

**SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

B E T W E E N :

XXXXXXXX

Appellant

and

DIRECTOR OF THE ONTARIO DISABILITY SUPPORT PROGRAM

Respondent

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PART I: IDENTIFYING STATEMENT

1. This is an appeal by Mr. X from a decision of the Social Benefits Tribunal (“the Tribunal”) finding that he was not a “person with a disability” under s. 4(1) of the *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sch. B, (“the Act”), and was therefore ineligible for income support.

PART II: OVERVIEW STATEMENT

2. Mr. XXX is a middle-aged father of two with a history of uncontrolled diabetes. His doctors, including his longstanding family physician and several specialists, confirmed that he has serious impairments arising from a combination of chronic insomnia, sciatic nerve pain, diabetes, chronic depression, pre-senile dementia, and gastroesophageal reflux disease (“GERD”).
3. Due to his conditions, Mr. XXX became increasingly unable to work. Among other things, he was unable to stand for the long hours required by his job at a gas station and he frequently forgot assigned tasks because of his deteriorating memory. He kept working as long as possible, fearing the loss of financial support for his wife, children, and extended family in Sri Lanka. Ultimately, his declining health left him unable to work.
4. The Director denied Mr. XXX’s application for Ontario Disability Support Program (“ODSP”) benefits and the Tribunal upheld that denial.
5. In doing so, the Tribunal made three errors of law:

- i. It applied the wrong legal test for “person with a disability” within the meaning of s. 4(1) of the *Act*;
- ii. It misapprehended the evidence and made findings unsupported by the evidence; and
- iii. It violated procedural fairness by rejecting Mr. XXX’s testimony solely due to the passage of time.

PART III: SUMMARY OF FACTS

A. Background

6. Mr. XXX is a 45 year-old man who came to Canada from Sri Lanka as a refugee in 2007. He lives with his wife and their two children, ages 8 and 11.¹
7. Mr. XXX suffers from chronic insomnia, sciatic nerve pain, diabetes, chronic depression, pre-senile dementia, and GERD.²
8. Mr. XXX is a hard-working man who has mostly been employed since his arrival in Canada. As both a father of two and a sibling of eleven, Mr. XXX has worked physically demanding jobs to support his family and extended family members in Canada and Sri Lanka.³

¹ Appeal Book, Tab 2: Transcript of hearing at p. 22.

² Appeal Book, Tab 1, Tribunal Decision at pp. 2-3, paras. 6, 8.

³ Appeal Book, Tab 2: Transcript of hearing at 24.

9. He ultimately had to leave his last job due to his disabilities, as he could no longer meet the physical demands of the workplace and was also struggling due to his issues with memory.⁴

B. The Ontario Disability Support Program Application

10. Mr. XXX applied for ODSP benefits in June 2015 at the suggestion of his family doctor, Dr. XXX, who has been treating him since 2007.⁵

11. The Director denied Mr. XXX's disability application on September 3, 2015 and subsequently denied his internal review request.⁶ Mr. XXX appealed to the Tribunal.

C. Tribunal hearing delays

12. Mr. XXX had two appeal hearings. His first appeal hearing, originally scheduled for August 25, 2016,⁷ was adjourned four times by the Tribunal before finally being heard on July 13, 2017.⁸ After the Tribunal denied his first appeal Mr. XXX submitted an application for reconsideration of the decision within the statutory timelines, which

⁴ Appeal Book, Tab 2: Transcript of hearing at p. 23.

⁵ Appeal Book, Tab 3: Health Status Report at pp. 129-140; Tab 2: Transcript of hearing at p. 25. See also Tab 4: Self-Report Form at pp. 141-148.

⁶ Appeal Book, Tab 1: Tribunal decision at p. 1, para. 1.

⁷ Appeal Book, Tab 5: Adjudication Summary for SBT Hearing (August 9, 2016) at p. 149.

⁸ Appeal Book, Tab 9: Response to Appeal (June 20, 2017) at pp. 157-158. For adjournments see: Tab 6: Response to Appeal (January 23, 2017) at pp. 151-152; Tab 7: Response to Appeal (April 19, 2017) at pp. 153-154; Tab 8: Response to Appeal (May 26, 2017) at pp. 155-156.

was successful. A second appeal hearing was held on August 1, 2018,⁹ which is the subject of this appeal.

13. The delay caused by the Tribunal's multiple adjournments caused Mr. XXX significant stress.¹⁰ In describing them, the Tribunal member himself noted "I know it's been a mess."¹¹

D. Evidence before the Tribunal

14. Medical evidence before the Tribunal included medical reports from Mr. XXX's family physician,¹² a prescription list from his pharmacy,¹³ a letter from an endocrinologist,¹⁴ a report from the Scarborough Community Diabetes Program,¹⁵ and a report from the Cardiac Consult Clinic at Markham Stouffville Hospital.¹⁶

15. These medical reports confirmed diagnoses of chronic insomnia, sciatic nerve pain, diabetes, chronic depression, pre-senile dementia, and GERD.

16. Mr. XXX's treating health professionals confirmed the debilitating nature of his impairments. Dr. XXX wrote that he suffered poor sleep and memory, depressed mood with suicidal ideas and crying spells, anger and fatigue and had difficulty

⁹ Appeal Book, Tab 1: Tribunal decision at pp. 1-8.

¹⁰ Appeal Book, Tab 2: Transcript of hearing at pp. 24, 52.

¹¹ Appeal Book, Tab 2: Transcript of hearing at p. 52.

¹² Appeal Book: Tab 10: Medical Report of Dr. XXX (October 4, 2017) at p. 159; Tab 3: Health Status Report at pp. 129-140; Tab 11: Medical Charts with clarifying notes (July 10, 2017) at pp. 160-165.

¹³ Appeal Book, Tab 12: Prescription from Dr. XXX at pp. 166-167.

¹⁴ Appeal Book, Tab 13: Consultation Report of Dr. XXX (April 23, 2015) at pp. 168-169.

¹⁵ Appeal Book, Tab 14: Scarborough Community Diabetes Program Report (February 3, 2015) at p. 170; Tab 15: Scarborough Community Diabetes Program Report (May 11, 2015) at p. 171.

¹⁶ Appeal Book, Tab 16: Consultation Report of Dr. YYY (June 3, 2015) at pp. 172-173.

concentrating and completing tasks.¹⁷ She noted that he also experienced back pain, numbness in his right leg, burning sensations in both feet and epigastrically, headaches and blurry vision, and abdominal pain and acid reflux.¹⁸

17. Mr. XXX's testimony was consistent with these medical findings. He stated that his anxiety compounded his sleep issues, which in turn made it difficult for him to focus at work.¹⁹ Mr. XXX also noted his extreme headaches and the acute pain in both of his legs.²⁰ He detailed how he had difficulty swallowing and digesting food properly, which often led to a burning sensation in his chest.²¹ Finally, Mr. XXX testified that he had poor impulse control, making him cry and lose his temper easily.²²

18. In addition to his medication regime, Mr. XXX pursued physiotherapy and procured orthotics to help treat his physical impairments, though the evidence showed he had to discontinue physiotherapy due to its prohibitive cost and the orthotics were of little benefit to him.²³

19. Mr. XXX also followed the prescribed pharmacological treatment for his diabetes. Nonetheless, his endocrinologist wrote that despite some improvement, his glycemic control remained "suboptimal."²⁴

¹⁷ Appeal Book, Tab 3: Health Status Report at pp. 129-130; Tab 11: Medical Charts with clarifying notes (July 10, 2017) at pp. 160-165.

¹⁸ Appeal Book, Tab 3: Health Status Report at pp. 129-130; Tab 11: Medical Charts with clarifying notes (July 10, 2017) at pp. 160-165.

¹⁹ Appeal Book, Tab 2: Transcript of hearing at pp. 25-26, 40.

²⁰ Appeal Book, Tab 2: Transcript of hearing at p. 26.

²¹ Appeal Book, Tab 2: Transcript of hearing at p. 41.

²² Appeal Book, Tab 2: Transcript of hearing at pp. 38-39. See also: Tab 3: Health Status report at p. 133.

²³ Appeal Book, Tab 2: Transcript of hearing at p. 33.

²⁴ Appeal Book, Tab 13: Consultation Report of Dr. XXX (June 5, 2015) at p. 169.

E. The decision of the Social Benefits Tribunal

20. The Tribunal accepted that the medical conditions, impairments, and restrictions described above had been verified by a prescribed professional. The Tribunal refused Mr. XXX's appeal on the basis that his impairments were not "substantial", and therefore did not meet the threshold required by the legislation.²⁵

21. The Tribunal relied on two primary considerations to deny the appeal: (1) that there was a lack of identifiable treatment for Mr. XXX's mental and physical health impairments and (2) that Mr. XXX's testimony was unreliable due to the passage of time.²⁶

PART IV: ISSUES AND LAW

22. There are three issues to be determined by this Honourable Court:

- i. Whether the Tribunal erred in law by applying the wrong test for "person with a disability" within the meaning of s. 4(1) of the *Act*;
- ii. Whether the Tribunal erred in law by misapprehending the evidence and making findings unsupported by the evidence; and
- iii. Whether the Tribunal violated procedural fairness by rejecting Mr. XXX's testimony solely on the passage of time.

²⁵ Appeal Book, Tab 1: Tribunal decision at pp. 2-4, paras. 6-8, 14.

²⁶ Appeal Book: Rab 1: Tribunal decision at pp. 5-7, paras. 16, 18, 20.

A. Standard of Review

23. The *Act* provides a statutory right of appeal from a decision of the Tribunal to the Divisional Court on a question of law.²⁷ The standard of review is reasonableness.²⁸

24. The Tribunal makes an error of law if it applies the wrong test or principle; fails to apply an applicable legal principle or applies it unreasonably; ignores relevant factors or relies on irrelevant factors; disregards, misapprehends or fails to appreciate relevant evidence; or makes a finding without evidence.²⁹

25. As a general rule, issues of procedural fairness or natural justice are questions of law to be reviewed on a correctness standard.³⁰ No deference is due as the decision-maker has either complied with required duty of fairness or has breached it.

B. The legal test to qualify for benefits as a “person with a disability”

26. The legal test to qualify for ODSP benefits is set out in s. 4(1) of the *Act*:

Person with a disability

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

²⁷ *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sched. B, s. 31(1) [ODSPA].

²⁸ *Corrigan v. Ontario (Disability Support Program)*, 2016 ONSC 6212, at para. 22.

²⁹ *Jennings v. Minister of Social Services of Ontario*, 2015 ONSC 6689, at para. 41.

³⁰ *Mission Institution v. Khela*, [2014] S.C.J. No. 24 at para. 79.

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.³¹

27. Therefore, an applicant must show that he or she has a verified substantial impairment which results in a substantial restriction in his or her activities of daily living.³²

28. The *Act* is intended to support persons with significant, but not necessarily severe, long-term functional barriers.³³ As a remedial program, the words of the legislation are to be interpreted broadly and liberally with any ambiguity resolved in the applicant's favour.³⁴ The Tribunal must look at the "whole person" in making its determination as to whether an individual is a "person with a disability," including his or her ability to function in the areas of personal care, community and workplace."³⁵ This is an individual assessment that should take into account "the varying circumstances of each individual case in a manner consistent with the purposes of the *Act*."³⁶

³¹ *ODSPA, supra*, s. 4(1).

³² *Crane v. Ontario (Director, Disability Support Program)*, [2006] O.J. No. 4546 (C.A.), at paras. 19, 20 [*Crane*].

³³ *Gray v. Director of the Ontario Disability Support Program*, 2002 CanLII 7805 (ON CA), at para. 15 [*Gray*].

³⁴ *Ibid.* at paras. 9-12.

³⁵ *Crane, supra* at para. 25.

³⁶ *Siegel v. Ontario (Director, Disability Support Program)*, [2011] O.J. No. 5385 (Div. Ct.), at para. 13 [*Siegel*]; *Crane, supra* at para. 20; *Gray, supra* at para. 16.

C. The Tribunal applied the wrong legal test to assess substantiality

29. Although the Tribunal had the benefit of Mr. XXX's testimony, which was consistent with supportive medical evidence from his physicians, it relied on the lack of treatment as the determinative factor in its decision. It found that Mr. XXX's impairments were not substantial because no "current or proposed treatment" had been identified in his application,³⁷ diagnostics had not been requisitioned, and specialist referrals had not been made.³⁸

30. In making these findings, the Tribunal failed to apply the correct legal test for "person with a disability." While treatment may be relevant to the assessment of "substantiality" under s. 4(1) of the *Act*, it is not determinative, and does not displace consideration of an individual's circumstances: the determination of a substantial impairment is a subjective assessment which requires consideration of the "whole person."³⁹

31. The Tribunal failed to apply the proper "whole person" analysis under the *Act* in two ways. First, it failed to consider Mr. XXX's personal barriers to treatment, including how his impairments impacted treatment options. Second, in doing so it focused on his level of treatment at the expense of his actual impairments.

³⁷ Appeal Book, Tab 1, Tribunal Decision at p. 5, para. 16.

³⁸ Appeal Book, Tab 1, Tribunal Decision at p. 6, para. 18.

³⁹ *Gray, supra* at paras. 9, 13-17; *Crane, supra* at paras. 21-25; *Gallier v. Ontario (Disability Support Program)*, (2000) at para. 12.

i. The Tribunal erred in failing to consider Mr. XXX's barriers to treatment, or the impact of his depression on pursuing treatment

32. Treatment should not be considered in isolation. There can be many reasons why treatment is conservative, non-existent, or not pursued. For example, medical science may not have identified effective treatment for the medical condition. The patient may have other medical conditions that make treatment ineffective or dangerous. Available treatment may be risky. Treatment may have been tried in the past and found to not be effective for the individual or to have serious side-effects. The patient may have made a personal choice not to pursue treatment.
33. In this case, the Tribunal failed to consider the psychological and financial barriers Mr. XXX faced in obtaining treatment and how his impairments themselves may have impacted his options for treatment.
34. The evidence showed that Mr. XXX did not seek more interventionist treatment in some part because he did not want to believe he was a "sick person."⁴⁰ He was the primary breadwinner for his wife and two children, and had also been supporting his 11 younger siblings in Sri Lanka since the age of 19.⁴¹ Prior to becoming disabled, he worked up to 15 hours a day.⁴² The fear of not fulfilling his family obligations weighed heavily on him. This impacted his treatment choices by deepening his depression and making it more challenging for him to actively pursue treatment, or even admit that he required it.⁴³ The Tribunal failed to consider this crucial factor.

⁴⁰ Appeal Book, Tab 2: Transcript of hearing at pp. 24, 79, 94.

⁴¹ Appeal Book, Tab 2: Transcript of hearing at pp. 24-25, 74.

⁴² Appeal Book, Tab 2: Transcript of hearing at p. 31.

⁴³ Appeal Book, Tab 2: Transcript of hearing at p. 39.

35. Furthermore, Mr. XXX had been insulin-dependent since April 2015, which he found to be psychologically debilitating⁴⁴ because the idea of needing to prick himself five times a day with a needle made him depressed. He explained that the side effects from insulin included making him “feel like a dead snake.”⁴⁵ He nevertheless complied with the medication even though taking it exacerbated his depression.⁴⁶
36. The Tribunal also failed to consider evidence that Mr. XXX had been recommended physiotherapy as an additional treatment, which he attended but could not continue due to cost.⁴⁷ He even sought out free services but was not eligible for them as a result of his age.⁴⁸ He also purchased and wore orthotics that were recommended by his physiotherapist, though they did not assist to a great extent.⁴⁹
37. As a person of limited means, Mr. XXX had no choice but to rely on self-management techniques and his wife’s assistance for massages and hot water treatments to deal with his pain.⁵⁰ The Tribunal did not consider that Mr. XXX was recommended physiotherapy to treat his sciatic nerve pain, nor that financial barriers prevented him from being able to pursue that treatment. In failing to consider these personal circumstances in its assessment of Mr. XXX’s impairments, the Tribunal failed to apply the proper test required by law.

⁴⁴ Appeal Book, Tab 2: Transcript of hearing at p. 37.

⁴⁵ Appeal Book, Tab 2: Transcript of hearing at p. 37.

⁴⁶ Appeal Book, Tab 2: Transcript of hearing at p. 37.

⁴⁷ Appeal Book, Tab 2: Transcript of hearing at p. 33.

⁴⁸ Appeal Book, Tab 2: Transcript of hearing at p. 115.

⁴⁹ Appeal Book, Tab 2: Transcript of hearing at p. 33.

⁵⁰ Appeal Book, Tab 2: Transcript of hearing at pp. 26, 114.

ii. In relying on treatment as determinative the Tribunal erred by failing to consider Mr. XXX's actual impairments contrary to the "whole person" test

38. The Tribunal treated the lack of diagnostics and specialist referrals as fatal to the finding of substantial impairment. It found that "other than the application, medical conditions chart, and physician's letter, there was no documentary evidence to establish the nature and degree of the impairment."⁵¹ However, the Tribunal is required under the legislation to assess the nature and degree (*i.e.* the substantiality) of impairments based on the whole of the evidence before it and the individual's personal circumstances.⁵²

39. There was uncontradicted evidence of Mr. XXX's actual impairments, which were verified by his doctor:

- i. Due to his severe sleeping difficulties, he was unable to concentrate at and complete tasks at work.⁵³ His sleep was severely impacted by his anxious thoughts.⁵⁴ When he woke up he would be so fatigued that he felt like he "woke up...from death."⁵⁵
- ii. He had extreme headaches, which he described as feeling like "everything that's inside my head is just going to come fall..."⁵⁶

⁵¹ Appeal Book, Tab 1: Tribunal decision at p. 6, para. 18.

⁵² *Ontario v. Matthews*, [2000] O.J. No. 5305 at para. 16; *Crane, supra* at para. 25.

⁵³ Appeal Book, Tab 2: Transcript of hearing at pp. 25, 40.

⁵⁴ Appeal Book, Tab 2: Transcript of hearing at p. 26.

⁵⁵ Appeal Book, Tab 2: Transcript of hearing at p. 26.

⁵⁶ Appeal Book, Tab 2: Transcript of hearing at p. 26.

- iii. He had acute pain in both his legs. Sometimes he felt like he had pins and needles; other times he had a burning sensation throughout his legs.⁵⁷
- iv. He had a burning sensation in his chest and had difficulty swallowing. He was not able to digest food properly and felt extremely bloated.⁵⁸
- v. He had poor impulse control⁵⁹ and explained that he cried easily and lost his temper, even breaking his phone a couple of times in rage.⁶⁰

40. The ODSP application, medical conditions chart, and physician's letter is the evidence that the Tribunal is required to consider to decide if Mr. XXX met the definition of a "person with a disability". In only relying on treatment to find that Mr. XXX was not a "person with a disability," the Tribunal applied a restrictive and incorrect interpretation of "substantial impairment." This is contrary to the "whole person" test and is an error in law.

D. The Tribunal erred in law by misapprehending and making findings unsupported by the evidence

41. The Tribunal also committed legal errors in its assessment of the evidence in two respects. First, it made unsupported findings about Mr. XXX's non-compliance with treatment and second, it made speculative conclusions about the sufficiency of the treatment prescribed for Mr. XXX.

⁵⁷ Appeal Book, Tab 2: Transcript of hearing at p. 31.

⁵⁸ Appeal Book, Tab 2: Transcript of hearing at p. 41.

⁵⁹ Appeal Book, Tab 3: Health Status report at p. 133; Tab 2: Transcript of hearing at p. 38.

⁶⁰ Appeal Book, Tab 2: Transcript of hearing at p. 39.

i. The Tribunal made unsupported findings about Mr. XXX's non-compliance with treatment

42. Contrary to the Tribunal's assertion, Mr. XXX had in fact complied with recommended treatment such as dietary changes. He explained, however, that this did not alleviate his impairments as he was under immense stress due to fears for his family's safety during the ongoing civil war in Sri Lanka.⁶¹ Furthermore, the Tribunal's assertion that he was not exercising was also incorrect.⁶² Mr. XXX testified that he attempted exercise but experienced dizzy spells and shortness of breath after walking more than 10-15 minutes.⁶³
43. The Tribunal stated that Mr. XXX was offered but declined psychotherapy, but in making this finding it relied on evidence from 2018, which is not relevant to the date of the Director's decision.⁶⁴ Evidence relevant to the appropriate time period showed that Mr. XXX had in fact seen specialists and other health professionals.⁶⁵ In some cases treatment simply was not effective. For example, despite several recalibrations to his insulin prescription, his impairments remained poorly managed.⁶⁶
44. Even still, it bears repeating that compliance with specific treatment is not required to be found a "person with a disability." Such a requirement would violate personal

⁶¹ Appeal Book, Tab 2: Transcript of hearing at p. 38.

⁶² Appeal Book, Tab 1: Tribunal decision at p. 7, para. 20.

⁶³ Appeal Book, Tab 2: Transcript of hearing at p. 26.

⁶⁴ Appeal Book, Tab 1: Tribunal decision at p. 5, para. 16; Tab 2: Transcript of hearing at p. 94; Tab 18: Consultation Report of Dr. YYY (January 28, 2018) at pp. 176-178.

⁶⁵ Appeal Book, Tab 2: Transcript of hearing at pp. 44, 70-71.

⁶⁶ Appeal Book, Tab 2: Transcript of hearing at p. 37.

autonomy and be inconsistent with the remedial purposes of the *Act*. It would impose a burden on applicants to pursue potentially unnecessary and costly treatment in order to qualify for benefits. This expectation undermines the *Act's* purpose to effectively provide assistance to people with disabilities.⁶⁷

ii. The Tribunal erred in speculating on the sufficiency of treatment

45. Within an ODSP application the Intellectual and Emotional Wellness Scale (IEWWS) and the Activities of Daily Living Index (ADLI) are two indicia of the substantiality of an applicant's impairments and restrictions in daily life, and must be completed by a prescribed professional. In this case, the Tribunal concluded that it is "nearly inconceivable" that the ratings in the IEWWS and ADLI could be so high and there be no treatment.⁶⁸ However it is *not* the Tribunal's role nor does it have the requisite expertise to assume the function of a medical professional and make speculations about sufficiency of treatment. Treatment recommendations are highly individualized and made by medical professionals who have the expertise. In this case Mr. XXX was receiving treatment for both his physical and mental health impairments from his family doctor with whom he has had a lengthy doctor-patient relationship. His family doctor was best placed to assess his health holistically, and to make appropriate treatment decisions in consideration of his other co-morbidities.⁶⁹

46. In light of the existing medical evidence from Mr. XXX's doctor, it was not open to the Tribunal to speculate about treatment. As noted above, there could be numerous

⁶⁷ ODSPA, s. 1c)

⁶⁸ Appeal Book, Tab 1: Tribunal decision, pp. 5-6, paras. 16 and 18.

⁶⁹ Appeal Book, Tab 10: Letter from Dr. XXX (October 4, 2017) at p. 159.

reasons why more interventionist treatment is not warranted or possible. For example, when a person is experiencing multiple health impairments, treatment for some may exacerbate others as it did for Mr. XXX:

...They even changed the insulin itself because they felt...the one I was taking wasn't helping me. If my sugar level decreased then I would feel like my whole leg starts wobbling and I would not have the strength and ...it would give up on me. If it's really high, then I would feel fatigue and ...fall asleep.⁷⁰

47. Furthermore, Mr. XXX testified that the reason he was not getting more specific treatment for his pre-senile dementia was because his doctor believed it was related to his diabetes, for which he was receiving treatment.⁷¹ In replying to the Tribunal's questioning as to why his physicians did not prescribe him medication for his insomnia specifically Mr. XXX replied:

I understand...legally you want to separate everything and identify them individually. However, as a person, I am a person as a whole. Taking all these medications as a whole. And one is entwined with the other. And they're all helping one another.⁷²

48. This "whole" patient approach reflects the reality that qualified medical professionals, and not the Tribunal, are best-suited to determine treatment recommendations.

49. A recent Expert Report from the Collaborative Mental Health Care Working Group notes that diagnostics are a "poor indicator of functionality"⁷³ and "the absence of a

⁷⁰ Appeal Book, Tab 2: Transcript of hearing at p. 38.

⁷¹ Appeal Book, Tab 2: Transcript of hearing at p. 80.

⁷² Appeal Book, Tab 2: Transcript of hearing at p. 29 [emphasis added].

⁷³ Sunderji, N. et al, "Understanding the complexity of treatment of mental illness and addictions in Ontario" Report of the Collaborative Mental Health Care Working Group, Department of Psychiatry and Department of Family and Community Medicine, University of Toronto. 2017 at p. 1 [Sunderji].

referral does not reflect the severity of a patient's mental health condition and their level of functional impairment."⁷⁴ This lack of correlation exists because of a number of practice, systemic, and patient factors.

50. Practice factors include the fact that primary care physicians are often themselves providing mental health treatment, as was the case for Mr. XXX.⁷⁵

51. Systemic factors include the fact that family physicians have reported that access to psychiatry is the poorest among all specialists in Canada.⁷⁶

52. Patient factors include a consideration of the person as a whole. Quite significantly, the Expert Report notes mental health medications often cause side effects such as fatigue, nausea, and reduction in capacity, resulting in worsened levels of functional impairment.⁷⁷ Where a patient has medical-psychiatric co-morbidities, as does Mr. XXX, the evidence shows that this combination typically results in under-treatment and amplified disability.⁷⁸

53. In speculating about the non-sufficiency of the treatment which had been prescribed for Mr. XXX, the Tribunal ignored the medical evidence and usurped the expert role of treating physicians. This is an error in law.

⁷⁴ *Ibid.* at p. 1.

⁷⁵ Sunderji, *supra* at p. 3.

⁷⁶ Sunderji, *supra* at p. 5.

⁷⁷ Sunderji, *supra* at p. 10.

⁷⁸ Sunderji, *supra*, at p. 12.

E. The Tribunal violated procedural fairness by rejecting Mr. XXX's testimony solely on the passage of time

54. Mr. XXX had the right to be heard. This is a fundamental aspect of procedural fairness and includes the right to call evidence, have that evidence assessed fully and fairly and make submissions. In this case, the Tribunal rejected Mr. XXX's testimony, finding that it was unreliable solely because it was provided three years after the Director's decision. This was unfair for two reasons. First, the delay in hearing was caused by the Tribunal itself, and in no part by Mr. XXX. Second, the Tribunal failed to conduct a proper credibility assessment in concluding that Mr. XXX's testimony was unreliable.

i. The Tribunal acted unfairly in rejecting Mr. XXX's testimony on the basis of its own delay

55. As outlined above, there was a lengthy passage of time between the date of the Director's decision and the hearing, a delay that was entirely outside Mr. XXX's control. The long delay and multiple hearing cancellations exacerbated Mr. XXX's stress.⁷⁹ Even the Tribunal acknowledged this delay.⁸⁰

56. Mr. XXX bore all the harm from that delay because the Tribunal refused to rely on his testimony on the stated basis that the passage of time rendered it less reliable.⁸¹

57. To find Mr. XXX's testimony unreliable for no other reason than the "passage of time" is unfair. By this logic, there would be no purpose to courts ordering fresh

⁷⁹ Appeal Book, Tab 2: Transcript of hearing at pp. 24, 52.

⁸⁰ Appeal Book, Tab 2: Transcript of hearing at p. 52.

⁸¹ See for e.g. Appeal Book, Tab 1: Tribunal decision at 7, para. 20.

hearings as a remedy on appeal since testimony would always thereby be rendered stale. In this case, the treatment of Mr. XXX's testimony was not a result of weighing the evidence. Rather, the Tribunal rejected his testimony on the basis that it was unreliable solely due to the passage of time. This was prejudicial to Mr. XXX and violated his right to procedural fairness.⁸²

ii. The Tribunal acted unfairly in rejecting Mr. XXX's testimony without a proper credibility assessment

58. A tribunal is entitled to reject direct evidence it does not find credible. However, it is not entitled to do so without specific findings and reasons for rejecting uncontradicted evidence as it did in Mr. XXX's appeal.⁸³ In relying exclusively on the passage of time to discredit Mr. XXX's testimony, the Tribunal failed to conduct a proper credibility analysis.⁸⁴ As noted in the oft-cited *Faryna v. Chorny*, "a Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all the elements by which it can be tested in the particular case."⁸⁵ A proper analysis would have included making findings on factors pivotal to credibility such as Mr. XXX's appearance, demeanour and manner of testifying, the consistency or plausibility of his testimony, or his motivation.⁸⁶ The Tribunal made no such findings.

⁸² *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII) at paras. 105, 160.

⁸³ See for e.g. *Israel v. Canada (Citizenship & Immigration)*, 2013 FC 385 at para. 44.

⁸⁴ *Faryna v. Chorny*, 1951 CanLii 252 (BC CA).

⁸⁵ *Ibid.* at p. 357.

⁸⁶ See for e.g. *College of Nurses of Ontario v. Quicgue*, [1993] O.J. 1121 and *Pitts and Director of Family Benefits Branch of the Ministry of Community & Social Services*, 51 O.R. (2d) 302.

59. The Tribunal rejected Mr. XXX's testimony about his mental health impairments and preferred evidence about the level of treatment Mr. XXX was receiving because:

the Appellant's testimony was given almost 3 years after the time of the Director's decision. The Tribunal found the passage of time made the testimony less reliable...⁸⁷

60. In fact, it repeated this exact sentence twice more in its decision.⁸⁸ Rather than assessing the credibility of the evidence appropriately, the Tribunal provided this one boilerplate reason for finding that Mr. XXX's testimony was unreliable. The "passage of time" alone is not a reasonable justification for rejecting testimony.

61. Furthermore, a review of the transcript demonstrates that Mr. XXX was generally consistent in his testimony. He was forthcoming when he could not recall certain facts, such as all the medications he was on at the time of the Director's decision⁸⁹ or whether he went to the hospital at that time⁹⁰ and when he underwent his sleep study⁹¹ or saw a particular psychiatrist.⁹² He further clarified which of his impairments post-dated the Director's decision and were not subjects of the appeal.⁹³ He did not speculate why his physicians did or did not recommend a course of treatment and spoke only about what was in his knowledge.⁹⁴

62. Moreover, it is entirely reasonable that due to the passage of time a person is unable to remember specific details such as treatment dates or names of medications which

⁸⁷ Appeal Book, Tab 1: Tribunal decision at p. 6, para. 16.

⁸⁸ See also Appeal Book, Tab 1: Tribunal decision, pp. 6-7, paras. 18, 20.

⁸⁹ Appeal Book, Tab 2: Transcript of hearing at pp. 27, 29.

⁹⁰ Appeal Book, Tab 2: Transcript of hearing at pp. 42, 71.

⁹¹ Appeal Book, Tab 2: Transcript of hearing at p. 30.

⁹² Appeal Book, Tab 2: Transcript of hearing at p. 92.

⁹³ Appeal Book, Tab 2: Transcript of hearing at p. 73.

⁹⁴ Appeal Book, Tab 2: Transcript of hearing at p. 29.

are relatively inconsequential to the substantiality of a person's impairments. More importantly to this issue is the person's recall of how they felt physically and mentally at the relevant time they applied for disability benefits and at the time of the Director's decision. For Mr. XXX these latter details remained clear because he applied for ODSP when he made the difficult realization that he could no longer work due to his health.⁹⁵ It was thus unfair to Mr. XXX for the Tribunal to reject his testimony in the absence of a proper credibility assessment.

PART V: ORDER SOUGHT

63. It is respectfully requested that the appeal be allowed, the Tribunal's order be set aside, and the Court make an Order directing that Mr. XXX qualifies as a "person with a disability" under subsection 4(1) of the *Act* at the time of the Director's decision.

64. In the alternative, Mr. XXX seeks an order referring the matter back to the Tribunal for a new hearing before a different Tribunal member with such directions as this Honourable Court considers reasonable.

65. Mr. XXX is not seeking costs in this appeal.

February 19, 2019

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⁹⁵ Appeal Book, Tab 2: Transcript of hearing at p. 57.

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CERTIFICATE

1. An order under subrule 61.09(2) is not required.
2. The Appellant estimates that one hour will be required for oral argument.

DATE THIS 19th day of February, 2019

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SCHEDULE A: LIST OF AUTHORITIES

1. *Corrigan v. Ontario (Disability Support Program)*, 2016 ONSC 6212
2. *Jennings v. Minister of Social Services of Ontario*, 2015 ONSC 6689
3. *Mission Institution v. Khela*, [2014] S.C.J. No. 24
4. *Crane v. Ontario (Director, Disability Support Program)*, [2006] O.J. No. 4546 (C.A.)
5. *Gray v. Director of the Ontario Disability Support Program*, 2002 CanLII 7805 (ON CA)
6. *Siegel v. Ontario (Director, Disability Support Program)*, [2011] O.J. No. 5385
7. *Gallier v. Ontario (Disability Support Program)*, [2000] O.J. No. 4541
8. *Ontario v. Matthews*, [2000] O.J. No. 5305
9. Sunderji, N. et al, "Understanding the complexity of treatment of mental illness and addiitions in Ontario" Report of the Collaborative Mental Health Care Working Group, Department of Psychiatry and Department of Family and Community Medicine, University of Toronto, 2017
10. *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 (CanLII)
11. *Israel v. Canada (Citizenship & Immigration)*, 2013 FC 385
12. *Faryna v. Chorny*, 1951 CanLii 252 (BC CA)
13. *College of Nurses of Ontario v. Quicgue*, [1993] O.J. 1121
14. *Pitts and Director of Family Benefits Branch of the Ministry of Community & Social Services*, 51 O.R. (2d) 302

SCHEDULE B: LEGISLATION

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

1. The purpose of this Act is to establish a program that,
 - (a) provides income and employment supports to eligible persons with disabilities;
 - (b) recognizes that government, communities, families and individuals share responsibility for providing such supports;
 - (c) effectively serves persons with disabilities who need assistance; and
 - (d) is accountable to the taxpayers of Ontario. 1997, c. 25, Sched. B, s. 1.

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.

31. (1) Any party to a hearing before the Tribunal may appeal the Tribunal's decision to the Divisional Court on a question of law.

XXXXXXXXXX

- and -

**DIRECTOR OF THE ONTARIO
DISABILITY SUPPORT PROGRAM**

Appellant

Respondent

Court File No. 636/18

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

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