

**COURT OF APPEAL FOR ONTARIO**

**BETWEEN:**

**BRADLEY FERRIS**

Moving Party  
(Proposed Appellant)

- and -

**DIRECTOR OF THE ONTARIO DISABILITY SUPPORT PROGRAM**

Responding Party  
(Proposed Respondent)

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**FACTUM OF THE MOVING PARTY**  
**On a motion for leave to appeal**

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Income Security Advocacy Centre  
425 Adelaide Street West, 5<sup>th</sup> Floor  
Toronto, Ontario  
M5V 3C1

**Marie Chen** (LSUC 31780G)  
Tel: 416-597-5820 (Ext. 5152)  
Fax: 416-597-5821  
Email: [chenmel@lao.on.ca](mailto:chenmel@lao.on.ca)

Grey-Bruce Community Legal Clinic  
945 3<sup>rd</sup> Avenue East, Suite 2  
Owen Sound, Ontario  
N4K 2K8

**Seana Moorhead** (LSUC 45110V)  
Tel: 519-370-2200  
Fax: 519-370-2110  
Email: [moorhes@lao.on.ca](mailto:moorhes@lao.on.ca)

**Lawyers for the Moving Party**  
**(Proposed Appellant)**

TO: Ministry of Community and Social Services  
Legal Services Branch  
56 Wellesley Street West, 17<sup>th</sup> Floor  
Toronto, Ontario  
M7A 1E9

**Mimi Singh** (LSUC 27105P)

Tel: 416-327-9731

Fax: 416-327-0568

Email: [mimi.n.singh@ontario.ca](mailto:mimi.n.singh@ontario.ca)

**Lawyer for the Responding Party  
(Proposed Respondent)**

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**PART I: IDENTIFYING STATEMENT**

1. The moving party Bradley Ferris is a 56-year-old man who suffers from chronic pain and serious mobility issues, resulting from multiple traumatic accidents, injuries and surgeries over a thirty-five year period. He applied to the Ontario Disability Support Program (ODSP) for benefits as a person with a disability. His application was denied by the responding party, the Director, and he appealed to the Social Benefits Tribunal.
2. At the Tribunal Mr. Ferris filed additional medical evidence, under s. 64(1) of the Regulation to the *Ontario Disability Support Program Act*, including a report from his long standing treating specialist that detailed Mr. Ferris' medical history over three decades up to a few months before the Director's decision. Section 64(1) obligates the Tribunal to consider new medical evidence if it relates to an appellant's condition at the date of the Director's decision. The provision plays a critical role in ensuring that the Tribunal has the evidence before it that is necessary to determine whether an appellant before the Tribunal is eligible for disability benefits.
3. Even though the specialist clearly stated that he had not seen Mr. Ferris since prior to the date of the Director's decision, the Tribunal presumed that the report related to his condition on the date the report was written, and gave it "minimum weight". On appeal to the Divisional Court, the Court repeated the Tribunal's error.
4. This is a motion for leave to appeal the Divisional Court's decision.

5. There is significant public interest in the proposed appeal. This case is the fourth in a series of Divisional Court decisions that have eroded the protection afforded to appellants by interpreting s. 64(1) to establish a legal “presumption” that new medical reports post-dating the Director’s decision are irrelevant. In this case, the Divisional Court has gone even further by characterizing s. 64(1) as limiting the admissibility of medical evidence. This line of cases has created a significant evidentiary barrier for disabled applicants seeking to prove their eligibility for benefits and adopted an interpretation of s. 64(1) that is at odds with the intent of the provision and the stated purpose of the ODSPA to provide support for persons with disabilities.

## **PART II: SUMMARY OF THE FACTS**

6. Mr. Ferris is a 56 year-old carpenter who lives in Meaford, Ontario. Since 1975, he has had a series of traumatic accidents resulting in multiple injuries, surgeries and conditions. He was last employed in 2006. At the time of his ODSP application, he was in receipt of Ontario Works and excused from employment-related requirements “for medical reasons”.

Motion Record, Tab 5, pp. 92-93: Report of Dr. McCall (January 16, 2013); pp. 80, 82: Self Report Form (November 15, 2011); pp.114-173: Limitations to Participation Forms (19 December 2009, 8 September 2010, 30 November 2011, 18 November 2011, 26 February 2012)

**A. The Ontario Disability Support Program Application**

7. In November 2011, Mr. Ferris applied to the Ontario Disability Support Program for benefits as a “person with a disability”. The application forms completed by his family doctor Dr. Wong confirmed that Mr. Ferris suffers from osteoarthritis in the right knee, fracture dislocation of the right shoulder (repaired in 2004), fracture in the left humerus and dislocated left shoulder (repaired in 2010), and a crush injury to the left foot. Dr. Wong verified that Mr. Ferris experiences pain, decreased range of movement with respect to his left arm and shoulder and difficulty with walking, stairs and housekeeping.

Motion Record, Tab 5, pp. 66, 67: Health Status Report and Activities of Daily Living Index (November 26, 2011)

8. The Director denied Mr. Ferris’s application on May 1, 2012. That decision was confirmed following an internal review request.

Motion Record, Tab 5, pp. 61-62: Disability Adjudication Unit Decision (May 1, 2012); p. 54: Disability Adjudication Unit Decision (June 1, 2012)

**B. The Social Benefits Tribunal Appeal**

9. Mr. Ferris appealed the Director’s decision to the Social Benefits Tribunal.

Motion Record, Tab 5, pp. 38-39: Appeal Form (June 4, 2012)

**(i) The Specialist’s Report**

10. Mr. Ferris submitted additional medical evidence in support of his appeal, including a medical report dated January 16, 2013 with medical records from Dr. McCall, Mr. Ferris’ treating specialist in orthopaedic surgery and sports injuries.

Motion Record, Tab 5, pp. 88-89: Letter from Seana Moorhead (February 4, 2013); pp. 92-113: Report of Dr. McCall (January 16, 2013)

11. Dr. McCall, who has treated Mr. Ferris since 1980, stated in his report that he “last reviewed him [Mr. Ferris] on the 14<sup>th</sup> of December, 2011”. This date is prior to the date of the Director’s decision (May 2012). All medical records attached to the report also pre-dated the Director’s decision.

Motion Record, Tab 5, pp. 92: Report of Dr. McCall (January 16, 2013)

12. Dr. McCall confirmed that Mr. Ferris had “multiple physical disabilities” affecting his upper and lower limbs; “significant chronic pain” in his shoulders, left foot and right knee; is “disabled” in regard to walking, standing, climbing, kneeling, bending, lifting, pushing, pulling and reaching overhead; and will have increasing disability with time.

Motion Record, Tab 5, p. 93: Report of Dr. McCall (January 16, 2013)

13. Dr. McCall described Mr. Ferris’ injuries and resulting impairments and restrictions:
  - (i) Left foot: Mr. Ferris suffered a “severe crush injury” to his foot in a snow machine accident (1980) which required multiple surgeries. Further surgeries were carried out for a bone infection (1995) and removal of a bone outgrowth from the fracture (December 2011). He has loss of movement and chronic pain in his foot.

Motion Record, Tab 5, pp. 92-93: Report of Dr. McCall (January 16, 2013); p. 56: Operative Note (February 18, 1980); p. 95: Operative Note (May 30, 1995); pp. 112-113: Operative Note (December 7, 2011)

(ii) Right shoulder: Mr. Ferris suffered a fracture dislocation (2004) which required surgery. He had further surgery for “frozen shoulder” and a bicep tendon tear (January 2005). Mr. Ferris has some permanent disability in his shoulder with loss of movement and chronic pain.

Motion Record, Tab 5, pp.92-93: Report of Dr. McCall (January 16, 2013); pp.98-99: Operative Note (July 12, 2004); p. 101: Operative Note (January 10, 2005)

(iii) Left shoulder: Mr. Ferris suffered a dislocation (2010) followed by a fracture of his left humerus (June 2010). Surgery was performed on both injuries (June, December 2010). Mr. Ferris has permanent disability in his left shoulder, loss of movement and chronic pain.

Motion Record, Tab 5, pp.92-93: Report of Dr. McCall (January 16, 2013); p. 105: Consultation Note (June 7, 2010); p. 106: Operative Note (June 9, 2010); p. 110: Operative Note (December 8, 2010)

(iv) Right knee: Mr. Ferris developed chronic pain in his right knee after a fracturing his right femur in a car accident when he was 17. Knee surgery was performed for post traumatic osteoarthritis (December 2011). Mr. Ferris has osteoarthritis of his right knee with loss of movement and chronic pain.

Motion Record, Tab 5, pp.92-93: Report of Dr. McCall (January 16, 2013); p. 112: Operative Note (December 7, 2011)

14. Mr. Ferris also submitted “Limitations to Participation” forms completed by Drs. Wong and McCall in a two and a half year period prior to the Director’s decision. Mr. Ferris was certified to be temporarily unemployable for medical reasons and excused from Ontario Works employment related requirements. His medical limitations

associated with his shoulder and knee conditions were identified as heavy lifting, operating machinery, walking and bending.

Motion Record, Tab 5, pp. 114-123: Limitations to Participation Forms (19 December 2009, 8 September 2010, 30 November 2011, 18 November 2011, 26 February 2012)

**(ii) The Tribunal Decision**

15. The Tribunal decided that the additional medical reports should be given “minimum weight” based on the Divisional Court’s decision in *Jemiolo v. ODSP*: a medical report is presumed to apply on the date it is written unless there is specific indication to the contrary.

Motion Record, Tab 4, p.20: Decision of the Tribunal, at para. 15  
*Jemiolo v. Ontario (Director, Disability Support Program)*, *supra*, at para. 22

16. The Tribunal proceeded to treat the specialist report as referring to Mr. Ferris’ condition on the date of the report, January 2013, that is, after the date of the Director’s decision of May 2012. Because the report was written in the present tense, the Tribunal concluded that it showed that Mr. Ferris’s condition had deteriorated after the date of the Director’s decision.

Motion Record, Tab 4, pp.20-21: Decision of the Tribunal, at paras. 18-19

17. The Tribunal relied on the initial application forms to conclude that Mr. Ferris was not a person with a disability as the time of the Director’s decision. Mr. Ferris appealed to the Divisional Court.

Motion Record, Tab 4, pp.21-24: Decision of the Tribunal, at paras. 21-30

### C. The Divisional Court Decision

18. The Divisional Court characterized s. 64(1) of the Regulation as relating to the admissibility of evidence: “Pursuant to section 64(1) of Reg. 222/98 of the ODSPA new medical evidence is admissible at the appeal hearing where it i) relates to the appellant’s condition at the effective date of the Director’s decision ...”

Motion Record, Tab 3, p.13: Decision of the Divisional Court, at para. 6  
*Ontario Disability Support Program Regulation, O. Reg. 222/98, s. 64(1)*

19. In dismissing Mr. Ferris’s appeal, the Divisional Court accepted that the specialist report related to Mr. Ferris’s condition after the date of the Director’s decision, and concluded that the Tribunal was not incorrect when it gave the older medical reports greater weight than the new reports.

Motion Record, Tab 3, pp.14-15: Decision of the Divisional Court, at paras. 13-17

### PART III: QUESTIONS ON APPEAL

20. The issue to be determined on this appeal is one of statutory interpretation: Does section 64(1) of the ODSP Regulation, a mandatory inclusion provision which obligates the Tribunal to consider relevant new medical evidence, establish a presumption that new medical evidence dated after the date of the Director’s decision is irrelevant or inadmissible?

**PART IV: ISSUES AND LAW****A. The proposed appeal raises questions of public importance**

21. An appeal lies to the Court of Appeal with leave from an Order of the Divisional Court on a question that is not a question of fact only.

*Courts of Justice Act*, R.S.O. 1990, c. C43, s. 6(1)(a)

22. Leave to appeal from the Divisional Court will be granted if there is an arguable issue involving the interpretation of a statute of Ontario, the interpretation, clarification or propounding of some general rule or principle of law, or the point in issue involves a question of public importance. This proposed appeal involves the interpretation of an Ontario statute as well as questions of public importance.

*Re Sault Dock Co. Ltd. and the City of Sault Ste. Marie* (1973), 2 O.R. 479 (C.A.), at p. 481

23. Medical evidence is critical to the establishment of disability under the ODSPA. As further argued below, the legislation recognizes the importance of new medical evidence by creating a mandatory duty under s. 64(1) of the ODSP Regulation that the Tribunal consider medical evidence that relates “to the effective date of the Director’s decision”. Yet, a series of Divisional Court decisions, of which this is the fourth, have eroded that mandatory obligation through the judicial creation of a legal presumption that such evidence is irrelevant if the date on the report is after the date of the Director’s decision. Instead of ensuring the inclusion of relevant medical evidence, section 64(1) has become a significant evidentiary barrier for disabled

applicants seeking to establish their eligibility for benefits, contrary to the intent of the legislation and the purpose of the ODSPA to provide support for and effectively serve persons with disabilities.

O. Reg. 222/98, s. 64(1)(a)

*Omar v. Ontario (Director, Disability Support Program)*, [2007] O.J. No. 1216 (Div. Ct.)

*Jemiolo v. Ontario (Director, Disability Support Program)*, [2009] O.J. No. 884 (Div. Ct.)

*Peplinski v. Ontario (Director, Disability Support Program)*, 2012 ONSC 2972

24. This development in the interpretation of s. 64(1) impacts upon the ability of some of Ontario's most impoverished and vulnerable residents to prove that they are "person(s) with a disability" and therefore entitled to the income supports and benefits provided by the legislation, and raises issues of public importance such as to warrant consideration by this Court.

## **B. Standard of review and statutory interpretation of the ODSPA**

25. Section 31(1) of the *Ontario Disability Support Program Act* (ODSPA) provides a statutory right of appeal from a decision of the Tribunal on questions of law. The standard of review is correctness.

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

*Surdivall v. Ontario (Disability Support Program)*, 2014 ONCA 240, 119 O.R. (3d) 225, at para. 18

26. The Ontario Disability Support Program provides monthly support to eligible persons with disabilities and serves some of Ontario's most impoverished and vulnerable individuals. The program is meant to ensure support for disabled applicants. The purpose of the ODSPA is set out in s.1, which includes the establishment of a

program that “provides income and employment supports to eligible persons with disabilities” and “effectively serves persons with disabilities who need assistance”.

*Surdivall v. Ontario (Disability Support Program)*, *supra*, at paras. 8, 35  
*Ontario (Disability Support Program) v. Ansell*, 2011 ONCA 309, at para. 10  
*Ontario Disability Support Program Act*, ss. 1(a), 1(c)

27. It is a well-established principle of statutory interpretation that words in a statute must be “read in their entire context and in their grammatical and ordinary sense harmoniously with” the scheme and object of the Act and the intention of the legislature. Remedial legislation such the ODSPA is to be given “such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit”. The ODSPA “should be interpreted broadly and liberally and in accordance with its purpose of providing support for people with disabilities”. Any ambiguity in its interpretation should be resolved in favour of the applicant seeking benefits.

*Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, at paras. 21, 22, 36  
*Ontario (Disability Support Program) v. Ansell*, *supra*, at para. 25  
*Crane v. Ontario (Director, Disability Support Program)*, [2006] O.J. No. 4546 (QL) (C.A.), 83 O.R. (3d) 321, at para. 15  
*Gray v. Director of the Ontario Disability Support Program*, [2002] O.J. No. 1531 (QL) (C.A.), 59 O.R. (3d) 364, at paras. 9-10, 12  
*Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F at s. 64

### **C. Disability under the ODSPA**

28. Medical evidence is crucial to establishing disability under the ODSPA. To be eligible for ODSP support as a “person with a disability” under s. 4(1) of the ODSPA, an applicant is required to satisfy three factors: (i) substantial impairment; (ii) substantial restriction in the person’s activities of daily living; and (iii) medical

verification of the impairment and restriction. Substantial impairment is the only factor at issue in this proposed appeal.

*Ontario Disability Support Program Act*, s. 4(1)  
*Crane v. Ontario (Director, Disability Support Program)*, *supra*, at paras. 16, 25

29. The “core of the concept of impairment is medical”. “Substantial” is to be given a flexible meaning related to the varying circumstances of each individual case, in a manner consistent with the purposes and to best ensure the attainment of the object of the ODSPA.

*Crane v. Ontario (Director, Disability Support Program)*, *supra*, at paras. 18, 22  
*Gray v. Ontario (Director, Disability Support Program)*, *supra*, at para. 16  
*Ontario (Director, Disability Support Program) v. Gallier*, [2000] O.J. No. 4541 (QL), at para. 13

**D. Section 64(1) ODSP Regulation – a mandatory inclusion provision**

30. The Tribunal is not bound by the traditional rules of evidence. With respect to the admissibility of evidence, s. 15 of the *Statutory Powers Procedure Act* (“SPPA”) provides the Tribunal with a broad discretion to admit any evidence that is relevant, unless excluded by privilege or by statute.

*Statutory Powers Procedure Act*, R.S.O., 1990, c. S.22, s. 15

31. Section 64(1)(a) of the ODSP Regulation goes beyond that general discretion in the SPPA by identifying a specific type of evidence that merits mandatory consideration. It requires the Tribunal to consider additional medical reports, even if they were not part of the original application, if the reports relate to the applicant’s condition at the date of the Director’s decision.

64. (1) On an appeal to the Tribunal from a decision that a person is not a person with a disability, a report described in paragraph 5 of subsection 14(2)<sup>1</sup> that was not provided to the Director before the decision was made shall be considered by the Tribunal if,

(a) it relates to the appellant's condition at the effective date of the Director's decision; ...<sup>2</sup>

Thus, section 64(1) is a “mandatory inclusion” provision, under which a Tribunal “must” consider additional medical evidence if it relates to the appellant's condition at the time of the Director's decision.

*Benoit v. Ontario (Director, Disability Support Program)*, [2002] O.J. No. 1007 (ONSC), at para. 4  
O. Reg. 222/98, s. 64(1)(a)

#### **E. The erosion of the s. 64(1) mandatory obligation to consider new medical evidence**

32. However, this statutory entitlement and mandatory obligation have been eroded by a series of Divisional Court decisions that have created a legal presumption against the relevance of new medical evidence that post-dates the Director's decision.

33. In *Omar* (2007), the Divisional Court qualified s. 64(1)(a) by stating that it requires a Tribunal to consider new medical evidence only if it relates to the appellant's condition at the time of the Director's decision. The word “only” was inserted by the Court and does not appear in s. 64(1).

*Omar v. Ontario (Director, Disability Support Program)*, *supra*, at paras. 2, 3

<sup>1</sup> This refers to a report by a prescribed health professional verifying an applicant's impairment and restriction for the purposes of establishing disability under s. 4(1) of the ODSPA. See O. Reg. 222/98, ss.14(2)5, 46

<sup>2</sup> New reports are also required to be submitted to the Tribunal and the Director at least 30 days before the hearing date: s.64(1)(b)

34. The Divisional Court in *Jemiolo* (2009) relied on the statement in *Omar* to further limit the scope of s. 64(1) by imposing a presumption against the relevance of new medical evidence. The Court held that supplementary medical reports dated after the Director's decision "are presumed to outline the Appellant's condition at the date on which they are written unless there is specific indication to the contrary." The Court required as "specific indication to the contrary", express confirmation from the doctors that their reports related to the appellant's condition at the time of the Director's decision.

*Jemiolo v. Ontario (Director, Disability Support Program)*, *supra*, at paras. 19-22, 25

35. In *Peplinski* (2012), the Divisional Court applied the *Jemiolo* presumption and further circumscribed the types of factors that would constitute "specific indication to the contrary".

*Peplinski v. Ontario (Director, Disability Support Program)*, *supra*, at para. 15

36. In this proposed appeal, the Divisional Court in deciding that the Tribunal did not err, sanctioned the Tribunal's reliance on the *Jemiolo* presumption in giving "minimal weight" to the new medical evidence.

Motion Record, Tab 3, p.13: Decision of the Divisional Court, at paras. 11, 13, 17  
 Motion Record, Tab 4, p.20: Decision of the Tribunal, at para. 15

37. The Tribunal had relied upon the presumption to justify giving minimum weight to the specialist's report. Instead of looking at the substance of the report to determine its relevance as s.64(1) requires it to do, the Tribunal presumed that the specialist's report related to the date on which it was written, that is after the Director's decision. On that basis, the Tribunal rejected the specialist's report, concluding that it reflected

a deterioration of Mr. Ferris' condition after the date of the Director's decision when that was impossible - the report clearly stated that the specialist did not see Mr. Ferris after the Director's decision.

Motion Record, Tab 4, p.20: Decision of the Tribunal, at para. 15, 18-19

38. The specialist stated unequivocally that he last reviewed Mr. Ferris on December 14, 2011, that is four and a half months before the Director's decision (in May 2012). All the information in and appended to the report pre-dates the Director's decision and related to Mr. Ferris' conditions before the Director's decision.

Motion Record, Tab 5, pp. 92. 93-113: Report of Dr. McCall (January 16, 2013)

39. The Divisional Court further eroded the mandatory obligation in s. 64(1) by defining it as a provision on the admissibility of new medical evidence. The Divisional Court found that "(p)ursuant to section 64(1) ... new medical evidence is admissible at the appeal hearing" when it relates to the appellant's condition at the time of the Director's decision.

Motion Record, Tab 3, p.13: Decision of the Divisional Court, at para. 6

**F. The *Jemiolo* presumption is a misinterpretation of s. 64(1), contrary to the scheme and purpose of the ODSPA**

40. Interpreting s. 64(1) as imposing a presumption against either the relevance or admissibility of medical evidence that post-dates the Director's decision is incompatible with the ordinary meaning of the provision, the statutory scheme and the purpose of the ODSPA to provide support to and effectively serve persons with disabilities.

*Re Rizzo & Rizzo Shoes Ltd.*, *supra*, at paras. 21, 22, 36  
*Gray v. Director of the Ontario Disability Support Program*, *supra*, at paras. 9-10, 12  
*Ontario (Disability Support Program) v. Ansell*, *supra*, at paras. 25, 26

**(i) S. 64(1) does not establish a presumption**

41. By imposing a presumption, the Divisional Court has created an exclusionary legal rule that imposes an evidentiary burden on an appellant not contained in s. 64(1). Read in their grammatical and ordinary sense, the words of s. 64(1) do not create a presumption against the relevance of post-dated medical evidence. Rather, as an inclusionary and mandatory provision, it does the opposite. As described above, section 64(1) creates an entitlement and a mandatory duty: it permits an applicant to file new (such as post-dated) relevant medical evidence, and obligates the Tribunal to consider such evidence where it relates to the person's disabilities at the date of the Director's decision. There is simply no wording that creates a presumption of irrelevance against post-dated medical evidence.

*R. v. Oakes*, [1986] 1 S.C.R. 103, at 115-116

42. A presumption of irrelevance defeats the intent of s. 64(1), which explicitly allows for the filing of medical reports obtained after the Director's decision. Such medical reports will usually post-date the Director's decision. To rule them as presumptively irrelevant or inadmissible on the basis of their dates renders s. 64(1) pointless or futile.

*Re Rizzo & Rizzo Shoes Ltd.*, *supra*, at para. 27

43. Presumptions about the date of a report fetters the Tribunal's duty to consider the totality of the evidence and, as this case demonstrates, inhibits the Tribunal from

considering the substance of the whole report before reaching a conclusion about its relevance.

44. Further, s. 64(1) does not identify evidence that is inadmissible. It is strictly about medical evidence that must be considered. As the Divisional Court in *Benoit* stated, s. 64(1) is “not exhaustive of the conditions for admissibility” and does not “determine that the evidence must be excluded if [its] conditions are not met.” Admissibility is governed by the “relevance” requirement set out in the *SPPA*. As addressed below, evidence that does not relate to the date of the Director’s decision may nonetheless be relevant to the appeal and thus admissible.

*Benoit v. Ontario (Director, Disability Support Program)*, [2002] O.J. No. 1007 (ONSC), at paras. 4, 6

**(ii) The presumption is contrary to the scheme and purposes of the ODSPA**

45. Read in its entire context and considered within the scheme of the ODSPA, s. 64(1) represents legislative recognition of the important role that medical evidence plays in access to disability benefits. It entrenches the right of appellants to provide additional medical evidence in support of their appeals and imposes a mandatory duty on the Tribunal to consider such evidence. It ensures that the Tribunal can receive and consider evidence that will help it to make a correct decision about whether or not a person is eligible for ODSP benefits. The goal of s. 64(1) is to ensure that persons with disabilities are not denied access to the benefits to that they need on the basis of a technicality. In this way, s. 64(1) furthers the ODSP’s purpose to ensure support to and effectively serve disabled persons.

*Ontario Disability Support Program Act*, ss. 1(a), 1(c)

46. The mandatory obligation to consider new medical evidence in s. 64(1) is unique within the ODSP scheme. Apart from the general discretion to consider “relevant” evidence found in the SPPA, s. 64(1) is the only legislative provision that specifically requires the Tribunal to admit and consider a particular kind of evidence.

*Statutory Powers Procedure Act*, s. 15(1)  
O. Reg. 222/98, s. 65(2)

47. The importance of the opportunity for an appellant to provide new medical evidence to the Tribunal is heightened when viewed within the context of the ODSP application process. There is no legislative requirement that applicants include supplementary medical reports as part of the initial application for benefits. An applicant is only required to submit a set of forms: the Health Status Report and Activities of Daily Living and a Self Report Form. It is only when their applications are denied and appellants are given disclosure of the reasons for the denial that the need for supplementary evidence becomes apparent. Section 64(1) provides applicants the opportunity to provide that evidence.

O. Reg. 222/98, s. 14(1); s. 62(3)  
Motion Record, Tab 5, pp. 64, 78: Health Status Report and Activities of Daily Living, and Self Report Form

48. There are many reasons why medical evidence that relates to the period after the Director’s decision may be relevant to the appeal. For example, later evidence may be relevant to the setting of a medical review date or may document the results of treatment. Later evidence may relate to a permanent and stable disability that existed at the time of the Director’s decision. It is relevance that governs admissibility, not

the date on a doctor's report. To describe section 64(1) as relating to admissibility, as the Divisional Court did in this case, is quite simply at odds with the statutory scheme.

49. Section 64(1) reflects the clear intention of the legislature to allow an appellant the right to file and have considered supplementary evidence relevant to establish their eligibility for benefits. The *Jemiolo* presumption against post-dated medical reports thwarts this legislative intent. It imposes an evidentiary burden and creates a significant evidentiary barrier to the ability of disabled persons to establish their claims and ultimately to access essential benefits they need, contrary to the beneficial purposes of the ODSPA to provide support for and effectively serve people with disabilities.

*Gray v. Director of the Ontario Disability Support Program, supra*, at para. 9  
*Ontario (Disability Support Program) v. Ansell, supra*, at para. 48  
*Ontario Disability Support Program Act*, ss. 1(a), 1(c)

50. Further, by misinterpreting s. 64(1) as an admissibility provision, the Divisional Court has restricted the admissibility of new medical evidence, contrary to the intent of the provision and to the purposes of the ODSPA, with grave consequences for vulnerable and disabled appellants.

#### **PART V: ORDER SOUGHT**

51. It is therefore respectfully requested that this Honourable Court grant this motion for leave to appeal.

52. The proposed appellant is not seeking his costs in this appeal.

**Date: February 6, 2015**

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**Marie Chen, LSUC #31780G**

**INCOME SECURITY ADVOCACY CENTRE**

425 Adelaide Street West, 5<sup>th</sup> Floor

Toronto, ON M5V 3C1

Tel: 416-597-5820, ext. 5152

Fax: 416-697-5821

E-mail: chenmel@lao.on.ca

**Lawyer for the Appellant**

**SCHEDULE A: List of Authorities**

1. *Re Sault Dock Co. Ltd. and the City of Sault Ste. Marie* (1973), 2 O.R. 479 (C.A.)
2. *Omar v. Ontario (Director, Disability Support Program)*, [2007] O.J. No. 1216 (Div. Ct.)
3. *Jemiolo v. Ontario (Director, Disability Support Program)*, [2009] O.J. No. 884 (Div. Ct.)
4. *Peplinski v. Ontario (Director, Disability Support Program)*, 2012 ONSC 2972
5. *Surdivall v. Ontario (Disability Support Program)*, 2014 ONCA 240, 119 O.R. (3d) 225
6. *Ontario (Disability Support Program) v. Ansell*, 2011 ONCA 309
7. *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27
8. *Gray v. Director of the Ontario Disability Support Program*, [2002] O.J. No. 1531 (QL) (C.A.), 59 O.R. (3d) 364
9. *Crane v. Ontario (Director, Disability Support Program)*, [2006] O.J. No. 4546 (QL) (C.A.), 83 O.R. (3d) 321
10. *Ontario (Director, Disability Support Program) v. Gallier*, [2000] O.J. No. 4541 (QL)
11. *Benoit v. Ontario (Director, Disability Support Program)*, [2002] O.J. No. 1007 (ONSC)
12. *R. v. Oakes*, [1986] 1 S.C.R. 103

**SCHEDULE B: Legislation****Ontario Disability Support Program Act, 1997, S.O. 1997, c. 25, Sched. B,****Purpose of Act**

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.

**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 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. 1997, c. 25, Sched. B, s. 4 (1).

**Appeal to Court**

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.

**Ontario Disability Support Program Regulation, O. Reg. 222/98****Form, etc., of Application for Income Support**

**14.** (1) An application for income support shall be made to the Director in the form and manner approved by the Director. O. Reg. 222/98, s. 14 (1).

**Notification of Appeal and Written Submissions**

**62.** (1) Upon receiving a notice of appeal, the Tribunal shall send a copy of the notice to any other parties to the proceeding. O. Reg. 222/98, s. 62 (1).

(2) If the Director intends to file a written submission, it shall be filed with the Tribunal within 30 days after the Director receives a copy of the notice of appeal. O. Reg. 222/98, s. 62 (2).

(3) A copy of the Director's written submission, if any, shall be provided to the appellant and any other party. O. Reg. 222/98, s. 62 (3).

**New Medical Evidence**

**64.** (1) On an appeal to the Tribunal from a decision that a person is not a person with a disability, a report described in paragraph 5 of subsection 14 (2) that was not provided to the Director before the decision was made shall be considered by the Tribunal if,

(a) it relates to the appellant's condition at the effective date of the Director's decision; and

(b) it is submitted to the Tribunal and the Director for a review by the Disability Adjudication Unit at least 30 days before the date of the hearing. O. Reg. 222/98, s. 64 (1); O. Reg. 394/04, s. 17.

**Conduct of Oral Hearing of Tribunal**

**65.** (2) Unless the parties agree otherwise, a party who intends to produce written or documentary evidence or written submissions, other than reports referred to in

subsections 64 (1) and (2), at an oral hearing shall provide copies of that evidence or those submissions to the other parties and the Tribunal,

- (a) in the case of the appellant, at least 20 days before the hearing; and
- (b) in the case of the Director and any other parties, at least 10 days before the hearing. O. Reg. 222/98, s. 65 (2); O. Reg. 394/04, s. 18 (1).

(3) If a party does not produce evidence or submissions in accordance with subsection 62 (2), clause 64 (1) (b) or subsection (2), the Tribunal may, on the terms and conditions it considers appropriate,

- (a) adjourn the hearing;
- (b) refuse to accept the evidence or written submissions; or
- (c) accept the evidence or written submissions. O. Reg. 222/98, s. 65 (3); O. Reg. 581/98, s. 13; O. Reg. 394/04, s. 18 (2).

### **Statutory Powers Procedure Act, R.S.O., 1990, c. S.22**

#### **What is admissible in evidence at a hearing**

**15.** (1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court,

- (a) any oral testimony; and
- (b) any document or other thing,

relevant to the subject-matter of the proceeding and may act on such evidence, but the tribunal may exclude anything unduly repetitious.

#### **What is inadmissible in evidence at a hearing**

(2) Nothing is admissible in evidence at a hearing,

(a) that would be inadmissible in a court by reason of any privilege under the law of evidence; or

(b) that is inadmissible by the statute under which the proceeding arises or any other statute.

**Legislation Act, 2006, S.O. 2006, c. 21, Sch. F.**

**Rule of liberal interpretation**

**64.** (1) An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.

**Same**

(2) Subsection (1) also applies to a regulation, in the context of the Act under which it is made and to the extent that the regulation is consistent with that Act.

**Courts of Justice Act, R.S.O. 1990, c. C43**

**Court of Appeal jurisdiction**

**6.** (1) An appeal lies to the Court of Appeal from,

(a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;

**BRADLEY FERRIS**  
**Moving Party**  
**(Proposed Appellant)**

- and -

**DIRECTOR OF THE ONTARIO DISABILITY SUPPORT PROGRAM**  
**Responding Party**  
**(Proposed Respondent)**

**Court File No. M44407**

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**COURT OF APPEAL FOR ONTARIO**

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**FACTUM OF THE MOVING PARTY**  
**on a motion for leave to appeal**

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Income Security Advocacy Centre  
425 Adelaide Street West, 5<sup>th</sup> Floor  
Toronto, Ontario M5V 3C1

**Marie Chen** (LSUC 31780G)  
Tel: 416-597-5820 (Ext. 5152)  
Fax: 416-597-5821  
Email: [chenmel@lao.on.ca](mailto:chenmel@lao.on.ca)

Grey-Bruce Community Legal Clinic  
945 3<sup>rd</sup> Avenue East, Suite 2  
Owen Sound, Ontario N4K 2K8

**Seana Moorhead** (LSUC 45110V)  
Tel: 519-370-2200  
Fax: 519-370-2110  
Email: [moorhes@lao.on.ca](mailto:moorhes@lao.on.ca)

**Lawyers for the Moving Party**  
**(Proposed Appellant)**