

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

**BETWEEN:**

**MARIA ANNA PAVON**

**Appellant**

**and**

**DIRECTOR OF THE ONTARIO DISABILITY SUPPORT PROGRAM**

**Respondent**

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**FACTUM OF THE APPELLANT**

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DATE: October 18, 2011

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

**Jackie Esmonde (LSUC # 47793P)**

Tel: (416) 597-5820, ext 5153  
Fax: (416) 597-5821  
Email: esmondja@lao.on.ca

**Lawyer for the Appellant**

**TO:** Registrar, Divisional Court  
Osgoode Hall, 130 Queen Street West  
Room 174  
Toronto, Ontario  
M5H 2N5

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

**Michelle Schrieder**

Tel: 416-327-9731

Fax: 416-327-0568

Lawyer for the Respondent

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## **PART I: IDENTIFYING STATEMENT**

1. This is an appeal by Ms. Pavon from a decision of the Social Benefits Tribunal (“the Tribunal”) concluding that it did not have jurisdiction to hear her overpayment appeal because it had been brought more than one year from the original date of the decision of the Director of the Ontario Disability Support Program (“the Director”).

## **PART II: OVERVIEW STATEMENT**

2. The Tribunal made a critical error in refusing to hear Ms. Pavon’s appeal. The Ontario Disability Support Program’s (“ODSP”) appeal process provides for an informal resolution process, called an “internal review”, prior to a Tribunal appeal. The trigger for the commencement of the one-year time period for appealing to the Tribunal is the decision on internal review – not the original date of the Director’s decision. When the Tribunal concluded that Ms. Pavon’s appeal was 59 days late, it was counting from the original date of the Director’s decision. However, counting from the internal review, Ms. Pavon’s Tribunal appeal was commenced well within the time periods contemplated by the legislation.

3. In the alternative, should this Honourable Court conclude that the one-year time period had passed, the legislation explicitly grants the Tribunal the discretion to extend time. It is submitted that the Tribunal erred in concluding that it lacked the discretion to extend time for Ms. Pavon’s appeal.

4. As a result of these errors, Ms. Pavon had no opportunity to challenge the validity of the Director's decision to assess a significant overpayment of greater than \$35,000, an amount that is devastating for a family struggling with illness and disability.

### **PART III: STATEMENT OF FACTS**

5. Ms. Pavon is a 46 year-old HIV-positive woman. Her husband was seriously injured in a workplace accident in 2005 and has not been able to return to work.

6. As a result of her disabilities, Ms. Pavon was a long-term recipient of ODSP. Ms. Pavon cooperated with all requests from her ODSP caseworkers and consistently informed ODSP of all changes to her financial circumstances. Following his accident, her husband received ODSP income support as her dependent. When he began to collect Workplace Safety and Insurance ("WSIB") benefits, Ms. Pavon notified her caseworker as required. Noting that her ODSP monthly income support did not change, she drew her caseworker's attention to the WSIB benefits several times, but ODSP took no action on this information.

Appeal Book & Compendium, Tab 5, p. 15 [Tribunal Record, p. 60]: Note Detail (12/04/2006).

7. On February 9, 2009 the Director assessed a significant overpayment of \$36,668.74 for the period between October 2005 and October 2008. The overpayment arose because the Director took over three years to act on the financial information Ms. Pavon provided about her husband's WSIB benefits.

Appeal Book & Compendium, Tab 3, p. 12 [Tribunal Record, p. 24]: ODSP Notice of Overpayment (February 9, 2009).

8. In the time immediately following the assessment of the overpayment, Ms. Pavon experienced a number of health crises. She was hospitalized in January 2009 and again in October 2009. Despite her own precarious health, she also provided ongoing care and assistance to her husband, who had his own medical issues during this period. She also provided care to her young niece, who was ill in early 2009.

Appeal Book & Compendium, Tab 6, pp. 16-18 [Tribunal Record, pp. 20-22]: Internal Review request (March 23, 2010).

9. In March 2010, Ms. Pavon was able to seek and obtain legal advice. At that time, Ms. Pavon was working part-time and no longer receiving ODSP benefits. She submitted a request for an internal review on March 23, 2010 in respect of two issues: a) the assessment of the overpayment; b) the recovery of the overpayment. Because the internal review application was submitted more than 30 days from the original decision, she also asked for an extension of time for an internal review based on the extraordinary health and personal difficulties she had been experiencing.

Appeal Book & Compendium, Tab 6, pp. 16-19 [Tribunal Record, pp. 21, 184]: Internal Review request (March 23, 2010).

10. The Director accepted that Ms. Pavon had been unable to request an internal review at an earlier time due to circumstances beyond her control and granted an extension of time. The internal review was conducted on April 20, 2010. The internal review upheld the original decision to assess an overpayment. The ODSP caseworker advised Ms. Pavon that she had until May 24, 2010 to submit an appeal to the Tribunal.

Appeal Book & Compendium, Tab 7, p. 20 [Tribunal Record, p. 58]: Letter from Karen Crockett (April 20, 2010).

11. Ms. Pavon submitted her appeal to the Tribunal on April 6, 2010.<sup>1</sup> In her appeal, Ms. Pavon again challenged both the assessment of the overpayment and its recovery. She also requested an extension of time to appeal, if required.

Appeal Book & Compendium, Tab 4, pp. 13-14 [Tribunal Record, pp. 18-19]: Notice of Appeal (April 6, 2010).

12. Ms. Pavon's Tribunal hearing was on May 3, 2011. The Director did not disclose the basis upon which the \$36,668.74 had been calculated. Instead, as a preliminary issue, the Director argued that the Tribunal lacked the jurisdiction to hear the appeal because it had been commenced more than one year after the Director's original decision. As a result, the hearing focused entirely on preliminary legal argument and no evidence on the merits of the appeal or the request for an extension of time to appeal was presented.

13. By decision dated August 4, 2011, the Tribunal declined to accept jurisdiction based on its interpretation that the appeal was commenced 59 days beyond the one-year time period established in the legislation.

Appeal Book & Compendium, Tab 2, p. 11 [Tribunal Record, p. 201]: Tribunal Reason's (August 4, 2011).

14. Ms. Pavon submitted a request for reconsideration, which was refused.

Tribunal Record, Reconsideration Application, pp. 202-437.

Appeal Book & Compendium, Tab 8, p. 21 [Tribunal Record, p. 438]: Reconsideration decision (November 7, 2011).

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<sup>11</sup> As is explained further below, Ms. Pavon commenced her appeal prior to the completion of the internal review. The legislation permits the filing of an appeal once the established timeline for the Director's decision on internal review has passed.

## PART IV: ISSUES AND LAW

15. The issues to be determined on this appeal are:
- a) Whether the one-year time period established in the legislation starts to run from the date of the internal review decision, as opposed to the date of the original decision;
  - b) In the alternative, whether the Tribunal has the power to extend the time to appeal beyond one year from the date of the Director's original decision.

### A. Standard of Review

16. The *Ontario Disability Support Program Act* (“ODSPA”) provides that the parties to a hearing before the Tribunal may appeal to the Divisional Court on “a question of law” only.

*ODSPA*, S.O. 1997, c. 25, Sched. B, s. 31.

17. It is well established that decisions from the Tribunal should be reviewed on a standard of correctness.

*Ontario v. Favrod*, 2006 CanLII 4898 (ON S.C.D.C.) at para. 10.

### B. Overview of the Statutory Appeal Process

18. ODSP recipients have a wide variety and combination of mental and physical disabilities. However, they have in common a significant level of vulnerability and marginalization, both socially and economically. With this in mind, the ODSP benefits scheme was created to support persons with disabilities, and specifically to serve them “effectively”:

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 [emphasis added].

*ODSPA*, SO 1997, c 25, Sch B, at s. 1.

19. One of the ways in which the *ODSPA* and its accompanying Regulation (*ODSPR*) effectively serves people with disabilities is through an appeal process that allows recipients to challenge decisions that affect their ODSP benefits.

20. The first step in the appeal process is to request an “internal review”, which is conducted by an ODSP caseworker. A request for an internal review must be made within 30 days from the date the decision is received or “deemed” to have been received (i.e. three days following mailing).

*ODSPR*, O. Reg. 222/98 at s. 58(1).

*ODSPA* at s. 50.

21. The Director has the discretion to extend this 30-day timeline where the Director is satisfied that “the applicant or recipient was unable to request an internal review within that time because of circumstances beyond his or her control.” There are no statutory limitations placed on the length of an extension of time for internal review.

*ODSPR* at s. 58(3).

22. Once the request has been received, the Director has ten days to “complete” the internal review. At the conclusion of the internal review, the Director may “confirm, set aside or vary” the original decision.

*ODSPR* at ss. 59(1) (“The prescribed time for completing an internal review is 10 days from the day the Director receives the request for internal review”), 60(2)(b).

23. An internal review is a mandatory step prior to commencing an appeal to the Tribunal. If an internal review application is submitted beyond the 30-day deadline and an extension of time is not granted, the appellant cannot appeal to the Tribunal.

*Walsh v. Ontario (Disability Support Program)*, 2012 ONCA 463 at para. 58.

*ODSPA* at s. 22(1).

24. However, if an internal review is completed, an appellant dissatisfied with the result can commence an appeal to the Tribunal within 30 days from the day that the Director's decision is "final" as defined by s. 20(3)(b) of the *ODSPA*. Section 20(3)(b) states that a decision is "final" on the earliest of:

- "The prescribed time for completing the internal review expires" (i.e. ten days after the internal review request is received, s. 59(1) *ODSPR*);
- "The day the results of the completed internal review are received"; and,
- "The day the results of the completed internal review are deemed to be received."

*ODSPR* at s. 61(1).

*ODSPA* at s. 20(3)(b).

25. Thus, where an extension of time for an internal review is granted, the 30-day deadline for appealing to the Tribunal commences, at the latest, when the internal review has been or ought to have been completed. However, not surprisingly for a regime that serves individuals with disabilities, the *ODSPA* permits the Tribunal to extend time to appeal. In order to obtain an extension of time to appeal, an appellant must satisfy the Tribunal that there are "apparent grounds" for an appeal and that there are "reasonable grounds" for extending the time.

*ODSPA* at s. 23(2).

26. The *ODSPR* establishes a one-year limit on the commencement of Tribunal appeals, commencing from “the date of the Director’s decision.”

*ODSPR* at s. 61(2).

27. A recent Court of Appeal decision, *Walsh*, addressed the interpretation of the one-year time limit. The appellant in that case argued that the one-year time period did not start to run until she “understood” the decision. The Court of Appeal rejected this approach. Instead, the Court of Appeal concluded that section 61(2) of the *ODSPR* “imports what is effectively an ultimate limitation period of one year to bring an appeal from an eligible decision of the Director.”

*Walsh v. Ontario (Disability Support Program)*, 2012 ONCA 463 at para. 61.

28. While *Walsh* has provided clarity to the interpretation of s. 61(2) *ODSPR*, neither the legislation nor the Ontario Court of Appeal explicitly address which “decision of the Director” is being referenced as the trigger for the one year time period – is it the original decision or the internal review decision? This issue was not raised by the facts in *Walsh* because no internal review had been conducted in that case, and the Court ultimately concluded that Ms. Walsh had no right of appeal as a result. However, as will be argued below, the only reasonable interpretation of the legislation and the Court of Appeal’s decision is that the time period commences from the internal review decision.

29. Also not addressed by *Walsh* is whether the Tribunal has the jurisdiction to extend time to appeal a decision if more than one year has passed since the Director's decision. The Court of Appeal stated explicitly that it was not addressing the extension of time power, as it was not raised by the facts of the case:

In any case, the Divisional Court recognized that the issue [of the power to extend time] was neither in play, nor dispositive, and I concur with the holding at para. 11 of its reasons:

We do not need to decide whether the Tribunal had jurisdiction under subs. 23(2) of the Act to extend the time for filing an appeal beyond the one year prescription. The Tribunal was not asked to extend the time, and it did not do so.

*Walsh v. Ontario (Disability Support Program)*, 2012 ONCA 463 at para. 56.

30. Unlike *Walsh*, both the issue of which Director's decision triggers the one-year time period and the Tribunal's powers to extend time were directly before the Tribunal in Ms. Pavon's appeal.

### **C. The one-year time period is triggered by the Director's decision on internal review**

31. The legislative provision establishing the one year time period states as follows:

61(1) For the purpose of subsection 23 (1) of the Act, the prescribed time for appealing a decision of the Director is 30 days from the day the Director's decision is final under clause 20 (3) (b) of the Act.

61(2) No appeal to the Tribunal shall be commenced more than one year after the date of the Director's decision.

*ODSPR* at s. 61(1-2).

32. While the text of s. 61(2) *ODSPR* does not explicitly state whether “the date of the Director’s decision” means the original decision or the decision on internal review, the one-year time period in s. 61(2) *ODSPR* must be read in its statutory context. It is submitted that, “the date of the Director’s decision” must mean the date of the internal review decision, for several reasons.

33. First, the immediately preceding subsection in the legislation (s. 61(1)) establishes that the 30 day timeline for commencing a Tribunal appeal starts from the date of receipt (deemed or actual) of the internal review decision, or the date the internal review decision ought to have been made by, whichever is earlier. In other words, in the normal course it is the internal review decision that triggers the 30-day timeline for appealing.

34. Thus reading s. 61(2) *ODSPR* in context, it is apparent that the one-year time period in s. 61(2) has the same trigger. Otherwise, appellants would be faced with the absurd result that the initial time period and the one-year appeal period for launching an appeal would be triggered by two different events.

35. Second, had s. 61(2) *ODSPR* been intended to refer to the date of the Director’s “original decision” that precise term could have been used, as it is elsewhere in the legislative scheme.

For example, see *ODSPR* at s. 60(2)(a): The decision made on an internal review shall include, (a) the Director’s original decision.

36. Third, when an internal review is conducted, the Director has the option of upholding, overturning or varying the original decision. For example, in an internal review of an

overpayment decision, it is not uncommon for the amount of the internal review to be varied. If an internal review is conducted, any subsequent appeal to the Tribunal is an appeal of the overpayment amount established by the internal review decision. This is why, in the normal course, the 30-day deadline for filing a notice of appeal runs from the date that the internal review is completed or deemed to have been completed. It is simply common sense that the internal review decision is what triggers the appeal timelines.

37. Fourth, while s. 61(2) *ODSPR* places a one-year limit on the commencement of an appeal, there is no corresponding time limit on the Director's discretion to grant an extension of time for internal review. This means that if the one year limit on appeals is interpreted to mean the date of the "original" decision, there could be cases where the Director agrees, because of extenuating circumstances, to conduct an internal review more than one year after the date of the original decision. However, since one year from the date of the original decision has passed, whatever decision the Director makes on internal review is insulated from appeal. This would be so even in circumstances in which the internal review decision significantly varied the original decision, and/or varied it in a clearly erroneous or prejudicial manner. Such an absurd result could not have been intended by the drafters of the legislation.

*ODSPA* at ss. 22, 23.

*ODSPR* at ss. 58(1), (3).

38. Further, there is no prejudice to the Director resulting from an interpretation that has the one-year time period triggered by the internal review decision. Rather, the Director maintains a very significant power – which is the power to decline to grant an extension of time to conduct an internal review where the Director is not satisfied that extenuating circumstances for the delay

have been demonstrated. However, where the Director is satisfied that the delay was beyond the recipient's control, those same circumstances further support the interpretation that the one year time period runs from the internal review.

*ODSPR* at s. 58(3).

39. A time period that has been excused by the Director based on circumstances beyond the recipient's control should not then be counted against a recipient to deny an appeal right.

40. While it is the appellant's position that the date of commencement of the one-year time period is unambiguous, to the extent that there are at least two potential meanings of the phrase "the date of the Director's decision", the ambiguity in remedial legislation such as the *ODSPA* should be interpreted in a manner that favours the claimant and which upholds the purpose of the legislation.

*Ontario v. Ansell*, 2011 ONCA 309 at paras. 25-26.

41. This well-established principle of interpretation is particularly important in the context of the labyrinth of complex rules that ODSP recipients must navigate. There are approximately 800 rules and regulations that must be applied before a recipient's eligibility and benefit entitlement can be determined. These complex rules have been described as "inconsistently applied" and "virtually impossible to communicate to clients." In such a context, robust appeal rights are necessary in order to ensure fairness and consistency in decision-making.

Commission for the Review of Social Assistance in Ontario (June 2011), "A Discussion Paper: Issues and Ideas" at p. 28.

42. The Court of Appeal in *Walsh* endorsed the internal review decision as the trigger for the one year time period when it said: “The Act seeks to compensate for any perceived unfairness arising from the timelines in two ways: the right to re-apply; and the Director’s ability to extend the time ... for requesting an internal review.” Of course, unlike the decision under appeal in *Walsh*, the overpayment that is the subject of Ms. Pavon’s appeal cannot be dealt with by way of “reapplication.” Absent an appeal right, the debt established by the overpayment decision will follow her until it is repaid. However, as the Court of Appeal observed, an extension of time for internal review compensates for the extremely tight appeal timelines in the legislation in appropriate cases and, thereby, preserves Ms. Pavon’s right to appeal.

*Walsh v. Ontario (Disability Support Program)*, 2012 ONCA 463 at para. 78.

43. The Director’s argument at the Tribunal and its anticipated argument before this Court directly contradicts a province-wide memorandum issued after the Court of Appeal’s decision in *Walsh*. In that memorandum, the Director has endorsed the interpretation that the time periods commence from the date of the internal review decision: “If the Director/Administrator agrees to extend the time for internal review under subsection 58(3) of O. Reg 222/98 ... the appellant can commence an appeal to the SBT within the prescribed 30 day timeline under subsection 20(3)(b) of the ODSPA.”

Memorandum to Regional Directors (July 25, 2012) at p. 3.

44. In this case, the Director was satisfied that Ms. Pavon “was unable to request an internal review within [30 days] because of circumstances beyond ... her control” and therefore granted an extension of time for an internal review. The internal review decision is dated April 20, 2010. Because this was more than ten days after the request had been submitted, Ms. Pavon had



already filed a Notice of Appeal to the Tribunal on April 6, 2010, well within the one year time period.

*ODSPR* at s. 58(3).

45. It is therefore respectfully submitted that the Tribunal erred in law in concluding that Ms. Pavon's appeal was out of time.

**D. The Tribunal has the power to extend the one year time period for starting an appeal**

46. In the alternative, should this Honourable Court conclude that the one-year time period is triggered by the Director's original decision (and thus Ms. Pavon's appeal was commenced out of time), it is submitted that the Tribunal has the power to extend time beyond the one-year appeal period.

47. Section 23 of the *ODSPA* provides:

23. (1) An applicant or recipient may appeal a decision of the Director within the prescribed period after an internal review by filing a notice of appeal that shall include reasons for requesting the appeal.

(2) The Tribunal may extend the time for appealing a decision if it is satisfied that there are apparent grounds for an appeal and that there are reasonable grounds for applying for the extension.

*ODSPA, supra*, s. 23 [emphasis added]

48. In dismissing Ms. Pavon's appeal, the Tribunal concluded that it did not have the power to extend time beyond one year. In reaching that conclusion, the Tribunal claimed to be bound by the (then-Divisional) Court's conclusion in *Walsh* about the existence of a one year limitation period:

Given the interpretation given by the [Divisional] Court [in *Walsh*] to subsection 61(2) of O. Reg 222/98 under the Act, the Tribunal again finds it is limited in its ability to extend the time for an appeal in this case .... The Court stated that the one year limitation applies whether or not the requirements for requesting an internal review are complied with. Accordingly, no appeal lies to this Tribunal and it, therefore makes no order.

Appeal Book & Compendium, Tab 2, p. 11; [Tribunal Record, p. 201]: Tribunal Reason's (August 4, 2011).

49. However, as noted above, the Divisional Court explicitly stated that it was not addressing the question of whether the Tribunal had the power to extend time to appeal beyond the one-year time period, as did the Court of Appeal. With respect, the Tribunal's reasoning was circular: there is a one year limitation period; therefore there can be no extension of time. This reasoning is not logical, because an extension of time necessarily requires that a time limit has been missed. The Tribunal provided no analysis of its power to extend time pursuant to s. 23(2) *ODSPA*. That analysis now falls to this Honourable Court.

*Walsh v. Ontario (Disability Support Program)*, 2012 ONCA 463 at para. 56.

50. However, the Tribunal correctly identified the main interpretive issue, that being the relationship between the discretion to extend time in s. 23(2) *ODSPA* and the one year time period set out in s. 61(2) *ODSPR*. There are two possible interpretations based on the plain language of the legislation.

51. The first is that the Tribunal has the discretion to extend time only for appeals that are filed more than 30 days after internal review but less than one year after the Director's decision. This is a strict reading of the legislation. However, it is not presumptively the correct interpretation. As the Supreme Court noted in *Alberta (Information and Privacy Commissioner)*:

“when ... the provision is silent as to when an extension of time can be granted, there is no presumption that silence means that the extension must be granted before expiry.” Rather, the court must turn to other principles of statutory interpretation in order to resolve the conflicting interpretations.

*Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61 at para. 66.

52. The second possible interpretation is that the Tribunal has the discretion to extend time regardless of whether one year has passed since the Director’s decision. The plain language of s. 23(2) *ODSPA* provides that the Tribunal may extend time provided that there are “apparent grounds for an appeal” and “reasonable grounds” for the extension. Section 23(2) *ODSPA* does not reference any other sections of the legislation nor indicate that an ultimate limitation period can be prescribed by regulation with the effect of over-riding the discretion to extend time. This first approach is the large and liberal interpretation of the statute, consistent with its purpose of serving people with disabilities “effectively.”

*Ontario v. Ansell*, 2011 ONCA 309 at paras. 25-26.

53. *Charter* and human rights principles serve as an important interpretive tool to assist in determining which interpretation should be preferred. As the Supreme Court noted in *Zundel*, when faced with competing but reasonable interpretations of legislative language, the interpretation that accords with *Charter* values is to be preferred:

... where a legislative provision, on a reasonable interpretation of its history and on the plain reading of its text, is subject to two equally persuasive interpretations, the Court should adopt the interpretation which accords with the *Charter* and the values to which it gives expression.

*R. v. Zundel*, 1992 CanLII 75 (SCC) at p. 49.

54. The Court of Appeal has previously taken equality principles into account in interpreting the *ODSPA*. In *Ansell*, the Court of Appeal considered the potentially discriminatory impact of alternative statutory interpretations in concluding that child support payments should be considered income to the parent, rather than the adult disabled child: “In this context, “income” does not include child support. To hold that it does would be inconsistent with an important element and an important objective of the *ODSPA*, and would produce a result that unfairly discriminates against disabled children of separated parents.”

*Ontario (Disability Support Program) v. Ansell*, 2011 ONCA 309 at paras. 26, 44 to 49.

55. Concerns about discrimination similarly inform the interpretation of appeal rights. *ODSP* recipients experience multiple barriers as a result of their disabilities, which can impact upon every aspect of their lives. Take, for example, the case of the *ODSP* recipient in the case identified as SBT 1105-03547. While the one-year time period was not in issue in this appeal, it is instructive of the types of scenarios that arise for some *ODSP* recipients. An “incompetent” *ODSP* recipient living in a group home had his *ODSP* benefits paid directly to a trustee. The trustee misappropriated all of the *ODSP* payments for her own personal benefit, while providing allegedly false information to *ODSP* in order to increase the monthly benefit level. An overpayment was eventually assessed. Should this individual have lost his appeal right if his lack of capacity prevented him from appealing within one year of the overpayment decision? Or if his untrustworthy trustee failed to inform him of the overpayment until more than one year had passed?

SBT 1105-03547 (2012) (Charron).

56. To treat the one year time period in s. 61(2) *ODSPR* as an un-moveable “limitation period” would mean that a person without a disability could lose their appeal rights simply because their disabilities prevented them from appealing within one year. This would be an absurd result for a government program with a stated purpose of serving disabled people “effectively.” Moreover, as shall be argued, such an interpretation is clearly contrary to *Charter* and *Human Rights Code* principles of equality.

57. In an article making the case for “barrier-free” legislation, David Lepofsky and Randal Graham argue that a “large and liberal construction” that “best ensures the attainment” of the legislative objective “will typically be one that ensures that the relevant benefits, programs and protections are not withheld from large or vulnerable segments of the public (such as persons with disabilities).” The authors point out that strict limitation periods pose an accessibility barrier for people with disabilities unless there are exceptions that take into account their needs:

Wherever legislation provides for a limitation period of any sort, it should include an exception for any person who, due to disability, was unable to comply with that limitation period. That could apply to, for example, a person who, due to mental disability, was unable to act earlier on the issue to which the limitation period pertained, and where no guardian could reasonably know about the need to act. It would also cover persons who, due to disability, couldn’t read a document served on them in an inaccessible format.

Absent accommodation by way of an extension of time power, it is inevitable that some people with disabilities will not be able to equally benefit from the appeal processes established in legislation.

M. David Lepofsky and Randal Graham (2010), “Universal Design in Legislative Drafting – How to ensure legislation is barrier-free for people with disabilities”, *National Journal of Constitutional Law* Vol. 27(1) 129-157 at 144, 149.

58. Other Ontario legal regimes ensure that limitation periods take into account the particular circumstances of people with disabilities. In the civil context, the *Limitations Act* provides that the limitation period does not run for persons who are “incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition.” Indeed, a limitation period that does not take the barriers faced by people with disabilities into account was found by the Ontario Court (General Division) in *Speerin* to violate the equality provisions in s. 15 of the *Charter*:

In my view, any limitation period to a right of action which fails to provide consideration for those people unable to comply with its terms because of physical disability fails to meet the standards imposed by s. 15 for the protection of that enumerated group.

*Limitations Act, 2002*, SO 2002, c 24, Sch B, ss. 7(1) and 15(4).

*Speerin v. North Bay (City)*, [1991] O.J. No. 1902 (Gen. Div.) at p. 3.

59. Similarly, the Newfoundland Court of Appeal in *Snow* concluded that a plaintiff’s *Charter* rights were violated by a civil limitation period that took no account of a period of disability. This violation was not saved by s. 1:

Moreover, this violation is not justifiable under s. 1. Assuming that the statutory purpose of creating the limitation period is aimed at the attainment of desirable social objective, it is unnecessary for the purpose of achieving that objective to foreclose from maintaining an action a person whose personal disability deprives him or her of the capacity to assert the claim. To the contrary the injustice of barring a claim before an individual’s handicap caused by his or her impaired mental faculties has been sufficiently off-set might be viewed as the anti-thesis of the values espoused in a modern free and democratic society [emphasis added].

*Snow (Guardian ad litem of) v. Kashyap*, [1995] N.J. No. 15 (Newfoundland C.A.) at paras. 45, 62-70.

60. It is submitted that the ODSP program has approached the barrier posed by limitation periods somewhat differently than the approach in the civil context. While the limitation period may continue to run during a period of incapacity, an extension of time can be granted in

appropriate circumstances. This is similar to the Ontario and federal human rights regimes, which establish a permeable one-year time period that can be extended at the discretion of the Tribunal and Commission, respectively.

*Human Rights Code*, RSO 1990, c H.19, s. 34.

*Canadian Human Rights Act*, RSC 1985, c H-6, s. 41(1)(e).

See also: *Workplace Safety and Insurance Act, 1997*, SO 1997, c 16, Sch A, ss. 22(3), 31(5).

61. It would be a cruel irony if a program designed to serve disabled people “effectively” failed in a most basic way to accommodate people with disabilities, extinguishing a right of appeal when the Director itself has acknowledged that extenuating circumstances prevented Ms. Pavon from starting a timely appeal.

62. It is therefore respectfully submitted that the plain wording and purpose of the *ODSPA* as well as equality principles support an interpretation that protects the Tribunal’s ability to extend time beyond the one-year time period in appropriate circumstances.

63. In this case, Ms. Pavon was denied the opportunity to establish that “there are apparent grounds for the appeal” and “reasonable grounds” for granting an extension.

64. It is therefore respectfully submitted that the Tribunal committed a legal error in concluding it lacked the jurisdiction to extend the time to appeal. The matter should be remitted to the Tribunal to allow Ms. Pavon to call evidence to establish that an extension of time should be granted.

**PART V: ORDER SOUGHT**

65. It is therefore respectfully requested that this appeal be allowed and the matter returned to the Social Benefits Tribunal for a hearing on the merits of the underlying appeal.

66. In the alternative, it is requested that the matter be remitted to the Social Benefits Tribunal for a hearing on whether an extension of time to appeal should be granted.

**Date: October 18, 2011**

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**Jackie Esmonde, LSUC #47793P**

**INCOME SECURITY ADVOCACY CENTRE**  
425 Adelaide Street West, 5<sup>th</sup> Floor  
Toronto, ON M5V 3C1

Tel: 416-597-5820, ext. 5153

Fax: 416-697-5821

E-mail: esmondja@lao.on.ca

**Lawyer for the Appellant**



Court File No. 553/11

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

**BETWEEN:**

**MARIA ANNA PAVON**

**Appellant**

**and**

**DIRECTOR OF THE ONTARIO DISABILITY SUPPORT PROGRAM**

**Respondent**

**CERTIFICATE**

1. An order under subrule 61.09(2) is not required.
2. The Appellant estimates that 1.5 hours will be required for oral argument.

DATED THIS 18<sup>th</sup> day of October 2012

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**Jackie Esmonde**

**Income Security Advocacy Centre**  
425 Adelaide St. W., 5th Flr.  
Toronto, ON M5V 3C1

Tel: 416-597-5820 (extension 5153)

Fax: 416-597-5821

Email: esmondja@lao.on.ca

Lawyer for the Appellant

**SCHEDULE A: List of Authorities**

1. *Ontario v. Favrod*, 2006 CanLII 4898 (ON S.C.D.C.).
2. *Walsh v. Ontario (Disability Support Program)*, 2012 ONCA 463.
3. *Ontario v. Ansell*, 2011 ONCA 309.
4. Commission for the Review of Social Assistance in Ontario (June 2011), “A Discussion Paper: Issues and Ideas” at p. 28-29.
5. Memorandum to Regional Directors (July 25, 2012).
6. *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61.
7. *R. v. Zundel*, 1992 CanLII 75 (SCC).
8. SBT 1105-03547 (2012) (Charron).
9. M. David Lepofsky and Randal Graham (2010), “Universal Design in Legislative Drafting – How to ensure legislation is barrier-free for people with disabilities”, *National Journal of Constitutional Law* Vol. 27(1) 129-157.
10. *Speerin v. North Bay (City)*, [1991] O.J. No. 1902 (Gen. Div.).
11. *Snow (Guardian ad litem of) v. Kashyap*, [1995] N.J. No. 15 (Newfoundland C.A.).

## **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 [emphasis added].

#### **When decision final**

- 20(3). A Director's decision that may be appealed is final,
  - (a) when the prescribed time for requesting internal review expires, if no internal review is requested within that time; or
  - (b) on the earliest of the day the prescribed time for completing the internal review expires, the day the results of the completed internal review are received and the day the results of the completed internal review are deemed to be received under section 50, if an internal review has been requested.

#### **Internal review before appeal**

22. (1) No appeal may be commenced unless an internal review has been requested.

#### **Same**

- (2) The request for internal review must be made within the prescribed time.

#### **If review requested**

- (3) If the applicant or recipient requests an internal review, the review shall be completed in the prescribed manner and within the prescribed period.

#### **Appeal to Tribunal**

23. (1) An applicant or recipient may appeal a decision of the Director within the prescribed period after an internal review by filing a notice of appeal that shall include reasons for requesting the appeal.
- (2) The Tribunal may extend the time for appealing a decision if it is satisfied that there are apparent grounds for an appeal and that there are reasonable grounds for applying for the extension.

### **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.

### **Notice**

**50.** If notice is given by ordinary mail, it shall be deemed to be received on the third day following the date of mailing.

ODSPR, O. Reg. 222/98

REQUEST FOR INTERNAL REVIEW

- 58.** (1) The prescribed time for requesting an internal review is 30 days from the day the decision is received or deemed to have been received under section 50 of the Act.
- (2) A request for an internal review shall be in writing.
- (3) The Director may hold an internal review even if it was not requested within the prescribed time if the Director is satisfied that the applicant or recipient was unable to request an internal review within that time because of circumstances beyond his or her control.

TIME AND MANNER OF CONDUCTING INTERNAL REVIEW

- 59.** (1) The prescribed time for completing an internal review is 10 days from the day the Director receives the request for internal review.

DECISION ON INTERNAL REVIEW

- 60.** (1) A decision made on an internal review shall be in writing and shall be delivered personally to the applicant or recipient or sent by prepaid regular mail to his or her last known address.
- (2) The decision made on an internal review shall include,
- (a) the Director's original decision;
  - (b) a statement of whether the Director's decision is confirmed, set aside or varied;
  - (c) reasons for the decision on internal review; and
  - (d) the effective date of the decision on internal review.

TIME AND MANNER OF COMMENCING APPEAL TO TRIBUNAL

61(1) For the purpose of subsection 23 (1) of the Act, the prescribed time for appealing a decision of the Director is 30 days from the day the Director's decision is final under clause 20 (3) (b) of the Act.

61(2) No appeal to the Tribunal shall be commenced more than one year after the date of the Director's decision.

Limitations Act, 2002, SO 2002, c 24, Sch B.

**Incapable persons**

7. (1) The limitation period established by section 4 does not run during any time in which the person with the claim,
- (a) is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition; and
  - (b) is not represented by a litigation guardian in relation to the claim.

**Ultimate limitation periods**

15. (1) Even if the limitation period established by any other section of this Act in respect of a claim has not expired, no proceeding shall be commenced in respect of the claim after the expiry of a limitation period established by this section.

**General**

- (2) No proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place.

...

**Period not to run**

- (4) The limitation period established by subsection (2) does not run during any time in which,
- (a) the person with the claim,
    - (i) is incapable of commencing a proceeding in respect of the claim because of his or her physical, mental or psychological condition, and
    - (ii) is not represented by a litigation guardian in relation to the claim ...

Human Rights Code, RSO 1990, c H.19.

**Application by person**

**34.** (1) If a person believes that any of his or her rights under Part I have been infringed, the person may apply to the Tribunal for an order under section 45.2,

- (a) within one year after the incident to which the application relates; or
- (b) if there was a series of incidents, within one year after the last incident in the series.

**Late applications**

(2) A person may apply under subsection (1) after the expiry of the time limit under that subsection if the Tribunal is satisfied that the delay was incurred in good faith and no substantial prejudice will result to any person affected by the delay.

Canadian Human Rights Act, RSC 1985, c H-6.

**Commission to deal with complaint**

**41.** (1) Subject to section 40, the Commission shall deal with any complaint filed with it unless in respect of that complaint it appears to the Commission that

(a) the alleged victim of the discriminatory practice to which the complaint relates ought to exhaust grievance or review procedures otherwise reasonably available;

(b) the complaint is one that could more appropriately be dealt with, initially or completely, according to a procedure provided for under an Act of Parliament other than this Act;

(c) the complaint is beyond the jurisdiction of the Commission;

(d) the complaint is trivial, frivolous, vexatious or made in bad faith; or

(e) the complaint is based on acts or omissions the last of which occurred more than one year, or such longer period of time as the Commission considers appropriate in the circumstances, before receipt of the complaint.



Workplace Safety and Insurance Act, 1997, SO 1997, c 16, Sch A,

**Claim for benefits, worker**

22. (1) A worker shall file a claim as soon as possible after the accident that gives rise to the claim, but in no case shall he or she file a claim more than six months after the accident or, in the case of an occupational disease, after the worker learns that he or she suffers from the disease.

**Same, survivor**

(2) A survivor who is entitled to benefits as a result of the death of a worker shall file a claim as soon as possible after the worker's death, but in no case shall he or she file a claim more than six months after the worker's death.

**Extension of time**

22(3) The Board may permit a claim to be filed after the six-month period expires if, in the opinion of the Board, it is just to do so.

**Decisions re rights of action and liability**

31. (1) A party to an action or an insurer from whom statutory accident benefits are claimed under section 268 of the *Insurance Act* may apply to the Appeals Tribunal to determine,

- (a) whether, because of this Act, the right to commence an action is taken away;
- (b) whether the amount that a person may be liable to pay in an action is limited by this Act; or
- (c) whether the plaintiff is entitled to claim benefits under the insurance plan.

**Same**

(2) The Appeals Tribunal has exclusive jurisdiction to determine a matter described in subsection (1).

**Finality of decision**

(3) A decision of the Appeals Tribunal under this section is final and is not open to question or review in a court.

**Claim for benefits**

(4) Despite subsections 22 (1) and (2), a worker or survivor may file a claim for benefits within six months after the tribunal's determination under subsection (1).

**Extension of time**

(5) The Board may permit a claim to be filed after the six-month period expires if, in the opinion of the Board, it is just to do so.

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