

CHAPTER 4

Social Benefits Tribunal

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Overview and History

The Social Benefits Tribunal (SBT) hears appeals stemming from the *Ontario Works Act, 1997* (OWA)¹ and the *Ontario Disability Support Program Act, 1997* (ODSPA).² The SBT was created in accordance with the OWA,³ but its hearings predominantly stem from the denials of disability claims under the ODSPA. The SBT was created when its enabling legislation created a new welfare scheme in Ontario known as Ontario Works (OW). Simultaneously, the Ontario Disability Support Program (ODSP), a benefit program offering financial assistance to Ontarians with disabilities, was legislated. The SBT hears appeals from individuals who have been denied, cut from, or suspended from OW or ODSP, or from individuals who owe an overpayment to either program. The SBT has a chairperson, one or more vice-chairs, and multiple tribunal members.⁴

OW is administered through the municipalities in Ontario⁵ under the power of the director, who is appointed under the OWA and whose powers include the delivery and oversight of OW in its entirety.⁶ The director also oversees the administration of the ODSP.⁷

Legislation and Regulations

The OWA and ODSPA are the key pieces of legislation governing the SBT, in conjunction with legislative requirements in the *Statutory Powers Procedure Act* (SPPA).⁸ The SPPA is discussed in the Chapter 1 and specifically does not apply to OW and ODSP internal reviews or interim assistance.⁹

Ontario Works Act, 1997 and Regulations

The OWA sets out its purpose in section 1, which clearly outlines both a social agenda and an accountability requirement in subsections (a) through (d). The social agenda is highlighted in the statute's aim to provide financial assistance to Ontarians “most in need” (section 1(a) and (d)) and to “effectively” serve people requiring assistance (section 1(c)). Accountability to taxpayers is evident in the sections that impose employment searching obligations and promote “individual responsibility” and “self-reliance” (section 1(a) and (d)).

1 *Ontario Works Act, 1997*, SO 1997, c 25, Schedule A.

2 *Ontario Disability Support Program Act, 1997*, SO 1997, c 25, Schedule B.

3 OWA, s 60.

4 OWA, ss 61(1), 62(1).

5 OWA, ss 37, 38; and O Reg 136/98.

6 OWA, ss 47, 48.

7 OWA, ss 37, 38.

8 *Statutory Powers Procedure Act*, RSO 1990, c S.22.

9 OWA, ss 27(4), 30(3); and ODSPA, ss 22(4), 25(3).

Eligibility for financial assistance is determined through section 7(3) of the OWA and requires residency in Ontario, budget and asset limits,¹⁰ information disclosure,¹¹ and cooperation with all of the above by all dependants.¹² There are exceptions to the Ontario residency rule: some of these include incarcerated persons,¹³ persons subject to a removal or deportation order,¹⁴ certain classes of students enrolled in full-time study at a postsecondary institution,¹⁵ or, more generally, persons under 18 years of age.¹⁶ Eligibility may also require additional undertakings, such as job-searching.¹⁷ Just as dependants of an applicant are required to abide by the eligibility factors, they are also able to receive benefits¹⁸ along with the applicant, as members of a **benefit unit**.¹⁹ Emergency assistance and temporary assistance are also made possible under the OWA.²⁰ Employment assistance is part of the financial assistance piece of this program and may include help finding a job or similar activities.²¹

Four regulations exist pursuant to the OWA.²² The main regulation, known as the General Regulation, outlines key aspects of OW.²³ This General Regulation is central to understanding the OWA, SBT jurisdiction, and SBT process because it gives additional insight to the sections outlined in the statute. Other regulations created under the OWA are O Reg 564/05 (Prescribed Policy Statements), O Reg 136/98 (Designation of Geographic Areas and Delivery Agents), and O Reg 135/98 (Administration and Cost Sharing).

Ontario Disability Support Program Act, 1997 and Regulations

Like the OWA, the ODSPA sets out its purpose at the beginning: to create income and employment supports; however, this Act is aimed at assisting persons with disabilities in Ontario (section 1(a)). The purpose also outlines the

benefit unit a person and all dependants on behalf of whom the person receives or applies for income support

10 O Reg 134/98, ss 38-39, 48-54.1.

11 *Ibid*, ss 14, 20.1.

12 OWA, s 7(3); and *supra* note 10, s 4.

13 *Supra* note 10, s 8(a).

14 *Ibid*, s 6(1)1.

15 *Ibid*, s 9.

16 *Ibid*, s 10.

17 OWA, s 7(4).

18 OWA, s 8.

19 OWA, s 2.

20 OWA, ss 9, 10.

21 OWA, ss 3-4; and *supra* note 10, ss 3, 25-31.

22 OWA, s 74.

23 *Supra* note 10.

same accountability to taxpayers as in the OWA (section 1(d)). Financial assistance under the ODSPA is available to persons with disabilities as per section 4(1) of the Act, which outlines specific requirements for being found eligible:

- 4 (1) A person is a person with a disability for the purposes of this Part if,
- (a) the person has a substantial physical or mental impairment that is continuous or recurrent and expected to last one year or more;
 - (b) the direct and cumulative effect of the impairment on the person's ability to attend to his or her personal care, function in the community and function in a workplace, results in a substantial restriction in one or more of these activities of daily living; and
 - (c) the impairment and its likely duration and the restriction in the person's activities of daily living have been verified by a person with the prescribed qualifications.

Of course, an eligible individual must also meet financial (income and asset)²⁴ and information²⁵ requirements and must be a resident of Ontario²⁶ to receive assistance. Similarly to those for OW, dependants of the applicant/recipient are subject to eligibility requirements²⁷ and are made ineligible through certain factors.²⁸ Recipients may also be found ineligible because of a failure to pursue other resources.²⁹

Section 5(2) of the ODSPA originally included additional requirements that were a barrier to eligibility. That section has since been made inoperable by the courts after a lengthy court battle that started as a standard ODSP application. Section 5(2) states that

- A person is not eligible for income support if,
- (a) the person is dependent on or addicted to alcohol, a drug or some other chemically active substance;
 - (b) the alcohol, drug or other substance has not been authorized by prescription as provided for in the regulations; and
 - (c) the only substantial restriction in activities of daily living is attributable to the use or cessation of use of the alcohol, drug or other substance at the time of determining or reviewing eligibility.

24 *Ibid*, s 5(1)(c); and O Reg 222/98, ss 27, 28.

25 ODSPA, s 5(1)(d); and O Reg 222/98, at ss 12, 14(2).

26 ODSPA, s 5(1)(b).

27 ODSPA, s 5(1)(e); and O Reg 222/98, ss 3-4, 6.

28 O Reg 222/98, ss 7-9.

29 *Ibid*, s 11.

Essentially, this created a barrier to ODSP for individuals who suffered from a drug, alcohol, or other substance addiction and suffered substantial impairments and restrictions in their daily living as a result thereof, unless this addiction existed alongside another substantially impairing condition. Individuals could not get ODSP based on addiction alone, even if their impairments and restrictions met the test in section 4(1). For example, if Joe’s application for ODSP listed “addiction to oxycontin” as the condition, and all other boxes on the application verifying the resulting impairments, restrictions in daily living, and duration of the condition were satisfactorily completed, he would still be denied ODSP on the basis of section 5(2) alone. However, if Joe’s application for ODSP listed two conditions, one being “addiction to oxycontin” and the second being “degenerative disc disease,” and both conditions were fully verified with resulting impairments, restrictions in daily living, and duration, then he would stand a good chance of being accepted for ODSP.

This legislative provision came under review in a case known as *Tranchemontagne*.

Tranchemontagne

In 1999, two applications were made to the ODSP based on addiction alone. One was made by Norman Werbeski, and the other was made by Robert Tranchemontagne. At the SBT, both appellants argued that section 5(2) was a violation of their human rights under Ontario’s *Human Rights Code* (Code),³⁰ on the grounds of disability. Disability under the Code had not previously been interpreted to include alcoholism, but both appellants felt that it was a reasonable extension of the definition. Both applications were based on alcoholism, and in 2001 both were denied by the SBT on the basis of section 5(2), even though the SBT found them both to have substantial impairments and restrictions because of their alcoholism.³¹ The SBT deferred jurisdiction on the human rights arguments.

Werbeski appealed the SBT decision to the Divisional Court, and the judgment of the court was delivered on March 25, 2003 (one day after it was heard, which is remarkable!).³² Tranchemontagne’s appeal was joined with Werbeski’s, and as such this decision applied to both appellants. The appeals were based on the SBT failing to recognize the paramountcy of the Code over the ODSPA. Specifically, the appellants argued that section 1 and section 47(2) of the Code trumped section 5(2) of the ODSPA and sought a declaration that the Code should override the section 5(2) bar on alcoholism as a condition eligible

30 RSO 1990, c H.19.

31 *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14 at 5-6.

32 *Werbeski v Ontario (Disability Support Program)*, [2003] OJ No1409.

for ODSP. (Section 1 of the Code outlines the rights of Ontarians to receive services free from discrimination on a number of grounds, one of those grounds being disability. Section 47(2) of the Code states the primacy of the Code over other pieces of legislation, unless there is a legislative statement to the contrary.

The Divisional Court found that the SBT was restricted by its enabling legislation, and although the SBT was required to apply the Code in interpreting its enabling legislation, it could not apply the Code in way that would override its enabling legislation or jurisdiction (as per previous case law).³³ Furthermore, the court found that the SBT did not have the expertise to determine such a jurisdictional matter, although the court indicated that the apparent conflict must be addressed by a court with competent expertise and jurisdiction to do so.³⁴ The court denied the appeal.³⁵

Werbeski and Tranchemontagne, unsatisfied, appealed the Divisional Court decision to the Ontario Court of Appeal. In a decision dated September 16, 2004 this court also denied their appeal.³⁶ The appeal was based on the Divisional Court's erroneous decision not to recognize the SBT's jurisdiction to acknowledge the paramountcy of the Code.³⁷ Specifically, the issue before the Court of Appeal was whether the Divisional Court was wrong to find that the SBT does not have jurisdiction to order that section 5(2) is contrary to the Code.³⁸ The judgment delivered by Weller J on behalf of the court concluded that the SBT did have jurisdiction to determine if section 5(2) offends the Code on the basis that the SBT was a tribunal capable of determining questions of law and that the enabling legislation did not specifically exclude the SBT from doing so.³⁹ However, because of practical considerations, the court also determined that the Human Rights Tribunal was a more appropriate venue to determine this legal issue.⁴⁰ For the latter reason, the appeal was dismissed.⁴¹

Once again, the appellants refused to give up, and they appealed the Ontario Court of Appeal decision to the Supreme Court of Canada.⁴² The issue on appeal raised the following question: "Is the Social Benefits Tribunal ("SBT"), a provincially created statutory tribunal, obligated to follow provincial human rights legislation in rendering its decisions?"⁴³ The Supreme Court of

33 *Ibid* at para 3.

34 *Ibid* at paras 4, 6.

35 *Ibid* at para 8.

36 *Tranchemontagne v Director of the Ontario Disability Support Program of the Ministry of Community Family and Children's Services* (2004), 72 OR (3d) 457.

37 *Ibid* at 3.

38 *Ibid* at 3.

39 *Ibid* at 4-5, 52-53, 58-59.

40 *Supra* note 36 at 6-7, 61, 69.

41 *Ibid* at 70.

42 *Supra* note 31.

43 *Ibid* at 1.

Canada found that the SBT did have jurisdiction to consider the Code,⁴⁴ that it could not decline to consider Code issues when raised,⁴⁵ and that it was the best venue to determine the issue.⁴⁶ The appeal was allowed, and the Supreme Court ordered that the matter be sent back to the SBT for a determination on the merits of the applicants' cases while mandating that it determine the human rights arguments.⁴⁷

Once again, the appellants found their applications for ODSP before the SBT. It was 2006, and a significant amount of time (seven years!) had passed since their original applications had been filed for assistance. In a decision dated November 30, 2006, and after days of hearing evidence, the SBT concluded that both Werbeski and Tranchemontagne were disabled according to section 4(1) of the ODSPA and that section 5(2) constituted discrimination in accordance with the Code.⁴⁸ The director appealed the decision to the Divisional Court on an error of law, with a number of complicated issues on appeal that focused on the evidence presented before the SBT and the correct application of the test to determine inconsistency in the Code.⁴⁹ Ultimately, the Divisional Court dismissed the director's appeal, upholding the SBT's decision in favour of Werbeski and Tranchemontagne. The court's decision was based on the following determinations: the SBT did not err in considering the respondent's witness evidence,⁵⁰ and the SBT applied the correct test to determine Code violations, including contextual factors,⁵¹ and to identify the correct comparator groups.⁵²

The case was not done yet. The director appealed the 2009 Divisional Court decision to the Ontario Court of Appeal, which was the final stop.⁵³ The director's appeal once again advanced complicated questions of law based on errors in the Divisional Court's reasoning in considering the correct application of the test to determine a Code violation and in the court's upholding of the SBT's approach to the expert evidence supplied by Werbeski and Tranchemontagne.⁵⁴ The Ontario Court of Appeal denied the director's appeal, although it did not accept the test put forth by the Divisional Court⁵⁵ and found that there had been a questionable application of the evidence.⁵⁶

44 *Ibid* at 40-42.

45 *Supra* note 31 at 46.

46 *Ibid* at 48-52.

47 *Ibid* at 53.

48 *Ontario (Director, Disability Support Program) v Tranchemontagne* (2009), 95 OR (3d) 327 at 21-25.

49 *Ibid* at 26.

50 *Ibid* at 52.

51 *Ibid* at 94, 123.

52 *Ibid* at 116.

53 *Ontario (Director, Disability Support Program) v Tranchemontagne*, 2010 ONCA 593.

54 *Ibid* at 9-11.

55 *Ibid* at 12, 127.

56 *Ibid* at 13, 143.

The result was that section 5(2) of the ODSPA, though still part the Act, is of no force or effect, as it was found to discriminate unfairly against individuals disabled through alcoholism. Since the final 2010 Ontario Court of Appeal decision, application to ODSP for assistance can be made based on substance abuse or addiction alone, provided they satisfy the requirements in section 4(1) of the ODSPA. This decision also affected the determination of “disability” under the Code in other jurisdictions, such as before the Human Rights Tribunal of Ontario,⁵⁷ in Ontario Labour Arbitration Awards,⁵⁸ and in criminal matters.⁵⁹ In addition, it has been considered in other decisions as a basis for interpretation.⁶⁰

Sadly, Werbeski did not live to see the matter resolved.⁶¹

In addition to the legislative provisions outlined above, the ODSPA has five regulations,⁶² with the General Regulation being most important.⁶³ Like the OW General Regulation, the importance of the ODSP General Regulation lies in its depth and detail. It provides greater clarity on subject matter raised in the legislation; for example both the legislation and this General Regulation are required to understand the requirements of a Notice of Decision and the appeal process. The other regulations outline specifics around employment supports,⁶⁴ assistance for children with severe disabilities,⁶⁵ administration and cost sharing,⁶⁶ and prescribed policy statements,⁶⁷ and while important to these specific topics, they do not cover as broad areas as the General Regulation does.

Rules of Procedure and Practice Directions

SBT procedure is primarily governed by its internal rules and practice directions. The SBT rules of procedure are divided into two parts: the Social Justice Tribunals Ontario (SJTO) Common Rules and the SBT Rules of Procedure.⁶⁸

57 See *Carter v Chrysler Canada Inc*, 2017 HRTO 168; and *Appleton v Artisan Co-operative Homes Inc*, [2016] OHRTD No 1709.

58 See *Ontario Nurses' Assn v Sunnybrook Health Sciences Centre (Discharge Grievance)*, [2016] OLAA No 361; and *Toronto District School Board v Ontario Secondary School Teachers' Federation District 12 (Accommodation Grievance)*, [2015] OLAA No 301.

59 *R v Jewett*, 9 MVR (6th) 306.

60 See *Hendershott v Ontario (Ministry of Community and Social Services)*, 2011 HRTO 482; *Hay v Ontario Provincial Police*, 2012 HRTO 2316; Decision No 681/10, [2012] OWSIATD No 1025; *Andrews v Canada (Indian and Northern Affairs)*, 2013 CHRT 21; and *Riche v Treasury Board (Department of National Defence)*, 2013 CRTFP 35.

61 *Supra* note 53 at para 17.

62 ODSPA, s 55.

63 *Supra* note 28.

64 O Reg 223/98.

65 O Reg 224/98.

66 O Reg 225/98.

67 O Reg 562/05.

68 Social Justice Tribunals Ontario, Social Benefits Tribunal, “Rules and Practice Directions” (2015), online: <<http://www.sjto.gov.on.ca/sbt/rules-of-procedure/>>.

Ten different practice directions⁶⁹ also guide the SBT and parties on topics such as litigation guardians,⁷⁰ reconsideration requests,⁷¹ and recording proceedings.⁷²

The SJTO Common Rules apply to all tribunals in the SJTO cluster (see Chapter 1 for more details on clustering). The purpose of the Common Rules is to allow for a cohesive set of binding practices among the tribunals in the cluster, but they have been part of the SBT's structure only since October 2013. The SBT Rules of Procedure have been in effect since January 2016. As per the preamble to the Rules of Procedure, the two parts should be read together. This means that when faced with an issue covered in either set of rules, parties and members are obliged to consider both sets of rules in the interpretation of the issue raised.

The SJTO Common Rules advance the ideals of fairness and an expeditious resolution of matters. They promote a liberal and purposive interpretation for the “fair, just and expeditious resolution of disputes,” while promoting effective party participation and proportionality between the outcomes and issues.⁷³ The rules also mandate courtesy, respect, and good faith by participants in the tribunal process,⁷⁴ which clearly establish boundaries for self-represented litigants while simultaneously echoing the requirements of licensed counsel as set out through rules of conduct.⁷⁵ Tribunal powers are also touched upon, specifically with respect to innate ability to exercise its own powers⁷⁶ or to waive or vary any of the applicable rules,⁷⁷ or even to dismiss a vexatious matter for abuse of process.⁷⁸ Such powers, and others, are also outlined in the SBT Rules of Procedure at 1.4 and 1.5.

Other topics in the SBT Rules of Procedure are noted throughout this chapter.

69 *Ibid.*

70 Social Justice Tribunals Ontario, Social Benefits Tribunal, “Practice Direction on Litigation Guardians before the Social Justice Tribunals Ontario” (1 October 2013), online: <<http://www.sjto.gov.on.ca/documents/sjto/Practice%20Directions/Litigation%20Guardians%20before%20SJTO.html>>.

71 Social Justice Tribunals Ontario, Social Benefits Tribunal, “Practice Direction on Reconsideration Requests” (2015), online: <<http://www.sjto.gov.on.ca/documents/sbt/Reconsideration%20Requests.html>>.

72 Social Justice Tribunals Ontario, Social Benefits Tribunal, “Practice Direction on Recording Proceedings” (2015), online: <<http://www.sjto.gov.on.ca/documents/sbt/Recording%20Proceedings.html>>.

73 *Supra* note 68, r A3.1.

74 *Ibid.*, r A7.1.

75 Law Society of Ontario, *Paralegal Professional Conduct Guidelines* (1 October 2014; amendments current to 28 Sep 2017), online: <<http://www.lsuc.on.ca/paralegal-conduct-guidelines>>. and Law Society of Ontario, *Paralegal Rules of Conduct* (1 October 2014; amendments current to 28 Sep 2017), online: <<http://www.lsuc.on.ca/paralegal-conduct-rules>>.

76 *Supra* note 68 at A4.1.

77 *Ibid.*, r A4.2.

78 *Ibid.*, rr A8.1, A8.2.

Application Process

Individuals apply to the SBT by completing an appeal form and submitting it to the tribunal if their application for OW or ODSP had been denied, if their OW or ODSP had been cancelled or suspended, or if an overpayment had been rendered against them. Practitioners must understand the entire process of applying for OW and ODSP, including the lead-up to this appeal.

Ontario Works

Applications for OW are enabled through section 15 of the OWA. The General Regulation for Ontario Works provides greater insight into the application process.⁷⁹ The standard procedure is for an individual to go to a local office, meet with a caseworker, and take a financial eligibility test. Decisions about eligibility are usually made within a day or two, and the applicant is informed immediately. The amount of monthly assistance is determined by the regulations.⁸⁰ Typically, a single person on OW receives approximately \$706 per month, inclusive of basic needs and shelter allowances.⁸¹

Ontario Disability Support Program

Applications for ODSP assistance are made under section 10(1) of the ODSPA but are further referred to in section 14 of the General Regulation for ODSP.⁸² Applications for ODSP must be completed by a medical professional.⁸³ An optional personal statement portion may be completed by the applicant. ODSP eligibility determinations take significantly longer than for OW eligibility because local offices must wait to receive the disability determination package back from the medical practitioner, which can take up to 90 days. The amount of monthly assistance awarded, if the person is found eligible, is determined by the regulations.⁸⁴ Typically, a single person on ODSP receives approximately \$1128.00 per month, inclusive of basic needs and shelter allowances.⁸⁵ ODSP also enables recipients to work and offers employment supports,⁸⁶ as well as a scheme for treatment of earnings.⁸⁷

79 *Supra* note 10, ss 16-20.

80 *Ibid*, ss 40-47.2.

81 *Ibid*, ss 41(1)1, 42(2)2.

82 *Supra* note 28, ss 14-16.

83 ODPSA, s 4(1)(c); and *ibid*, s 46.

84 *Supra* note 28, ss 29-37.

85 *Ibid*, ss 30(1)1, 31(2); and *supra* note 64, ss 30, 31.

86 ODSPA at 32-36.

87 *Supra* note 28, ss 38-40.

Overpayments

If recipients receive more assistance than they are entitled to, an **overpayment** may be rendered against them, which means they must pay the money back.⁸⁸ Overpayments can be collected through a reduction in the amount of monthly financial assistance,⁸⁹ through a court order for recovery,⁹⁰ or through recovery from other programs,⁹¹ as well as a debt owing to the Crown.⁹²

A recipient will receive a written notice of overpayment under section 21(1) of the OWA or section 16 of the ODSPA that will list the amount of the debt and any information necessary. After a notice of overpayment is received, the recipient may launch an internal review of the decision⁹³ and then proceed to an appeal at the SBT.⁹⁴ A decision of the SBT that upholds the overpayment is final and enforceable against the appellant.⁹⁵

Director's Decisions, Internal Reviews, and Appeals to the Tribunal

Decisions concerning overpayments, suspensions, and denials must be given to the affected individual and contain information about appeal rights, which begin with an internal review.⁹⁶ Internal review requests must be made within 30 days of the date of the decision,⁹⁷ and the director will allow or deny the request.⁹⁸ Often, the internal review decision will uphold the director's original decision. The applicant or recipient may then appeal to the SBT⁹⁹ but

overpayment money paid to a recipient that is in excess of the correct amount the person should have received, thus creating a debt to the Crown

88 OWA, s 19; ODSPA, s 14; and *ibid*, ss 51, 52.

89 OWA, s 20(1); *supra* note 10, s 62-64; ODSPA, ss 14(4), 15.

90 OWA, s 22.

91 ODSPA, s 14(3); and *ibid*, s 19(3).

92 OWA, s 22.1; and ODSPA, s 14(2.1)(4).

93 OWA, s 27; and ODSPA at 22(1).

94 OWA, s 26(1); and ODSPA at 21(1).

95 OWA, s 21(3).

96 OWA, ss 24, 26; *supra* note 10, s 67; ODSPA, s 19; and *supra* note 28, s 56.

97 OWA, s 27 (3); *supra* note 10, ss 69, 70; ODSPA, s 22(3); *supra* note 28 at 58; and Social Justice Tribunals Ontario, Social Benefits Tribunal, "Social Benefits Tribunal: Rules of Procedure for Appeals to the Social Benefits Tribunal" (1 January 2016), r 2.1, online: <<http://www.sjto.gov.on.ca/documents/sbt/SBT%20Rules%20Parts%201%20&%202%20EN.html#rule2>>.

98 *Supra* note 10, s 71; and *supra* note 28, ss 59, 60.

99 OWA, s 28; and *supra* note 68, r 2.3, 2.5.

only if the original decision pertained to the “eligibility for or the amount of basic financial assistance”¹⁰⁰ for OW or to “eligibility for or the amount of income support, assistance ... or extended health benefits”¹⁰¹ for ODSP.

Some decisions cannot be appealed, including the denial of discretionary assistance¹⁰² (i.e., a recipient’s request for moving costs) or a decision related to emergency assistance.¹⁰³ Appeals must be made within 30 days from the date of the internal review decision, although the SBT may grant an extension.¹⁰⁴ Appeals to the SBT must be made on the tribunal-approved appeal form.¹⁰⁵ See Form 1 under the Forms heading later in this chapter. Appeals are denied if the appellant fails to file within the limitation period or fails to attend the hearing, whether in person or by other means (e.g., phone or teleconference).¹⁰⁶ This appeal process is essentially the application process at the SBT.

Hearing Process

Once an appeal has been filed with the SBT, a notice of hearing will be sent from the tribunal to the parties within 60 days, and with at least 30 days’ notice of the pending date.¹⁰⁷ The SPPA has specific requirements for what must be included in a written notice of hearing.¹⁰⁸ The SPPA standards are reflected in the requirements that are laid out in the OWA General Regulation, which requires:

The notice of hearing shall set out,

(a) in the case of an oral hearing, the place, date and time of the hearing;
or

(b) in the case of a paper hearing, the dates by which the parties are required to provide their written submissions and documentary evidence to the Tribunal.¹⁰⁹

Hearings are held across the province,¹¹⁰ usually at community centres or hotels.

100 *Ibid*, s 26(1).

101 ODSPA, s 21(1).

102 *Ibid*, s 21(2); and *supra* note 10, ss 59, 68; see also *supra* note 28, s 57.

103 OWA, s 26(2); and ODSPA, s 21(2).

104 OWA, ss 28(1), (2); *supra* note 10, s 72; ODSPA, s 23(1); *supra* note 28, s 61; and Social Justice Tribunals Ontario, *supra* note 97, r 3.1, 3.3.

105 *Supra* note 68, r 3.2.

106 OWA, s 34(1).

107 *Supra* note 10, s 74(1), (3); and *supra* note 28, s 63.

108 *Supra* note 9, s 6(3)(4)(5).

109 *Supra* note 10, s 74(2).

110 *Ibid*, s 65; and *supra* note 68, r 7.5.

Although the appellant may feel odd showing up at a local library boardroom for a hearing, this approach reduces expenses (by avoiding bricks-and-mortar costs) and promotes greater access to justice (by limiting appellants' need to travel). The OWA and the SBT Rules of Procedure also provide for written hearings, specifically where all parties agree.¹¹¹

SBT now provides the option of video conferencing.¹¹² This pilot project in conjunction with the Rexdale Community Legal Clinic (Rexdale), which hosts the conferencing option, is testing how effective and efficient video conferencing is. Rexdale has identified some early benefits of the pilot project as increased scheduling efficiencies and cost savings for the SBT, reduced travel time and costs for representatives and appellants, decreased stress for appellants, and greater overall convenience.¹¹³ Rexdale also highlights some innate challenges concerning security, privacy, integrity, budget, training, and communication, as well as challenges specific to the self-represented appellant.¹¹⁴

Despite the provisions of the SPPA,¹¹⁵ all SBT hearings are closed to the public.¹¹⁶ On appeal, the burden of proof lies with the appellant.¹¹⁷

The OWA promotes fairness in decision-making through its mandate that members

(a) shall not have taken part in any investigation or consideration of the subject-matter of the hearing before the hearing; and

(b) shall not communicate directly or indirectly in relation to the subject-matter of the hearing with a person except upon notice to and opportunity for all parties to participate.¹¹⁸

The exception, of course, is the tribunal's legal adviser, from whom members can seek legal advice.¹¹⁹ Tribunal members are also required to take notes at the hearing.¹²⁰ Typically, only one member presides over a hearing; however, the OWA allows for more than one member to be appointed to sit in a hearing, with one as the presiding member.¹²¹

111 OWA, s 65; *supra* note 10, s 83; and *supra* note 68, r 7.7-7.10.

112 E Ann McRae, "Video Conferencing as an Option at the Social Benefits Tribunal: Completely unscientific analysis of the issues faced in the pilot project at the Rexdale Hub, 2015-2016" in *Designing the Infrastructure of Tribunals: The Six-Minute Administrative Lawyer 2017* (Toronto: Law Society of Ontario, 2017) at 6C-1.

113 *Ibid.*

114 *Ibid.*

115 *Supra* note 9, s 9.

116 OWA, s 66(1); and *supra* 68, r 7.1.

117 OWA, s 28(11); and ODSPA, s 23(10).

118 OWA, s 66(2).

119 *Ibid.*, s 66(3).

120 *Supra* note 10, s 76(4).

121 *Ibid.*, s 64.

Written Submissions

Any documents that a party wants to use at the hearing are subject to disclosure requirements.¹²² For matters arising out of the OWA, the appellant must provide disclosure at least 20 days before the hearing, and the administrator, at least 10 days before the hearing.¹²³ The same timelines apply for matters arising out of the ODSPA,¹²⁴ except for medical evidence in disability determination appeals, where the timeline for new evidence is at least 30 days before the hearing.¹²⁵ Written disclosure timelines are also addressed in the SBT Rules of Procedure, Rules 4 and 5.9 to 5.11.

Oral Hearings

Oral hearings before the SBT follow an **adversarial** hearing approach. Hearings usually begin with the tribunal member introducing himself or herself and then explaining the procedure that will be followed. Typically, SBT hearings last one to two hours. After the introductory comments have been made, the member will proceed by asking if any preliminary issues need to be addressed. Preliminary issues may be a request for further disclosure from the other side or an adjournment for grounds that were not previously obvious (in other words, you should not leave an adjournment request to the day of the hearing if you knew that it was required before then).

After preliminary matters have been dealt with, or if there were no preliminary issues, then the member will invite the appellant (the individual appealing the decision of the director) to begin presenting of his or her case.¹²⁶ Usually, the appellant's legal representative directly examines the appellant. If the party is unrepresented, the member will likely question the appellant. After the direct examination, if the director's representative is present (known as the case presenting officer), that person will cross-examine the appellant and call upon any of the director's witnesses (usually there are none). A representative of the director need not be present to proceed with the hearing; in the representative's absence, the tribunal relies upon the written submissions of the director (previously provided).¹²⁷

After all parties have presented their cases, the tribunal may ask if anything further needs to be addressed or may request closing statements, though they are rare and may be reserved for more complicated matters. At this point, the member will close the hearing and will reserve his or her decision.

adversarial two parties arguing their case before an independent trier of fact

122 OWA, s 28(10); and ODSPA, s 23(9).

123 *Supra* note 10, s 76(2)(a)(b).

124 *Ibid*, s 65(2)(a)(b).

125 *Ibid*, s 64(1)(b).

126 *Supra* note 10, s 76(1).

127 OWA, s 28(8)(9); and ODSPA, s 23(7)(8).

Decisions, Reconsiderations, and Appeals

The decision is mailed to the parties within 60 days, per legislative requirements,¹²⁸ although it is typically sent sooner. The SBT has the power to deny the appeal, grant the appeal in full or in part, or refer it back to the administrator.¹²⁹ Reasons must be given for the decision.¹³⁰ Either party may request a **reconsideration** of the SBT's decision. In a reconsideration request, the requesting asks the tribunal to take a second look at its decision. Reconsideration requests must be made within 30 days of receiving the hearing decision.¹³¹ Further rules concerning reconsideration requests are found in both the SBT Rules of Procedure¹³² and the practice direction on reconsideration requests.¹³³ Appeals from SBT decisions can be made to the Divisional Court on questions of law¹³⁴ within 30 days of receiving the decision.¹³⁵ The Divisional Court may deny the appeal, grant the appeal in full or part, or refer the matter back to the tribunal.¹³⁶

Forms

The SBT Rules of Procedure refer to a number of forms. The Appeal Form (Form 1) and the Application for Reconsideration (Form 2) are just two examples. These forms have been reproduced here.

reconsideration a request to the tribunal to review the decision

128 *Supra* note 10, s 78(1); and *supra* note 28, s 67(1).

129 OWA, s 31(1); and ODSPA, s 26(1).

130 OWA, s 31(2); and ODSPA, s 26(2).

131 *Supra* note 10 at 79(1); and *supra* note 28, s 68.

132 *Supra* note 68, r 15.

133 *Supra* note 71.

134 OWA, s 36(1); ODSPA, s 31(1); and *supra* note 68, r 16.1.

135 *Supra* note 10, s 81; ODSPA7, s 70; and *supra* note 68, r 16.1.

136 OWA, s 36(5); and ODSPA, s 31(5).

FORM 1 Instructions for Filing an Appeal



Social Justice Tribunals Ontario
Providing fair and accessible justice
Social Benefits Tribunal

Instructions for Filing an Appeal: Form 1

1. Before you can appeal to the SBT you must request an internal review by the Ontario Disability Support Program (ODSP) or Ontario Works (OW) office that made the decision. The SBT does not decide internal reviews. You must file your appeal with the SBT within 30 days of receiving the internal review decision. If you are late filing you need to explain why. The SBT will decide whether to allow a late appeal.
2. Attach copies of the following to this form:
 - i) the original **Notice of Decision** from the OW or ODSP office
 - ii) your **request for an internal review** from the OW or ODSP office
 - iii) the **internal review decision** (if you received one).
3. The SBT does not have the authority to review all social assistance decisions. If we can't hear your appeal, we will send you a letter with the reasons why.
4. If you are experiencing financial hardship while you wait for your appeal to be decided you can ask the SBT for interim assistance by completing Part 4 of this form. Interim assistance is financial help while waiting for your appeal to be decided. If the SBT decides you are eligible for interim assistance, you will be notified in writing. If you lose your appeal, your interim assistance will be assessed as an overpayment and you will have to pay it back.

Note: The SBT does not issue cheques. Your local ODSP or OW office will pay the interim assistance.
5. If you do not attend your hearing and don't provide a reasonable explanation for your absence, your appeal will be denied and you will not be allowed to appeal a subsequent decision on the same issue for two years. For more information, visit our website at www.sjto.ca/sbt or phone the SBT at one of the numbers below:

Tel: 416-326-0978
Toll-free: 1-800-753-3895
TTY: Call the Bell Relay Service at 1-800-855-0511

Social Benefits Tribunal • 655 Bay Street, 14th Floor, Toronto, Ontario M7A 2A3 • Fax 416-326-5135



Social Justice Tribunals Ontario
 Providing fair and accessible justice
 Social Benefits Tribunal

Appeal FORM 1

File Number: [] [] [] [] [] - [] [] [] [] []
 (Office use only)

Part 1: General Information

Appellant's Name:				Appellant's date of birth:			
Address:				Unit Number:		PO Box:	
Municipality (City, town):	Province:	Postal Code:	Telephone 1:		Telephone 2:		

Which office made the decision you are appealing?

- Ontario Works office
- Ontario Disability Support Program office
- Disability Adjudication Unit

Member / Case ID:

[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]	[]
-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----	-----

Office name:

--

Office address:

--

Case worker's name:

--

Case worker's telephone:

--

Part 2: Internal Review Information

If you did not request an internal review, you may not appeal to the SBT.

What is the date of your original Notice of Decision?

[]	[]	/	[]	[]	/	[]	[]	[]	[]
-----	-----	---	-----	-----	---	-----	-----	-----	-----

dd/mm/yyyy

When did you make your request for an internal review?

[]	[]	/	[]	[]	/	[]	[]	[]	[]
-----	-----	---	-----	-----	---	-----	-----	-----	-----

dd/mm/yyyy

Did you receive an internal review decision?

- Yes
- No

Part 3: Your Appeal

Why are you appealing? Check **all** the boxes that apply to you.

- I was refused assistance.
- My assistance has been reduced.
- I have an overpayment.
- The amount of my assistance is wrong.
- My assistance has been cancelled.
- My assistance is on hold.
- They say I am not disabled.
- They say I am no longer disabled, as a result of a medical review.

Explain what you disagree with in the original decision and why. Use the space below and attach additional pages if necessary.

In what language would you like your hearing? English French

Will you need any of the following services at the hearing?

- Interpreter:
 - Language
 - Dialect
- Sign language interpreter

Physical or other accommodation to participate in the hearing. Please specify.

Signature:

Name:	
Signature:	Date:

Collecting Personal Information: The Social Benefits Tribunal (SBT) collects the personal information requested on this form under the *Ontario Works Act, 1997* or the *Ontario Disability Support Program Act, 1997*. It will be used for the purpose of conducting the appeal and will be shared with the parties. If you have any questions, contact the FIPPA representative at the SBT at 1-800-753-3895.

v. 01/10/2016

This completes the appeal section.
If you are experiencing financial hardship, complete Part 4 Application for Interim Assistance.

Part 4: Application for Interim Assistance

Describe your household. How many people, including yourself, are you applying on behalf of?

Adults Children

Check the box beside those sentences that best describe your situation.

- I am looking for work.
- I am in an employment assistance program.
- I am attending school.
- Full-time Part-time High School College University Other
- I am under 18 and cannot live at home.
- I am working, but earn less than the Ontario Works entitlement.
- Other

Are you receiving any money at all? Yes NoIf you live with your spouse, is he/she receiving any money? Yes No

If you or your spouse are receiving money, provide details of your household income below. Include the amount you receive, when you last received it and how often you receive this income.

Type of Income	Amount	Date Last Received (dd/mm/yyyy)	Weekly, Monthly or Other (Specify)
Example: Income A	\$100.00	01/06/2011	Monthly
Earnings from a job			
Vacation pay			
Ontario Works (OW)			
Ontario Disability Support Program (ODSP)			
Workplace Safety & Insurance Benefits (WSIB)			
Employment Insurance			
Canada Pension Plan			
Disability insurance (other than CPP, WSIB)			
Support payments			
Trust fund income			
Ontario Student Assistance Plan (OSAP)			
Rental/boarder income			
Borrowed money			
Foreign pension			
Self-employment earnings			
Other 1			
Other 2			

Will you be receiving any money next month that you have not already listed? Yes NoWhat type? Amount:

Provide the details below of the value of the assets you or any member of your household have.

Bank accounts (personal and business)	
Stocks, bonds, GICs	
RSPs	
Land and property other than your home	
Other	

How much money do you pay each month for:

Rent	
Mortgage	
Property taxes	
Room and board	
Heat	
Electricity	
Water	
Food	
Other	

Are you behind in any of your payments or unable to pay these expenses?

Yes No What expenses have you been late paying or unable to pay?

Have you received an eviction notice or notice your electricity or other service will be shut off?

Yes No Provide details:

Below, provide any additional information that you feel the tribunal should know regarding your financial circumstances.

Name:	
Signature:	Date:

Collecting Personal Information: The Social Benefits Tribunal (SBT) collects the personal information requested on this form under the *Ontario Works Act, 1997* or the *Ontario Disability Support Program Act, 1997*. It will be used for the purpose of conducting the appeal and will be shared with the parties. If you have any questions, contact the FIPPA representative at the SBT at 1-800-753-3895.

FORM 2 Application for Reconsideration



Social Justice Tribunals Ontario
 Providing fair and accessible justice
 Social Benefits Tribunal

Application for Reconsideration FORM 2

About an Application for Reconsideration

Use this application to ask the Social Benefits Tribunal (SBT) to reconsider a decision made on an appeal. You have 30 days from the time you receive your decision to ask for a reconsideration by submitting this application form. The SBT will review your application, determine if a new hearing should be held and send you a letter with that decision within 60 days.

You must send a copy of this Application for Reconsideration to the other parties to the original appeal decision. Other parties may file a response to this application within 15 days of receiving a copy. The [Practice Direction on Reconsideration Requests](#) explains the process in more detail.

Part 1: Information about the appeal

Are you the appellant or the respondent?

Appellant Respondent

The file number on the appeal decision is:

						-					
--	--	--	--	--	--	---	--	--	--	--	--

The date of the appeal decision is:

		/			/						
--	--	---	--	--	---	--	--	--	--	--	--

dd/mm/yyyy

Part 2: Information about the appellant

Appellant's name:				Appellant's date of birth:			
Address:				Unit Number:		PO Box:	
Municipality (City, town):		Province:	Postal Code:	Telephone 1:		Telephone 2:	

Part 3: Information about the respondent

The respondent is:

- Ontario Works office
 Disability Adjudication Unit
 Ontario Disability Support Program office

Office name:			Name of contact at the office:		
Address:					
Municipality (City, town):			Province:	Postal Code:	Telephone:

Part 4: Reasons for your request for reconsideration

Why should the SBT grant your request for a reconsideration hearing? Please give your reasons below.

The SBT may reconsider if it appears:

- there is a legal or jurisdictional error
- there was procedural unfairness
- there are new facts that were not available at the time of the hearing which could change the decision

Attach more sheets if necessary.

Part 5: Notice of service

Were there other parties to the original hearing other than the appellant and respondent?

- No
 Yes
 Names: _____

I have served a copy of this application on the other parties by:

- Regular post to the last known address
- Delivering it personally
- Sending a fax

Part 6: Signature

Name:	
Signature:	Date:

Collecting Personal Information: The Social Benefits Tribunal (SBT) collects the personal information requested on this form under the *Ontario Works Act, 1997*. It will be used to decide whether to grant a reconsideration and will become part of the SBT file. If you have any questions, contact the FIPPA representative at the SBT at 1-800-753-3895.

v. 01/10/2016

Case Law

A number of significant decisions stem from the SBT. The *Tranchemontagne* decision was one. Some other notable decisions are outlined briefly here.

Ontario (Director, Ontario Disability Support Program) v Gallier, [2000] OJ No 4542 (Div Ct)

Gallier is a 2000 decision from the Divisional Court that contemplates the SBT decision to find Gallier “a person with a disability” in accordance with section 4(1) of the ODSPA, stemming from an appeal by the director. The Divisional Court applied the standard of correctness in the appeal and considered “whether the Tribunal was ‘correct’ in its interpretation of the legislation.”¹³⁷ The court dismissed the appeal¹³⁸ on the following findings:

- There must be verification of the disability, in accordance with section 4(1), including “the circumstances of the impairment, its duration and its effect on the applicant”; however, not every detail requires verification in this sense, and some details may be provided by the appellant in testimony.¹³⁹
- The SBT can consider the appellant “in the context of her own situation” and in consideration of “the person”: “The test is not whether any person with these impairments and restrictions met the criteria, but whether this person met the criteria.”¹⁴⁰

Consideration of the person requires the tribunal to conduct an objective inquiry into who this person is that appears before it: What are her limitations? What is her age? What is her work history? Can she likely retrain or be re-educated? This type of inquiry allows for a greater understanding of the individual in the grand scheme of life and whether her situation is well aligned with the purposes of the ODSPA. This case was critical to the development of ODSP law in creating a holistic approach to interpretation, rather than a strict reading of legislation.

Gray v Ontario (Disability Support Program, Director) (2002), 59 OR (3d) 364, 212 DLR (4th) 353 (CA)

Gray is a 2002 decision from the Ontario Court of Appeal that considered, in part, the reasoning in *Gallier*. It stems from an application for ODSP by Cassie Gray, which was denied by the director and by the SBT and the Divisional

137 *Ontario (Director, Ontario Disability Support Program) v Gallier, [2000] OJ No 4542 at para 6 (Div Ct).*

138 *Ibid* at 14.

139 *Ibid* at 7-8.

140 *Ibid* at 12.

Court. Following the Divisional Court decision, Gray appealed to the Ontario Court of Appeal.¹⁴¹ Her application was based on the conditions of low abdominal pain, menstrual headaches, and migraines, and while there were restrictions provided on the application as well as through the appellant's testimony, the SBT found insufficient medical evidence to show that she was disabled according to section 4(1) of the ODSPA, as she was able to cope on a day-to-day basis.¹⁴² On appeal, the Divisional Court focused on the activities of daily living interpretation and also found that Gray did not meet the criteria in section 4(1).¹⁴³

The Ontario Court of Appeal disagreed with the lower court's reasoning and referred to the dissenting opinion of that court, which considered *Gallier* (consideration of "the person"); the remedial nature of the legislation (to be interpreted "broadly and liberally");¹⁴⁴ that ambiguity in the interpretation of the legislation (being for social welfare) should be interpreted in the applicant's favour;¹⁴⁵ and that there is a legislative requirement to give sufficient reasons supported by findings of fact.¹⁴⁶ Failing to give reasons in accordance with the legislative requirements, specifically section 67(3) of the Regulations, amounts to an error of law, as does focusing on the incorrect question of whether the applicant could cope on a day-to-day basis (and not just about substantial restrictions in activities of daily living). As such, the matter was sent back to the tribunal for determination but with a strong suggestion from the Court of Appeal that it be returned to the SBT "with the direction that this court is satisfied that the appellant is "a person with a disability within s. 4(1) of the Ontario Disability Support Program Act."¹⁴⁷

Crane v Ontario (Director, Disability Support Program) (2005), 83 OR 3d 321, 278 DLR 4th 374 (CA)

Crane is a 2005 decision of the Ontario Court of Appeal affirming the decision from the Divisional Court (ultimately ordering a new hearing¹⁴⁸), although disagreeing with part of the reasoning.¹⁴⁹ *Crane* has been considered in numerous other cases.¹⁵⁰ The respondent, April Crane, was denied ODSP for

141 *Gray v Ontario (Disability Support Program, Director)*, 59 OR (3d) 364, 212 DLR (4th) 353 at 1.

142 *Ibid* at 3.

143 *Ibid* at 6.

144 *Ibid* at 7-9.

145 *Ibid* at 10.

146 *Ibid* at 23-24.

147 *Ibid* at 27.

148 *Crane v Ontario (Director, Disability Support Program) (2005), 83 OR (3d) 321 (CA)* at 38.

149 *Crane v Director of the Ontario Disability Support*, 2005 CanLII 21115, 75 OR (3d) 282 (Div Ct). <http://canlii.ca/t/110qt>

150 See some recent cases: *Graham v Ontario (Director, Disability Support Program)*, 2015 ONSC 5791; *Ferris v Ontario (Director, Disability Support Program)*, 2014 ONSC 6151.

failing to meet the requirements in section 4(1), which she appealed to the Divisional Court. The Divisional Court allowed her appeal and a new tribunal hearing was ordered.¹⁵¹ The director appealed the Divisional Court decision to the Ontario Court of Appeal, with the issues before the appeal court being the interpretation of “person with a disability” in section 4(1) of the ODSPA and “substantial physical or mental impairment” in section 4(1)(a), as well as whether there was a significant factual error amounting to a “palpable and overriding error.”¹⁵² Crane’s application was based on the conditions of “fibromyalgia, asthma, anxiety/depression, headaches,” with fibromyalgia being the “principal condition” on which her application was based.¹⁵³ She was working a couple of days per week at a convenience store.¹⁵⁴

The Ontario Court of Appeal’s decision summarized the SBT’s denial of Crane’s appeal on the basis that her “impairments did not have substantial impact on lifestyle,” claiming there has to first be a substantial impairment, and then the direct and cumulative effect of the impairment has to be substantial restriction in activities of daily living.¹⁵⁵ Ultimately, the Court of Appeal dissected the section 4(1) test, finding that subsections (a) and (b) cannot be merged and must be considered separately (an error made by Divisional Court in its reasoning); however, there may be overlapping evidence in the consideration of the individual sections.¹⁵⁶

In summary, s. 4(1) of the ODSPA presents three questions—substantial impairment, substantial restriction in certain activities, and verification. These are separate questions that require separate analysis and answers. The onus is on the claimant to establish all three factors. Accordingly, if the Tribunal concludes that the claimant has failed to establish one of the factors, it need not deal with the other factors. Finally, in some cases (but not all) there can be an overlap in the evidence relevant to the factors in paras. (a) and (b) of s. 4(1). That is because although the concept of impairment is anchored in medicine, the determination of whether an impairment is substantial will require consideration of the whole person, including a person’s ability to function in the domains of personal care, community and workplace.¹⁵⁷

The “consideration of the whole person” was an important interpretive aspect stemming from this case. The court echoed the same sentiment earlier in the decision: “the inquiry would have to go beyond simple medical description and take account of the whole person, including some of her activities.”¹⁵⁸

151 *Supra* note 149.

152 *Ibid* at paras 2-3.

153 *Crane v Ontario (Director, Disability Support Program)*, *supra* note 148 at para 7.

154 *Ibid*.

155 *Ibid* at paras 9-10.

156 *Ibid* at para 20.

157 *Ibid* at para 25.

158 *Ibid* at para 20.

Jennings v Ontario (Minister of Social Services), 2015 ONSC 6689

Jennings is a 2015 decision from the Divisional Court based on an assessed overpayment. Darrell Jennings appealed a decision by the director to cancel his ODSP support and render an overpayment of \$25,712.30 because of failing to declare income and not meeting the eligibility requirement for income and assets. His appeal was denied by the SBT, so he appealed to the Divisional Court. The court found that there was a misapprehension of the evidence at the SBT, based on an inaccurate finding of wilful failure to disclose information,¹⁵⁹ and that this constituted an error of law.¹⁶⁰ Furthermore, the court starkly reprimanded both the tribunal and the director in their approach to finding the recipient responsible for overpayment, stating in the judgment:

I prefer to see the Tribunal's findings reflecting a tunnel vision based on its fundamental misunderstanding of the nature of a legal partnership, a misunderstanding apparently encouraged by the Director's representative.¹⁶¹

Surdivall v Director (Ontario Disability Support Program), 2014 ONCA 240

Surdivall is a 2014 decision from the Ontario Court of Appeal also dealing with an issue of overpayment. At issue was the discretionary power of both the director and the SBT in altering or forgiving an overpayment amount rendered against a recipient.¹⁶² The appeal arose from an overpayment that was ordered against Glynn Surdivall, a recipient of ODSP until he reached the age of 65.¹⁶³ In a notice from the director, Surdivall was found to owe \$3,050 (made from an innocent reporting error) and was ordered to pay the full amount. Surdivall appealed the overpayment to the SBT, where it found that the overpayment decision was correct, but the SBT cut the total amount to \$1525, with a repayment rate of \$10 per month.¹⁶⁴ The director appealed the SBT's decision to Divisional Court, where the judgment stated neither the director nor the SBT had the authority to forgive an overpayment debt.¹⁶⁵ The Ontario Court of Appeal disagreed with the finding of the lower court. On the issue of the director's discretion, the Court of Appeal considered the powers and duties of the director under the ODSPA, specifically sections 38(a)-(g); the purpose of the legislation, found at sections 1(a)-(d); and the recovery of overpayment

159 2015 ONSC 6689 at 2, 3, 59, 60, 66-74.

160 *Ibid* at 41 ("However, where a tribunal completely misapprehends the evidence or completely fails to take relevant and important evidence into account, this constitutes an error of law." *Shooters Sports Bar v Alcohol and Gaming Commission* (2008), 238 OAC 9, 2008 CanLII 25052 (DivCt) at para 38).

161 *Ibid* at 4; see also 64.

162 *Surdivall v Director (Ontario Disability Support Program)*, 2014 ONCA 240 at 2-3. <http://canlii.ca/t/g6c9s>

163 *Ibid* at 4.

164 *Ibid* at 5.

165 *Ontario (Disability Support Program) v Surdivall*, 2012 ONSC 1851 at 19.

sections, found at 14(1)(2.1)(4)(5).¹⁶⁶ Interpretation of the term “may be recovered” resulted in a conclusion that the director has “broad discretion,”¹⁶⁷ including discretion not to recover part or all of an overpayment.¹⁶⁸ The Court of Appeal also noted that flexibility is required in the collection of overpayments, particularly where overpayments result from innocent mistakes.¹⁶⁹ Finally, the court discussed at length the overall objective of the ODSPA as lending support for its interpretation.¹⁷⁰ On the issue of the SBT’s discretion, the court considered the SBT’s powers on appeal, found in the ODSPA sections 21(1) and 26(1), and the limited authority in section 29(3), which disallows the tribunal from making any decision that the director was not authorized to make, from which the court implied a positive discretion on the tribunal to be granted the authority to make any decision that director could make¹⁷¹ and that the SBT should have authority to exercise discretion when faced with an appeal from a discretionary decision, unless expressly granted otherwise in the legislation.¹⁷² Ultimately, the Court of Appeal found:

[T]he Director has discretion to forego recovery of part or all of an overpayment. As the Director has this discretion, so too did the tribunal have discretion to order that the Director collect only half of the overpayment Surdivall received. I would allow the appeal and reinstate the Tribunal’s decision.¹⁷³

Rea v Administrator (2005), 79 OR (3d) 583 (CA)

Rea is a 2005 decision from the Ontario Court of Appeal dealing with a cancellation of OW assistance for failure to provide information about change of circumstances. The director cancelled *Rea*’s OW for failing to comply with the information requirements in section 7 of the OWA. *Rea* agreed that she failed to comply with these requirements but argued that because of O Reg 134/98, specifically sections 14 and 35, her payments should have been terminated, but her dependant daughter’s payments should not have been terminated.¹⁷⁴ *Rea* argued that the two sections are related, but the Ontario Court of Appeal disagreed with this interpretation.¹⁷⁵ Section 14 places an obligation on the director to find a recipient ineligible for failure to provide information and does

166 *Supra* note 162 at 22-34.

167 *Ibid* at 30.

168 *Ibid* at 22-34.

169 *Ibid* at 37.

170 *Ibid* at 35-45.

171 *Ibid* at 72.

172 *Ibid* at 74.

173 *Ibid* at 212.

174 *Rea v Administrator, County of Simcoe Social Services Department*, 79 OR (3d) 583 at 1-2.

175 *Ibid* at 6.

not provide an exception for dependants.¹⁷⁶ Section 35 seems to contradict this, stating that if assistance is cancelled and there is a dependant, then the assistance should be reduced according to the amount of benefit that the person who failed to comply is entitled to.¹⁷⁷ Ultimately, the Court of Appeal disagreed that the two sections are related, finding that section 14 deals with foundational information that is required for initial and ongoing assistance, while section 35 refers to the calculation of entitlement.¹⁷⁸ Both sections must be read with the entirety of the Act in mind, specifically section 7, which outlines ineligibility factors and is central to the entire scheme; reading otherwise would undermine the purpose of the Act.¹⁷⁹

KEY LEGISLATION

Ontario Disability Support Program Act, 1997 and Regulations

- Administration and Cost Sharing, O Reg 225/98
- Assistance for Children with Severe Disabilities, O Reg 224/98
- Employment Supports, O Reg 223/98
- General, O Reg 222/98
- Prescribed Policy Statements, O Reg 562/05

Ontario Works Act, 1997 and Regulations

- Administration and Cost Sharing, O Reg 135/98
- Designation of Geographic Areas and Delivery Agents, O Reg 136/98
- General, O Reg 134/98
- Prescribed Policy Statements, O Reg 564/05

Statutory Powers Procedure Act

176 *Ibid* at 4.

177 *Ibid*.

178 *Ibid* at 7.

179 *Ibid* at 8-9.

KEY TERMS

benefit unit, 71

overpayment, 79

adversarial, 82

reconsideration, 83

REVIEW QUESTIONS

1. What are the two pieces of legislation from which appeals are made to the Social Benefits Tribunal? Name and briefly explain the differences between the two.
2. What other piece of legislation is central to the Social Benefits Tribunal's decision making, and why is this?
3. What larger organization does the Social Benefits Tribunal belong to, and how does this impact its functioning?
4. Name two types of appeals that the Social Benefits Tribunal will consider, from either piece of legislation in question 1.
5. Why are the regulations important to understanding and interpreting the Acts?
6. What is the significance of the *Tranchemontagne* decision?
7. If you had to request an internal review of a decision from the Director under the *Ontario Disability Support Program Act*, what authorities would you rely on?
8. If a new client approached you about an appeal form that he submitted to the Social Benefits Tribunal and you discovered that an internal review had not been completed, how would you advise this client? What authorities would you rely on?
9. After the Social Benefits Tribunal makes a decision following a hearing, if either party disagrees, what options might they pursue? State your authorities for your answer.
10. What information is required to appear on a notice of hearing, as per the OWA?

SCENARIOS

- 1. OWA Denial:** Joshua Insame applied for Ontario Works assistance on February 13, 2016 at the local OW office. Upon disclosing all information that the caseworker requested about his financial affairs (including bank statements and infrequent earnings from a temporary landscaping position) and personal information (address, phone number, health card information), Joshua was found ineligible for OW on the basis that he failed to provide his dependant's health card information and proof of school enrolment. Joshua requested an internal review of the decision, which was upheld. He now wonders if he is out of options or if he can take the denial of his application to the next step. What do you advise? Include references to the statutory or policy authorities that you rely on.
- 2. ODSP Denial:** Peter Garvett applied for ODSP based on numerous medical conditions, including sciatica, anxiety/depression, migraines, and diabetes. Peter's application was denied. He requested an internal review, which upheld the original decision. Peter sent in his appeal form to the SBT but has now come to you for assistance with his appeal. What are your next steps, and how would you advise Peter concerning SBT procedure before the hearing? Include references to statutory or policy authorities that you rely on.
- 3. OWA Overpayment:** Leah Hanball started receiving OW in January 2016. In March 2017, she received a notice from the director stating that she has been overpaid for a few months because of an administrative error. The notice letter stated that she was required to pay back the full amount of the overpayment and that a portion of the overpayment would be deducted from her ongoing monthly assistance. Leah is concerned about the monthly deductions as she is barely able to scrape enough money together each month for food and rent. She comes to you in May 2017 for advice. What would you tell Leah about how the law affects her in this situation? Include references to statutory or policy authorities that you rely upon.