

OW & ODSP overpayments: Court decision confirms collection can be waived

A recent court decision means that you can ask OW or ODSP to waive collection of part or all of your overpayment, in situations where collecting would be unfair or would cause you financial hardship.

ISAC recently won a legal case called *Surdivall v. Ontario (Disability Support Program)*. This case was about whether or not the law allows the Director of ODSP and the Social Benefits Tribunal to waive collection of overpayments in particular circumstances.

For many years, people were able to appeal OW or ODSP overpayments to the Social Benefits Tribunal in situations where repaying the debt would not have been fair. These appeals were standard practice. Many people made appeals like this and were successful in having collection of either all or part of their overpayment waived.

In 2011, ODSP suddenly took a different position. After the Social Benefits Tribunal reduced the amount of an overpayment that Mr. Surdivall had to repay because of an innocent mistake he had made, ODSP appealed the decision. ODSP said that the law said that the Social Benefits Tribunal could not waive overpayments.

Working with us at ISAC, Mr. Surdivall challenged that position in court. We argued that since the law actually says that overpayments “may be recovered,” both ODSP and the Social Benefits Tribunal can decide not to collect an overpayment. We said that they should not collect all of Mr. Surdivall’s overpayment because it would be unfair; in his situation, he had made an innocent mistake, had not benefitted from the overpayment, and would suffer financial hardship if he had to pay it all back.

Mr. Surdivall’s situation is not unusual. Social assistance in Ontario is very complicated. It’s very common for overpayments to happen because of innocent errors like his. They can even happen when all the rules are being followed – the social assistance system is set up in a way that can make overpayments inevitable.

In 2011, the Divisional Court decided that ODSP and the Social Benefits Tribunal did not, in fact, have discretion to waive overpayments. We appealed that disappointing decision to the Ontario Court of Appeal. In 2014 we won. The Court of Appeal agreed with us that the law actually gives the government leeway in how it recovers overpayments, including allowing them to waive collection of an overpayment if doing so makes sense in a person’s individual circumstances. The Court also confirmed the right of people on ODSP to appeal decisions about overpayment collection to the Social Benefits Tribunal.

ODSP appealed the decision to the Supreme Court of Canada, but the Supreme Court refused to hear their appeal.

The Court of Appeal’s decision also applies to overpayments received by people on OW.

What this means for you

If you are on OW or ODSP and have been assessed an overpayment, you might be able to get collection of your overpayment waived completely or in part, in circumstances like:

- You made an innocent mistake that caused the overpayment
- Your caseworker or other representative of ODSP made an error and/or caused a delay that resulted in the overpayment
- Collecting the overpayment would cause you financial hardship
- The overpayment resulted because of abuse or coercion that you experienced
- The overpayment happened because ODSP failed to accommodate your disability
- Other types of circumstances where it would be unfair to make you pay back the overpayment.

How can I request a waiver of my overpayment?

If OW or ODSP sends you a notice that you've received an overpayment and you have to pay it back, but you think you shouldn't have to because your situation is like those outlined above, you can ask for an "internal review" of their decision. You have to tell them what happened to cause the overpayment. You also have to ask them to waive either all or part of the overpayment, depending on the situation.

It is not unusual for overpayment decisions to be wrong. If you think there shouldn't be an overpayment at all or that the amount is wrong, you should also ask for an internal review of the decision to assess an overpayment in the first place.

You can even ask for a waiver of your overpayment by internal review if you are currently repaying an old overpayment – if, for example, the overpayment is being deducted from your monthly benefits. Be aware that if you want to challenge the creation of the overpayment more than 30 days after you were informed of it, you will have to ask for the internal review deadline to be extended.

If they do an internal review and still decide that you have to repay, and you disagree with the decision, you can appeal to the Social Benefits Tribunal.

If you need help requesting a waiver of your overpayment

Asking for an internal review or making an appeal to the Tribunal is complicated. If you need help, consult your local community legal clinic to see if they can assist. Use this website to find out how to contact them: www.legalaid.on.ca/en/contact/contact.asp?type=cl.

Read the Court's decision

If you want to read the decision of the Court of Appeal in the *Surdivall* case, open a PDF copy here: <http://www.canlii.org/en/on/onca/doc/2014/2014onca240/2014onca240.pdf>