2%  |
| Other                          | 478   | 4.7%  |
| Total                          | 10113 | 100%  |

## Table 7

### OWA appeals by issue 2008 - 2009

| Issue                          | #    | %      |
|--------------------------------|------|--------|
| Overpayment                    | 433  | 27.8%  |
| Failure to provide information | 312  | 20.1 % |
| Job search/loss                | 37   | 2.4%   |
| Income/assets in excess        | 164  | 10.3%  |
| Community start-up benefit     | 79   | 5.1%   |
| Conditions of eligibility      | 137  | 8.8%   |
| Spousal related                | 107  | 6.9%   |
| Employment assistance          | 29   | 1.9%   |
| Maximum entitlement            | 5    | 0.3 %  |
| Special diet                   | 12   | 0.8%   |
| Disposal of assets             | 11   | 0.7 %  |
| Qualifying child               | 9    | 0.6 %  |
| Other                          | 224  | 14.4 % |
| Total                          | 1556 | 100%   |

## Table 8

### Human Rights Issues in Appeals Filed 2008 - 2009

| Issue                                 | #   | %      |
|---------------------------------------|-----|--------|
| Assets in Excess - Disability Welfare | 2   | 1.1%   |
| Co-Residency                          | 1   | 0.6 %  |
| Employment & Training Start-Up        | 1   | 0.6%   |
| Failure to provide information        | 3   | 1.7%   |
| Health benefits                       | 2   | 1.1%   |
| Income in excess                      | 1   | 0.6%   |
| Mandatory special needs               | 2   | 1.1%   |
| Medical transportation costs          | 3   | 1.7%   |
| Not disabled                          | 117 | 66.1 % |
| Ontario Student Assistance Program    | 1   | 0.6%   |
| Overpayment                           | 9   | 5.1 %  |
| Retroactive benefits                  | 1   | 0.6 %  |
| Special diet                          | 33  | 18.6 % |
| Other                                 | 1   | 0.6%   |
| Total                                 | 177 | 100%   |

## Table 9

### Tribunal decisions by program and outcome 2008 - 2009

| Program | Granted  | Denied   | Denied in<br>absentia * | Referred<br>Back ** | Other *** | Total |
|---------|----------|----------|-------------------------|---------------------|-----------|-------|
| ODSP    | 4315 55% | 1757 23% | 1241 16%                | 12 -                | 456 6%    | 7781  |
| OWA     | 164 19%  | 260 30%  | 324 38%                 | 3 -                 | 110 13%   | 861   |
| Total   | 4479 52% | 2017 23% | 1565 18%                | 15 -                | 566 7%    | 8642  |

\* 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 10

### Tribunal ODSP decisions by issue and outcome 2008 - 2009

| Issue                          | Granted | Denied | Denied in absentia * | Referred Back ** | Other *** | Total |
|--------------------------------|---------|--------|----------------------|------------------|-----------|-------|
| Not disabled                   | 60%     | 21%    | 15%                  | -                | 5%        | 6854  |
| Overpayment                    | 28%     | 34%    | 18%                  | 1%               | 19%       | 316   |
| Assets/income in excess        | 22%     | 35%    | 18%                  | 2%               | 22%       | 94    |
| Community start-up benefit     | 19%     | 37%    | 32%                  | -                | 12%       | 73    |
| Date of grant                  | 26%     | 43%    | 17%                  | 7%               | 14%       | 35    |
| Medical transportation costs   | 50%     | 18%    | 23%                  | -                | 9%        | 44    |
| Failure to provide information | 17%     | 34%    | 22%                  | -                | 27%       | 41    |
| Maximum entitlement            | 0%      | 40%    | 10%                  | 20%              | 30%       | 10    |
| Spousal related                | 33%     | 47%    | 7%                   | -                | 13%       | 15    |
| Other                          | 22%     | 34%    | 35%                  | -                | 9%        | 299   |
| Total                          | 55%     | 23%    | 16%                  | -                | 6%        | 7781  |

\* 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 OWA decisions by issue and outcome 2008 - 2009

| Issue                     | Granted | Denied | Denied in absentia * | Referred Back ** | Other *** | Total |
|---------------------------|---------|--------|----------------------|------------------|-----------|-------|
| Overpayment               | 25%     | 34%    | 26%                  | -                | 14%       | 305   |
| Job search and loss       | 4%      | 29%    | 64%                  | -                | 4%        | 28    |
| Failure to provide info   | 20%     | 35%    | 36%                  | 1%               | 9%        | 142   |
| Assets/income in excess   | 22%     | 32%    | 41%                  | -                | 5%        | 82    |
| Employment assistance     | 9%      | 36%    | 55%                  | -                | -         | 11    |
| Community start-up        | 23%     | 21%    | 38%                  | -                | 17%       | 52    |
| Spousal related           | 29%     | 22%    | 39%                  | -                | 10%       | 51    |
| Conditions of eligibility | 13%     | 24%    | 54%                  | -                | 10%       | 104   |
| Maximum entitlement       | 40%     | 20%    | 20%                  | -                | 20%       | 5     |
| Other                     | -       | 26%    | 47%                  | 2%               | 28%       | 81    |
| Total                     | 19%     | 30%    | 38%                  | -                | 13%       | 861   |

\* 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

### Tribunal decisions where appellant represented 2008 - 2009

| Program | Granted  | Denied   | Denied in<br>absentia * | Referred<br>Back ** | Other *** | Total |
|---------|----------|----------|-------------------------|---------------------|-----------|-------|
| ODSP    | 3754 72% | 1114 21% | 153 3%                  | 2 -                 | 169 3%    | 5192  |
| OWA     | 87 45%   | 59 30%   | 25 13%                  | 1 -                 | 23 12%    | 195   |
| Total   | 3841 71% | 1173 22% | 178 3%                  | 3 -                 | 192 4%    | 5387  |

\* 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 13****Appeals by county/district/municipality 2008 – 2009**

| County, District<br>Municipality | Appeals      | ODSP         | OWA         | % of Total<br>Appeals |
|----------------------------------|--------------|--------------|-------------|-----------------------|
| Algoma                           | 199          | 189          | 10          | 2                     |
| Brant                            | 230          | 215          | 15          | 2                     |
| Bruce                            | 50           | 42           | 8           | 1                     |
| Chatham-Kent                     | 164          | 147          | 17          | 1                     |
| Cochrane                         | 123          | 114          | 9           | 1                     |
| Dufferin                         | 25           | 24           | 1           | -                     |
| Durham                           | 331          | 270          | 61          | 3                     |
| Elgin                            | 125          | 78           | 47          | 1                     |
| Essex                            | 515          | 420          | 95          | 4                     |
| Frontenac                        | 189          | 175          | 14          | 2                     |
| Grey                             | 69           | 61           | 8           | 1                     |
| Haldimand-Norfolk                | 102          | 91           | 11          | 1                     |
| Haliburton                       | 8            | 8            | -           | -                     |
| Halton                           | 96           | 85           | 11          | 1                     |
| Hamilton-Wentworth               | 670          | 594          | 76          | 6                     |
| Hastings                         | 284          | 255          | 29          | 3                     |
| Huron                            | 33           | 29           | 4           | -                     |
| Kenora                           | 39           | 37           | 2           | -                     |
| Lambton                          | 131          | 115          | 16          | 1                     |
| Lanark                           | 104          | 95           | 9           | 1                     |
| Leeds & Grenville                | 95           | 81           | 14          | 1                     |
| Lennox & Addington               | 47           | 41           | 6           | -                     |
| Manitoulin                       | 15           | 15           | -           | -                     |
| Middlesex                        | 398          | 356          | 42          | 3                     |
| Muskoka                          | 62           | 49           | 13          | 1                     |
| Niagara                          | 383          | 364          | 19          | 3                     |
| Nipissing                        | 123          | 109          | 14          | 1                     |
| Northumberland                   | 132          | 74           | 58          | 1                     |
| Ottawa-Carleton                  | 754          | 647          | 107         | 7                     |
| Oxford                           | 116          | 104          | 12          | 1                     |
| Parry Sound                      | 41           | 38           | 3           | -                     |
| Peel                             | 621          | 522          | 99          | 5                     |
| Perth                            | 38           | 34           | 4           | -                     |
| Peterborough                     | 214          | 158          | 56          | 2                     |
| Prescott & Russell               | 88           | 52           | 36          | 1                     |
| Prince Edward                    | 27           | 24           | 3           | -                     |
| Rainy River                      | 17           | 17           | -           | -                     |
| Renfrew                          | 99           | 88           | 11          | 1                     |
| Simcoe                           | 317          | 269          | 48          | 3                     |
| Stormont Dundas & Glengarry      | 150          | 124          | 26          | 1                     |
| Sudbury                          | 207          | 180          | 27          | 2                     |
| Thunder Bay                      | 281          | 234          | 47          | 3                     |
| Timiskaming                      | 45           | 44           | 1           | -                     |
| Toronto                          | 2955         | 2623         | 332         | 25                    |
| Victoria                         | 90           | 76           | 14          | 1                     |
| Waterloo                         | 360          | 292          | 68          | 3                     |
| Wellington                       | 118          | 94           | 24          | 1                     |
| York                             | 389          | 360          | 29          | 3                     |
| <b>Total</b>                     | <b>11669</b> | <b>10113</b> | <b>1556</b> | <b>100%</b>           |

## Table 14

### Appeals by language 2008 – 2009

| Language                   | #     | %    |
|----------------------------|-------|------|
| English                    | 9455  | 81%  |
| French                     | 187   | 2%   |
| Interpreter other language | 2027  | 17%  |
| Total                      | 11669 | 100% |

## Table 15

### Interim assistance requests by program for the five-year period 2004 - 2005 to 2008 - 2009

| Fiscal Year | ODSP     | OWA      | Total |
|-------------|----------|----------|-------|
| 2004 - 2005 | 2010 54% | 1721 46% | 3731  |
| 2005 - 2006 | 1791 57% | 1369 43% | 3160  |
| 2006 - 2007 | 2487 70% | 1051 30% | 3538  |
| 2007 - 2008 | 2359 68% | 1106 32% | 3465  |
| 2008 - 2009 | 2122 66% | 1080 34% | 3202  |

## Table 16

### Tribunal decisions on interim assistance by program 2008 - 2009

| Program | Granted  | Denied   | Total |
|---------|----------|----------|-------|
| ODSP    | 425 16%  | 2170 84% | 2595  |
| OWA     | 919 81%  | 222 19%  | 1141  |
| Total   | 1344 36% | 2392 64% | 3736  |