Court File No.: 476/16

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

SHERYL ABBEY

Applicant

-and-

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF COMMUNITY AND SOCIAL SERVICES and HUMAN RIGHTS TRIBUNAL OF ONTARIO

Respondents

FACTUM OF THE INTERVENER
(A Coalition of the Council of Canadians with Disabilities, Income Security Advocacy Centre and the ODSP Action Coalition)

Date: October 23, 2017

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PART I – OVERVIEW

1. The intervening Coalition is composed of three organizations: the Council of Canadians with Disabilities, Income Security Advocacy Centre and ODSP Action Coalition. Together they represent the perspective and interests of persons with disabilities, including those who rely upon disability benefits.

2. The application for judicial review asks whether the Human Rights Tribunal of Ontario ("Tribunal") was wrong to conclude that it "cannot award damages for injury to dignity, feelings and self-respect" ("Human Rights Damages") for discrimination resulting from the application of Ontario Disability Support Program ("ODSP") Policy Directives. The Tribunal relied on principles developed under the *Canadian Charter of Rights and Freedoms* ("*Charter*") to hold that it was not able to award such damages absent bad faith or an abuse of power.

3. The Coalition makes two arguments:

   a. Jurisprudence on the limits of the remedial scope of the *Charter* should not apply to Ontario's *Human Rights Code* ("*Code*"). The *Code* includes explicit statutory language granting it jurisdiction to order Human Rights Damages. Principles of statutory interpretation require that the Tribunal's powers under the *Code* be read generously in order to achieve its purposes of preventing and remedying discrimination.

   b. In the alternative, the *Charter* jurisprudence relied on by the Tribunal to deny

Human Rights Damages does not apply when the source of the discrimination is an ODSP policy directive (as opposed to legislation). The directives are guides for administrative decision-making – not binding law. Moreover, the policy directive in question was itself inconsistent with the legislation.

PART II – FACTS

4. The Coalition takes no position on the facts.

PART III – ISSUES AND ANALYSIS

5. The issue to be determined is whether the Tribunal, having found that a recipient has been discriminated against by the application of an ODSP policy directive, can award Human Rights Damages.

A. Overview of the *Mackin* Principle: A *Charter*-based doctrine limiting damages for unconstitutional legislation

6. Government has a limited immunity from damages under section 24(1) of the *Charter*. This doctrine, established in *Mackin v. New Brunswick*, holds that where government acts pursuant to legislation in good faith and without abusing its power, it is generally not "appropriate and just" to award damages when that law is found to be unconstitutional. However, the Supreme Court has been careful to say that "it cannot be asserted that damages may <u>never</u> be obtained following a declaration of unconstitutionality" (emphasis added).

> *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 SCR 405 at paras. 78-80.

Vancouver (City) v. Ward, [2010] 2 SCR 28 at para. 41.

7. The purpose of this doctrine is to ensure that public officials are not deterred from carrying out their duties under apparently valid statutes due to fear of liability in the event that the statute is later struck down.

Vancouver (City) v. Ward, [2010] 2 SCR 28 at para. 41.

B. The *Mackin* principle should not apply to damages under the *Code*

8. The Tribunal acknowledged that Ms. Abbey's case was unique because the source of the discrimination was a policy directive "that is neither legislation nor regulation." As the Tribunal stated, "the rules at issue in this case … are not contained in the [*Ontario Disability Support Program Act*] or the regulations. They appear exclusively in policy directive 5.4."

Application Record, Tab 2: Tribunal Decision at paras. 62-64.

9. However, the Tribunal concluded that the principles from *Mackin* nonetheless applied because the policy directive was part of the "application of the law." In the absence of bad faith or an abuse of power, the Tribunal held that it could not award Human Rights Damages despite its finding that the policy directive was discriminatory.

Application Record, Tab 2: Tribunal Decision at paras. 190-191.

10. In applying the *Mackin* principle, the Tribunal erred in law. As elaborated below, the statutory language of the *Code* grants the Tribunal specific jurisdiction to award Human Rights Damages even where the discrimination arises from legislation. In the

alternative, if this Court concludes that the *Mackin* principle might apply to the Tribunal's remedial powers, it nonetheless should not apply to ODSP Policy Directive 5.4. The Policy Directive represents a discretionary administrative action of the ODSP Director: not only is it not binding law, but it is not even supported by the underlying legislation.

11. The *Code* is a distinct statutory regime from the *Charter*, with its own structure and remedial powers, including the explicit statutory power to award Human Rights Damages. As argued below, the general principles guiding remedies under the *Charter* are simply not applicable in this context.

i. The Charter and the Code have distinct remedial powers

12. Pursuant to section 24(1) of the *Charter*, a court of competent jurisdiction can grant anyone whose rights under the *Charter* have been infringed a remedy that it "considers appropriate and just in the circumstances."

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
>
> *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK), 1982*, c 11 *at s.* 24(1)

13. Faced with this general wording, courts have looked to several sources in order to delineate the scope of these powers and the types of remedies that can be granted. This jurisprudence is informed by, among other things, the other remedial sections of the *Charter* and general principles of public law governing the civil liability of government (such as those referred to in *Mackin*). The Supreme Court has been

reluctant to combine a remedy under section 24(1) of the *Charter* with an order under section 52 for declaratory relief.

Mackin v. New Brunswick (Minister of Finance), 2002 SCC 13, at paras. 78-81.

14. The language used in the remedial section of the *Code* is quite different. Rather than simply creating general remedial powers, the *Code* grants the Tribunal power to award specific remedies. The jurisdiction to grant "compensation for injury to dignity, feelings and self-respect" is one of those explicit remedies:

> 45.2 (1) On an application under section 34, the Tribunal may make one or more of the following orders …
>
> 1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
>
> ...

Human Rights Code, R.S.O. 1990, c. H.19 at s. 45.2(1) (emphasis added).

15. The *Code* also explicitly permits the Tribunal to award damages as restitution for losses arising from discrimination as well as the power to order any party to "do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act."

16. The Tribunal can order one or all of these remedies, depending on the facts of each case. The Tribunal is not limited to one remedy. The *Charter* does not contain explicit remedial language of this nature.

Human Rights Code, R.S.O. 1990, c. H.19 at s. 45.2(1).

17. In another important distinction, the *Code* does not give the Tribunal the authority to declare a legislative provision invalid. The Tribunal can only declare a provision "inapplicable" in the particular case before it.

> … the differences between the two provisions are far more important. A provision declared invalid pursuant to s. 52 of the *Constitution Act, 1982* was never validly enacted to begin with. It never existed as valid law because the legislature enacting it never had the authority to pass it. But when a provision is inapplicable pursuant to s. 47 of the *Code*, there is no statement being made as to its validity. The legislature had the power to enact the conflicting provision; it just so happens that the legislature also enacted another law that takes precedence. … It is not declaring that the legislature was wrong to enact it in the first place.

Tranchemontagne v. Ontario (Director, Disability Support Program), [2006] 1 SCR 513 at paras. 35-36.

Human Rights Code, R.S.O. 1990, c. H.19 at s. 47.

18. Given the "fundamental differences" between the *Charter* and the *Code*, including "differences in the nature of the legislation" *Charter* jurisprudence cannot be uncritically transposed to the *Code* context. Rather, the principles of statutory interpretation must be applied in order to ensure that the legislature's intention is achieved.

Ontario (Disability Support Program) v. Tranchemontagne, 2010 ONCA 593 at paras. 88-89.

ii. Human rights legislation is to be read purposively in order to prevent and remedy discrimination

19. As fundamental quasi-constitutional law, human rights legislation must be interpreted broadly and generously to advance its vital purposes of preventing and

remedying discrimination. As the “law of the people,” human rights law is entitled not only to an expansive interpretation, but also an accessible application.

> *Canadian National Railway Co. v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at p. 1134.
>
> *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14 at paras. 33, 49.

20. Statutory interpretation should not seek to “minimize” human rights, “enfeeble their proper impact,” or read human rights protections so restrictively that the purpose of eliminating discrimination is defeated.

> *Canadian National Railway Co. v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114 at pp.1134, 1136, 1138.

21. At its core, the purpose of anti-discrimination law is the achievement of substantive equality. Substantive equality recognizes that systemic and historical disadvantages faced by members of certain groups in Canada have limited their opportunities in Canadian society, and seeks to prevent conduct that perpetuates those disadvantages. The “main consideration” must be the impact of the impugned law on the individual or group concerned taking into full account the social, political, economic and historical factors concerning the group. In this way, the purpose of anti-discrimination law is to eliminate the exclusionary barriers faced by individuals belonging to protected groups in gaining meaningful access to what is generally available.

> *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 29.

22. This purpose is particularly salient when it comes to persons with disabilities, who represent a significant percentage of Canada's population. In 2012, almost 14% of the Canadian population, or 3.8 million individuals, reported having a disability that limited their daily activities.[1]

> Statistics Canada, *Canadian Survey on Disability,* 2012 (Ottawa: Minister responsible for Statistics Canada, 2015) at p. 3.

23. While the *Code* prohibits discrimination on the basis of disability, Ontarians with disabilities do not yet enjoy the benefits of full citizenship. The history of persons with disabilities in Canada is largely one of exclusion, marginalization and persistent disadvantage, problems that have not been adequately addressed and that continue today. Persons with disabilities consistently face myriad forms of discrimination in their daily lives. Not surprisingly, disability is the most frequently cited ground of discrimination before the Tribunal.

> *Human Rights Code*, RSO 1990, c H.19 at s. 1.
>
> *Eldridge v British Columbia*, [1997] 3 SCR 624 at para. 56.
>
> Social Justice Tribunals Ontario, *2015-16 Annual Report,* Table 5 at p. 29.

24. Given this context, it is crucial to ensure that persons with disabilities have access to legal forums where their discrimination complaints are adjudicated and effective remedies are ordered.

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[1] The actual number of persons with disabilities is likely higher, since the Report did not include persons under 15 years old, those who live in institutions or collective dwellings, or those who live on First Nations reserves.

iii. The jurisdiction to award Human Rights Damages should not be limited by the Mackin principle

25. The Tribunal's authority to award Human Rights Damages should not be limited by the principles set out in *Mackin*. Such a narrowing of the legislation would be contrary to: (1) the plain wording of the legislation, (2) the legislative intent for the primacy of the *Code* over other statutes, including specific language to bind the Crown, (3) the broader purposes of the *Code*, and (4) Canada's international obligations concerning the rights of persons with disabilities. Each of these arguments will be addressed in turn.

26. First, the plain wording of the legislation clearly grants the Tribunal the power to award Human Rights Damages. This power is stated explicitly and is not limited with regard to government respondents. As stated by the Supreme Court, statutory interpretation should begin with the plain wording of the statute itself. Only when ambiguity arises should the Court resort to external aids, "including other principles of interpretation".

Bell ExpressVu Limited Partnership v. Rex, 2002 SCC 42 at para. 29.

27. Second, to read the legislation in a manner that limits its scope with respect to government is contrary to the legislature's explicit intent for the *Code* to bind the Crown as paramount law. Indeed, the legislation states that the Crown is bound by its protection, along with "every agency of the Crown" and that the *Code* has primacy over other statutes. This express legislative intent supports a broad reading of the Tribunal's remedial powers in cases concerning government actors.

Human Rights Code, R.S.O. 1990, c H.19, at ss. 45.1–45.3, 47.

Tranchemontagne v. Ontario (Director, Disability Support Program), [2006] 1 SCR 513 at para. 13.

28. Third, a broad reading of the remedial powers in the legislation better accords with the purpose of the *Code* to remedy historic discrimination, including discrimination against persons with disabilities.

29. Because human rights legislation serves these purposes, it is crucial that the remedies available to the Tribunal are interpreted generously in order to effectively achieve its goals. The fundamental focus of human rights remedies is on the effects of discrimination on the Applicant, rather than the intentions of the Respondent. To require intent would "place a virtually insuperable barrier in the way of a complainant seeking a remedy." A requirement to establish bad faith in order to obtain Human Rights Damages improperly imports concepts of intention into the *Code*.

Ont. Human Rights Comm. v. Simpsons-Sears, [1985] 2 SCR 536 at paras. 13-14.

Canadian National Railway Co. v Canada (Canadian Human Rights Commission), [1987] 1 SCR 1114 at p. 1137.

30. Denying Human Rights Damages to those injured by discriminatory laws undermines the effectiveness of the *Code* for both individuals and the public interest because it creates a disincentive for government actors to ensure that laws and policies are consistent with the *Code*. It means that those who are injured by discriminatory laws cannot be made whole, as they have no remedy for their injury to dignity, feelings and self-respect. As the Supreme Court has said, human rights legislation is often the "final

refuge of the disadvantaged and disenfranchised", and must not be rendered meaningless by giving it limited remedial scope: "Human rights remedies must be accessible in order to be effective."

> *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 SCR 513 at para. 49.

31. In Ms. Abbey's case, the Program's decision was based on the discriminatory assumption that disability benefit recipients are incapable of engaging in complex types of self-employment. Ms. Abbey was not awarded Human Rights Damages, although she testified that the discrimination directly undermined her feelings of self-worth as a person with a disability. She provided extensive evidence about the impact of the discrimination on her, including shock, terror, devastation, stress, inability to sleep, loss of appetite, loss of enjoyment in life, suicidal thoughts, physical symptoms, embarrassment and demoralization.

> Application Record at Tab 2: Tribunal Decision at paras. 115, 153-156.

32. Finally, a broad reading of the *Code* better accords with Canada's obligations under international law. While not legally binding unless they have been incorporated into domestic law, courts may rely on international human rights instruments for statutory interpretation: "Courts will strive to avoid constructions of domestic law pursuant to which the State would be in violation of its international obligations."

> *R. v. Hape*, [2007] 2 S.C.R. 292 at para. 53.
>
> *Baker v. Canada* (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817 at paras. 69-71.

33. The *Convention on the Rights of Persons with Disabilities* ("*Convention*") guarantees persons with disabilities "equal and effective legal protection against discrimination on all grounds" and "effective access to justice for persons with disabilities on an equal basis with others." The *Universal Declaration of Human Rights* ("*Declaration*") states that access to justice includes access to effective remedies. The *Convention* and *Declaration* are important interpretive tools when considering our own domestic laws.

> *Convention on the Rights of Persons with Disabilities,* 30 March 2007, 2515 UNTS 2 at 70, Can TS 2010 No 8 (entered into force 3 May 2008, ratified by Canada 11 March 2010) at articles 5(2), 13.
>
> *Universal Declaration of Human Rights*, GA Res 217 (III) UNGAOR, 3d Sess, Supp No 13, UN Doc a/810 (1948) 71 at article 8.

34. To interpret the *Code* in a manner that denies Human Rights Damages would be inconsistent with these international obligations because it would deny persons with disabilities an effective remedy and would discourage them from pursuing human rights applications that challenge government laws or policies. Unlike human rights challenges involving private actors, where Human Rights Damages are frequently awarded, disability benefit recipients would not have access to the full suite of remedies established by the *Code*. As with Ms. Abbey, some of the harms they suffer would not be remedied.

35. Good governance is strengthened, not undermined, by holding government to account when it discriminates. The *Code* was specifically created with this goal in mind. It should not be undermined by limiting the Tribunal's remedial powers, where the legislation supports a different and more generous interpretation.

36. By uncritically importing concepts from constitutional law, the Tribunal's decision has the effect of denying a remedy to ODSP recipients who can establish that a social assistance law or policy injured their dignity, feelings and self-respect in a manner that was discriminatory. Such an outcome is contrary to the principles of statutory interpretation and would defeat the public interest purposes of the *Code*.

C. The *Mackin* principle does not apply to ODSP Policy Directive 5.4

37. In the alternative, the Tribunal was wrong to apply the *Mackin* principle to Policy Directive 5.4 for two reasons. First, the ODSP policy directives are not binding law. Second, the particular policy directive in question was not a reasonable interpretation of the Director's powers under the legislation and thus was not even authorized by law.

i. ODSP policy directives are not binding law

38. The Tribunal fundamentally mischaracterized the nature of the policy directive as akin to legislation. While some ODSP policies can have the force of law, the policy directive in question did not.

Application Record, Tab 2: Tribunal Decision at paras. 190-191.

39. The Ontario Disability Support Program provides monthly support to persons with disabilities who do not have sufficient income to meet their basic needs. It serves some of the most vulnerable individuals in the province. The support they receive is intended to help them live as independently as possible.

Surdivall v. Ontario (Disability Support Program), 2014 ONCA 240 at para. 8.

40. The Director of the Ontario Disability Support Program ("Director") is responsible for administering the program.

Ontario Disability Support Program Act, 1997, c. 25, Sched. B, s. 38.

41. The *Act* authorizes the Minister of Community and Social Services to make regulations "prescribing policy statements which shall be applied in the interpretation and application of this Act and the regulations."[2] Prescribed policy statements are legally binding, while non-prescribed directives are not.

Ontario Disability Support Program Act, 1997, c. 25, Sched. B, ss. 55(2)(2).

42. The policy directive at issue in this case, Policy Directive 5.4, is not a prescribed policy statement. The administrative ODSP policy directives are of a completely different character than prescribed statements. They are not legally binding rules. The policy directives, such as Policy Directive 5.4, were created by the Director to provide provincial staff with "the guidance they need to make decisions regarding the client's entitlement to services, supports and benefits" and encourage the exercise of discretion to "ensure that clients receive all of the benefits to which they are entitled."

Ontario Disability Support Program Act, *1997*, S.O. 1997, c. 25, Sched. B, ss. 37-38.

[2] The term "prescribed" is specifically defined in the *Ontario Disability Support Program Act, 1997* (section 2) as meaning "prescribed by the regulations made under this Act". To date, there is only one prescribed policy statement. It relates to the special diet allowance, a benefit available to disability benefit recipients: O. Reg. 562/05.

Application Record, Tab 2: Preamble to Policy Directives, quoted in Tribunal Decision, p. 26 at para. 69.

43. Administrative interpretations such as these do not have the force of law. Practice manuals cannot transform "discretion to decide" into a "binding legal rule."

R. v. Beaudry, 2007 SCC 5 at para. 45.

Thamotharem v. Canada (Minister of Citizenship and Immigration), 2007 FCA 198 at para. 66.

44. Indeed, there are numerous examples of the courts and the Social Benefits Tribunal disregarding ODSP policy directives, where those policies are found to represent an unreasonable interpretation of the legislation. For example, in *Moon v. ODSP*, the Divisional Court concluded that a policy directive concerning employment and business earnings should not have been followed because it "is not authorized by regulation nor by the provisions of the statute." Instead, "the legislation should be applied in such a way as to encourage him or her [to work]. Expenses incurred in operating such a modest business should be deducted in calculation of entitlement to benefits."

Moon v. Director of ODSP, [2002] O.J. No. 2045 at paras. 1-2, 4.

See also: *Corrigan v Ontario (Disability Support Program)*, 2016 ONSC 6212 at paras. 8, 33-35.

45. Government ought not to be immune from Human Rights Damages where the source of discrimination is an ODSP policy directive. The ODSP policy directives are not like legislation. Rather, they are interpretive guides for the administration of the program. Therefore, the *Mackin* principle does not apply.

ii. Policy Directive 5.4 is inconsistent with the legislation

46. The discriminatory aspect of Policy Directive 5.4 – the treatment of payments to employees and subcontractors – was not specifically required by the legislation. Instead, it represented an administrative policy choice that ultimately was not supported by the legislation.

47. The *ODSP Regulation* sets out in a general way the manner in which business income should be treated. It gives the Director the discretion to decide what deductions can be made from gross business income ("the net monthly income as determined by the Director").

O. Reg. 222/98, s. 38(1).

48. The legislation is not the source of the discrimination that Ms. Abbey experienced. The legislation makes no mention at all of self-employment nor the treatment of income paid to employees or subcontractors. Rather the source is a discriminatory administrative decision made by the Director about what deductions could be made from business income. This case is not one – such as *Mackin* – where public officials had been acting on the faith of statutes subsequently found to be unconstitutional.

49. Ms. Abbey was not the first person to raise concerns over Policy Directive 5.4. There are at least 14 cases in which the Social Benefits Tribunal refused to follow Policy Directive 5.4 – some relating to the employee/sub-contractor issue and others relating to different aspects of the Directive. The appellants in these cases did not need to rely

on discrimination arguments. The Social Benefits Tribunal relied on principles of statutory interpretation to find that Policy Directive 5.4 was "inconsistent with the judicial interpretation of the legislation" and that the Director "erred" in its interpretation of the legislation.

> SBT 0708-10166 and 0708-09145 (2009, Buckley-Routh) at p. 14.
>
> 2014 ONSBT 388 (CanLII) at para. 32.
>
> 2016 ONSBT 4913 (CanLII) at paras. 27-28.
>
> 2016 ONSBT 668 (CanLII) at paras. 37, 39-47.
>
> Other cases addressing payments to employees/sub-contractors: SBT 0510-07888 & 0701-00765 (2007, Dudley) at p. 2; 2014 ONSBT 4537 (CanLII) at paras. 34-36, 42-49; 2016 ONSBT 4747 (CanLII) at para. 12; 2016 ONSBT 520 (CanLII) at paras. 13-16.
>
> Cases addressing other aspects of Policy Directive 5.4: SBT 0510-08023 (2006, Brownlea) at p. 3; 2013 ONSBT 1158 (CanLII) at paras. 25-32; 2016 ONSBT 3794 (CanLII) at paras. 12-16; 2016 ONSBT 5187 (CanLII) at paras. 36-40; 2016 ONSBT 567 (CanLII) at paras. 29-32; 2016 ONSBT 4494 (CanLII) at paras. 46-61.

50. Seven years prior to Ms. Abbey's case, the Social Benefits Tribunal considered Policy Directive 5.4's treatment of employee wages and concluded:

> The Tribunal is not bound by the Director's Policy Directives and must instead apply the legislation. Although Policy Directives say that employees are not expenses; there is nothing in the Act or the Regulation that gives the Tribunal direction to not allowing employee wages to be considered as expenses.
>
> …
>
> The Tribunal finds the policy regarding business expenses, and more specifically, not allowing employees' wages as an expense, is not reasonable in the circumstances of this case.
>
> SBT 0708-10166 and 0708-09145 (2009, Buckley-Routh) at p. 14.

51. In Ms. Abbey's case, the Human Rights Tribunal's decision all but concludes that the treatment of payments to Ms. Abbey's subcontractors was not authorized by the legislation when it described it as "irrational" and "arbitrary", and states that the subcontractor rules "impeded rather than support one of the most important goals of the [*ODSP Act*]." Discretion must be exercised within the boundaries of the legislation that authorizes it, and Policy Directive 5.4 does not do so.

Application Record, Tab 2: Tribunal Decision at paras. 20, 129.

52. In conclusion, Ontario should not benefit from immunity based on its reliance on a non-binding policy directive, particularly one that had repeatedly been found to be inconsistent with the legislation in the years prior to Ms. Abbey's complaint. When policy directives discriminate, the Tribunal can award Human Rights Damages.

PART IV – ORDER SOUGHT

53. The Coalition takes no position on the order sought.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of October, 2017.

_____

Jackie Esmonde (LSUC# 47793P)
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Dianne Wintermute (LSUC# 26043V)

SCHEDULE A: LIST OF AUTHORITIES

1. *Mackin v. New Brunswick (Minister of Finance)*, [2002] 1 SCR 405.
2. *Vancouver (City) v. Ward*, [2010] 2 SCR 28.
3. *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 SCR 513.
4. *Ontario (Disability Support Program) v. Tranchemontagne*, 2010 ONCA 593.
5. *Canadian National Railway Co. v Canada (Canadian Human Rights Commission)*, [1987] 1 SCR 1114.
6. *Withler v. Canada (Attorney General)*, 2011 SCC 12.
7. Statistics Canada, *Canadian Survey on Disability,* 2012 (Ottawa: Minister responsible for Statistics Canada, 2015).
8. *Eldridge v British Columbia*, [1997] 3 SCR 624.
9. Social Justice Tribunals Ontario, *2015-16 Annual Report,* Table 5.
10. *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42.
11. *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 SCR 536.
12. *R. v. Hape*, [2007] 2 S.C.R. 292.
13. *Baker v. Canada* (Minister of Citizenship and Immigration), [1999] 2 S.C.R. 817.
14. *Surdivall v. Ontario (Disability Support Program)*, 2014 ONCA 240.
15. *R. v. Beaudry*, 2007 SCC 5.
16. *Thamotharem v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 198.
17. *Moon v. Director of ODSP*, [2002] O.J. No. 2045.
18. *Corrigan v Ontario (Disability Support Program)*, 2016 ONSC 6212.
19. Re SBT 0708-10166 and 0708-09145 (2009, Buckley-Routh).
20. Re 2014 ONSBT 388 (CanLII).
21. Re 2016 ONSBT 4913 (CanLII).
22. Re 2016 ONSBT 668 (CanLII).

23. Re SBT 0510-07888 & 0701-00765 (2007, Dudley).
24. Re 2014 ONSBT 4537 (CanLII).
25. Re 2016 ONSBT 4747 (CanLII).
26. Re 2016 ONSBT 520 (CanLII).
27. Re SBT 0510-08023 (2006, Brownlea).
28. Re 2013 ONSBT 1158 (CanLII).
29. Re 2016 ONSBT 3794 (CanLII).
30. Re 2016 ONSBT 5187 (CanLII).
31. Re 2016 ONSBT 567 (CanLII).
32. Re 2016 ONSBT 4494 (CanLII).

SCHEDULE B: LEGISLATION

A. *Canadian Charter of Rights and Freedoms*, *Constitution Act, 1982*, Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

B. *Convention on the Rights of Persons with Disabilities,* 30 March 2007, 2515 UNTS 2 at 70, Can TS 2010 No 8 (entered into force 3 May 2008, ratified by Canada 11 March 2010).

Article 5
1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law.
2. States Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.
3. In order to promote equality and eliminate discrimination, States Parties shall take all appropriate steps to ensure that reasonable accommodation is provided.
4. Specific measures which are necessary to accelerate or achieve de facto equality of persons with disabilities shall not be considered discrimination under the terms of the present Convention.

Article 13
1. States Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.
2. In order to help to ensure effective access to justice for persons with disabilities, States Parties shall promote appropriate training for those working in the field of administration of justice, including police and prison staff.

C. *Universal Declaration of Human Rights*, GA Res 217 (III) UNGAOR, 3d Sess, Supp No 13, UN Doc a/810 (1948) 71.

Article 8
Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

D. *Human Rights Code*, R.S.O. 1990, c. H.19.

45.1 The Tribunal may dismiss an application, in whole or in part, in accordance with its rules if the Tribunal is of the opinion that another proceeding has appropriately dealt with the substance of the application.

45.2 (1) On an application under section 34, the Tribunal may make one or more of the following orders if the Tribunal determines that a party to the application has infringed a right under Part I of another party to the application:

> 1. An order directing the party who infringed the right to pay monetary compensation to the party whose right was infringed for loss arising out of the infringement, including compensation for injury to dignity, feelings and self-respect.
>
> 2. An order directing the party who infringed the right to make restitution to the party whose right was infringed, other than through monetary compensation, for loss arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.
>
> 3. An order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act.

(2) For greater certainty, an order under paragraph 3 of subsection (1),

> (a) may direct a person to do anything with respect to future practices; and
>
> (b) may be made even if no order under that paragraph was requested.

45.3 (1) If, on an application under section 35, the Tribunal determines that any one or more of the parties to the application have infringed a right under Part I, the Tribunal may make an order directing any party to the application to do anything that, in the opinion of the Tribunal, the party ought to do to promote compliance with this Act.

(2) For greater certainty, an order under subsection (1) may direct a person to do anything with respect to future practices.

47. (1) This Act binds the Crown and every agency of the Crown.

(2) Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act.

F. *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sched. B.

2 In this Act,

"prescribed" means prescribed by the regulations made under this Act;

37 (1) The Director shall exercise the powers and duties conferred or imposed on the Director by this Act and the regulations.

38 The Director shall,

(a) receive applications for income support;

(b) determine the eligibility of each applicant for income support;

(c) if an applicant is found eligible for income support, determine the amount of the income support and direct its provision;

(d) administer the provisions of this Act and the regulations;

(e) determine how the payment of the costs of administering this Act and providing income support is to be allocated;

(f) ensure that the appropriate payments are made or withheld, as the case may be; and

(g) exercise the prescribed powers and duties.

G. General, O Reg 222/98.

38. (1) The following rules apply with respect to the treatment of earnings:

1. The sum of the total amount of gross monthly income from employment, the amounts paid under a training program and the net monthly income as determined by the Director from an interest in or operation of a business shall be reduced by,

   i. the total of all deductions required by law or by the terms of employment that are deductions,

   A. from wages, salaries, casual earnings or amounts paid under a training program, and

   B. made with respect to income tax, *Canada Pension Plan*, employment insurance, union dues or pension contributions,

ii. $200 per adult member of the benefit unit with earnings, which earnings are not otherwise fully exempted by this section,

iii. 50 per cent of the amount by which the monthly income determined under this paragraph exceeds the total amount of exemptions to which the member of the benefit unit is entitled under subparagraphs i and ii,

iv. child care expenses actually incurred, and not otherwise reimbursed or subject to reimbursement up to the maximum amounts provided in paragraph 2, for each dependent child and for each child on whose behalf temporary care assistance is provided pursuant to section 57 of Ontario Regulation 134/98 (General), made under the *Ontario Works Act, 1997* if,

A. the child care expenses are necessary to permit a recipient or a spouse included in the benefit unit to be employed or to permit a dependent adult to be employed or to participate in an employment assistance activity,

B. the child care expenses are not paid to a member of the benefit unit, and

C. the recipient has not received reimbursement for the child care expenses through the Child Care Tax Credit under subsection 8 (15.2) of the *Income Tax Act*,

v. the employment related expenses attributable to the person's disability that are necessary to enable the person to be employed, up to a maximum of $300 other than expenses,

A. that are reimbursed or subject to reimbursement, or

B. that relate to accommodating the person under section 17 of the *Human Rights Code*.

SHERYL ABBEY

Applicant

- and -

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO AS REPRESENTED BY THE MINISTER OF COMMUNITY AND SOCIAL SERVICES and HUMAN RIGHTS TRIBUNAL OF ONTARIO

Respondents

Court File No. 476/16

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

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