Court File No. 32/11

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

DIRECTOR OF THE ONTARIO DISABILITY SUPPORT PROGRAM
Appellant

-and-

RICHARD TREMBLAY
Respondent

FACTUM OF THE RESPONDENT
Richard Tremblay

March 7, 2011

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PART ONE: OVERVIEW

1. Mr. Tremblay is a 47 year-old man from Kapuskasing, Ontario. He has a grade 10 education and worked full-time in an auto shop until he sustained serious injuries in an automobile accident eleven years ago. Since that time he has suffered from chronic back pain and head aches that prevent him from working. Prior to being granted the disability benefits that are the subject of this appeal, Mr. Tremblay's sole source of income was social assistance through the Ontario Works program. As a result of his health conditions, he was medically excused from participating in Ontario Works employment-related requirements on the basis that he was "unemployable". The Social Benefits Tribunal found that Mr. Tremblay was sufficiently disabled to qualify for benefits as a "person with a disability" pursuant to the *Ontario Disability Support Program Act* ("ODSPA").

2. The Director alleges a series of errors on the part of the Social Benefits Tribunal, in particular its decision to admit and rely upon medical evidence from an earlier ODSP application, despite the fact that the Director considered this very evidence in processing the application that was the subject of the appeal to the Tribunal. At heart, the Director takes issue with the manner in which the Tribunal weighed the evidence. Faced with inconsistent medical evidence, the Tribunal provided a reasonable basis for preferring the evidence that supported Mr. Tremblay's appeal and properly exercised its obligation to admit and consider relevant evidence. Medical professionals verified that Mr. Tremblay is disabled by intense, daily pain that restricts his ability to work. The Tribunal made no error of law in concluding that Mr. Tremblay is a person with a disability and this appeal should be dismissed.

PART TWO: STATEMENT OF FACTS

3. Mr. Tremblay is a 47 year-old man. He completed his formal education in grade 10 at the age of 15, when he left school to assist his father who had been rendered paraplegic following a serious accident. As an adult, Mr. Tremblay worked for many years as an auto mechanic.

Respondent's Appeal Book, Tab 5: Letter from Ian Leishman (January 16, 2009) at p. 27-28.

Respondent's Appeal Book, Tab 2: Self-report (2008), p. 16.

4. Unfortunately in 2000, Mr. Tremblay was injured in a car accident while a passenger in a taxi. As a result of the accident he sustained a closed head injury, a fracture to the left maxilla and multiple lacerations to his face. Since the car accident, Mr. Tremblay has suffered from intense headaches, poor concentration and dizziness. He has further suffered from severe back pain since 2003.

Appellant's Appeal Book, Tab 2: Social Benefits Tribunal decision (July 7, 2009) at p. 8.

5. Mr. Tremblay has not been able to work since the accident and is currently in receipt of social assistance through the Ontario Works program. Most adults who rely on Ontario Works are required to participate in approved "employment assistance" activities. There are some exceptions to this requirement, including where the recipient has an injury, illness or disability that makes any degree of participation impracticable. As a result of his medical conditions, Mr. Tremblay has been excused from participation in Ontario Works programs because he is deemed "unemployable".

Appellant's Appeal Book, Tab 2: Social Benefits Tribunal decision (July 7, 2009) at p. 8.

Respondent's Appeal Book, Tab 4: Limitations to Participation Form (Dr. Milner) (June 14, 2008) at p. 25; Tab 14: Record of Hearing, p. 63.

Ontario Works Policy Directive 2.5: Participation Requirements (August 2010).

6. On October 30, 2008 Mr. Tremblay applied to the Ontario Disability Support Program ("ODSP") for benefits as a disabled person (hereafter the "2008 application"). A portion of the application forms are to be completed by a health professional. Access to doctors can be difficult in northern Ontario and Mr. Tremblay did not have a consistent family doctor. One of the family physicians who treated Mr. Tremblay, Dr. Maurice Milner, completed the application forms. In completing the forms, Dr. Milner did not conduct an assessment of Mr. Tremblay, nor did he question Mr. Tremblay concerning his ability to carry out typical "activities of daily living".

Appellant's Appeal Book, Tab 2: Social Benefits Tribunal decision (July 7, 2009) at p. 9.

7. The first portion of the application forms is called the "Health Status Report", and requires the completing physician to identify the applicant's health conditions. Dr. Milner identified two health conditions: headaches and back pain. Dr. Milner confirmed that each of these conditions was expected to last one year or more and was "continuous." He confirmed that Mr. Tremblay was taking 100 mg of Codein Contin four times per day to treat his back pain and 10 mg of Amytriptiline each evening to treat his headaches. Dr. Milner indicated that he had seen Mr. Tremblay between 0-5 times within the past year.

Respondent's Appeal Book, Tab 1: Health Status Report (Dr. Milner, 2008) at p. 3.

8. The second portion of the application form is called the "Activities of Daily Living Index". Dr. Milner's completion of the ADL was minimal, and indeed, Dr. Milner did not even fill in Mr. Tremblay's name as required on the forms. In terms of his assessment of Mr. Tremblay's ability to carry out the listed activities of daily living, Dr. Milner simply marked

"within normal limits" for all 24 areas. As noted above, Dr. Milner did not consult with Mr. Tremblay prior to completing this portion of the form.

Respondent's Appeal Book, Tab 1: Activities of Daily Living Index (Dr. Milner) at p. 11-14.

9. In contrast, a mere 3.5 months earlier, this same doctor completed a "Limitations to Participation" form that was submitted to the Ontario Works program, confirming that Mr. Tremblay was not able to work. Dr. Milner noted that Mr. Tremblay was impaired by "chronic back pain" that impacted upon his capacity for heavy lifting, bending, energy/stamina and standing. Dr. Milner's prognosis for Mr. Tremblay was "guarded." This assessment was accepted by Ontario Works and Mr. Tremblay was deemed "temporarily unemployable for medical reasons for six months."

Respondent's Appeal Book, Tab 4: Limitations to Participation Form (Dr. Milner) (June 14, 2008) at p. 25-26.

10. On January 16, 2009, the Disability Adjudication Unit concluded that Mr. Tremblay was not a person with a disability and denied him ODSP benefits. Mr. Tremblay submitted a request for an internal review of the decision on January 27, 2009. The original decision was upheld on February 6, 2009. Mr. Tremblay appealed this decision to the Social Benefits Tribunal.

Respondent's Appeal Book, Tab 5: Letter from Ian Leishman (January 16, 2009) at p. 27-28; Tab 3: DAU Decision at p. 23-24; Tab 6: Internal Review Request (January 27, 2009) at p. 29; Tab 7: DAU Internal Review decision at p. 30; Tab 8: Letter from Ian Leishman (February 6, 2009) at p. 31-32.

A. The application to submit additional evidence to the Social Benefits Tribunal

11. The Social Benefits Tribunal heard the appeal on May 6, 2009. The Director did not appear at the hearing, and relied upon generic written submissions filed in advance.

Appellant's Appeal Book, Tab 2: Social Benefit Tribunal decision, p. 6.

12. At the hearing, Mr. Tremblay applied to submit additional medical evidence. The additional evidence, from three different family physicians, included the following:

a) Application forms and documentation that had been submitted as part of an earlier ODSP application filed by Mr. Tremblay on January 30, 2006 and denied on November 2, 2006 (hereafter "the 2006 application"). A different doctor, Dr. Joseph Milkovic, completed the application forms. Dr. Milkovic noted he had seen Mr. Tremblay between 6-10 times within the prior year and confirmed the following conditions:

- Pain under the back right rib so intense that it prevented Mr. Tremblay from working, bending, twisting and sleeping. The prognosis was identified as "unknown."

- Headaches, pain to the back of the neck and dizziness that caused poor concentration, blurry vision and forgetfulness. These impairments and restrictions were expected to last one year or more and were continuous. The prognosis was that the conditions were "likely to remain the same."

- Facial pressure and pain resulting in blurry vision, forgetfulness and an inability to concentrate. These impairments and restrictions were expected to last one year or more and were continuous. The prognosis was that they were "likely to remain the same."

- Dr. Milkovic added that Mr. Tremblay experienced dizziness when bending and would lose his balance. He was very anxious and "stressed". He was sweating and extremely tired. Dr. Milkovic noted that these conditions had a severe impact on Mr. Tremblay's emotions, learning, motivation, and that Mr. Tremblay experienced moderate symptoms impacting upon his intellectual function, thinking and insight. He noted severe restrictions in Mr. Tremblay's ability to participate physically in sustained activity, and noted medium/moderate restrictions on Mr. Tremblay's ability to walk three blocks or more on level ground without needing to rest.

Respondent's Appeal Book, Tab 9: Health Status Report and Activities of Daily Living Index (Dr. Milkovic) (April 15, 2006) at p. 33-46 [emphasis added].

b) A "Limitations to Participation" form completed by Dr. Tarsem Ravi on November 17, 2006. Dr. Ravi noted that due to a neck injury, headaches and lower back pain, Mr. Tremblay experienced restrictions in heavy lifting, operating machinery, bending, ability to concentrate, drive, and energy/stamina. Based upon this form, Mr. Tremblay was deemed "temporarily unemployable for medical reasons for six months."

Respondent's Appeal Book, Tab 13: Limitations to Participation Form (Dr. Ravi) (November 17, 2006) at p. 58-59.

c) The Limitations to Participation form completed by Dr. Milner on June 14, 2008 and described above. As indicated at paragraph 9 above, the form confirmed that Mr. Tremblay was impaired by "chronic back pain" that impacted upon his capacity for heavy lifting, bending, energy/stamina and standing. Dr. Milner's prognosis for Mr. Tremblay was "guarded."

Respondent's Appeal Book, Tab 4: Limitations to Participation Form (Dr. Milner) (June 14, 2008) at p. 25-26.

13. The Disability Adjudication Unit (the unit responsible for determining ODSP applications) considered the evidence from the 2006 application when it made its decision in respect of the 2008 application. For example, in its reasons for denying the application, the Disability Adjudication Unit noted that the antecedent to the current complaints was a head injury in 2000 and that Mr. Tremblay's work experience was as a "shop maintenance person". These two pieces of information were not included with the 2008 application, but were documented in the application submitted in 2006.

Respondent's Appeal Book, Tab 3: DAU Decision (January 15, 2009) at p. 23-24; Tab 15: DAU Decision (November 1, 2006) at p. 71, Tab 11: Self Report at p. 50; Tab 10: Letter from All-Terrain Track Sales & Services Ltd. at p. 47.

14. The Tribunal granted the application to submit the above additional evidence, for the following reasons:

> Section 65(3) provides that if the Appellant does not produce evidence or submissions in accordance with subsection (2), the Tribunal may (a) adjourn the hearing; (b) refuse to accept the evidence or written submissions; or (c) accept the evidence or written submissions.
>
> The Tribunal finds the prejudice that would be suffered by the Appellant by refusing to accept the new evidence or by delaying the hearing by adjourning greatly outweighs the minimal amount of prejudice that the Director would suffer by proceeding with the hearing and allowing the evidence to be entered.
>
> After considering the above circumstances, the Tribunal finds it reasonable to accept the documentation into evidence at the hearing. The information is relevant to the issue at hand and provides more than a minor elaboration of the information submitted in November of 2008.
>
> Furthermore and for all of the above reasons, the Tribunal accepts information in the Health Status Report of April 2006 as evidence of verified impairments of intense back pain and poor concentration and dizziness and will consider these impairments for the purposes of this appeal.

Appellant's Appeal Book, Tab 2: Social Benefits Tribunal decision (July 7, 2009) at p. 6-7.

B. Social Benefit Tribunal's decision that Mr. Tremblay is a person with a disability

15. As a result of the Tribunal's decision to admit evidence, the Tribunal had the following evidence before it at the hearing:

a. The 2008 application materials;

b. The 2006 application materials;

c. Dr. Ravi's "Limitations to Participation" form (November 2006);

d. Dr. Milner's "Limitations to Participation" form (July 2008);

e. Mr. Tremblay's testimony.

16. The Tribunal was impressed with Mr. Tremblay's credibility, finding that he was a motivated man who had worked all his life, but who had been unable to return to the workplace after a serious accident. Mr. Tremblay testified that he had suffered for a number of years with chronic headache and back pain and continues to suffer pain with any physical strain.

Appellant's Appeal Book, Tab 2: Social Benefits Tribunal decision (July 7, 2009) at p. 9-10.

17. The Tribunal noted that the medical evidence was inconsistent. For example, Dr. Milkovic's documentation from the 2006 application noted severe limitations with respect to Mr. Tremblay's ability to participate in sustained physical activity; moderate limitations with respect to his ability to walk, and; mild limitations with respect to attention span and physical strength. In contrast, Dr. Milner indicated that all activities of daily living were within normal limits. In reconciling this evidence, the Tribunal stated as follows:

> The Appellant testified that Dr. [Milner] never discussed with him his capabilities with respect to his activities of daily living. The Appellant indicated that Dr. [Milner] simply prescribed his medication and sent him away. Dr. [Milkovic], who completed the initial [Health Status Report] in April 2006 appears to have been treating the Appellant since the time of the accident and would therefore be more aware of the Appellant's limitations. For these reasons, the Tribunal places more weight on the activities of daily living report completed in April of 2006 by Dr. [Milkovic].
>
> Appellant's Appeal Book, Tab 2: Social Benefits Tribunal decision (July 7, 2009) at p. 9.

18. The Tribunal also considered Mr. Tremblay's particular circumstances:

> The Appellant presented as a motivated man who has worked all his life at various manual labour jobs and construction. Since his accident, he has been unable to return to the workplace because of his back pain and headaches. He stated that he would work if he could. He finds it difficult, emotionally, to be confined to the home because of his conditions.
>
> The Appellant completed a grade 10 education and has completed no other education. Therefore, the Appellant would be most suited for labour related employment that he has engaged in most of his life. The Tribunal finds it highly unlikely that this Appellant would be capable of any type of labour related employment given his pain levels, headaches, poor concentration and dizziness. Movement of any kind causes an increase in his already present pain and brings on headaches. As for engaging in sedentary employment, the Appellant has difficulty lifting, bending, walking, and twisting. All of these activities would be required to some extent even in a sedentary employment situation and the Tribunal finds that it is highly unlikely that there is a workplace that would accommodate the depth of the Appellant's substantial impairments and resulting substantial restrictions.
>
> The Tribunal considered a letter of support for the Appellant written by his former employer. The Employer noted that the Appellant worked as a shop maintenance person and that he felt a definite loss to the company when the Appellant was unable to return to work. He further described the Appellant as hardworking and motivated. All of this suggests to the Tribunal that the Appellant would work if he could.
>
> Appellant's Appeal Book, Tab 2: Social Benefits Tribunal decision (July 7, 2009) at p. 10.

19. Following a consideration of all of the evidence, the Tribunal concluded that Mr. Tremblay is a person with a disability.

> Appellant's Appeal Book, Tab 2: Social Benefits Tribunal decision (July 7, 2009) at p. 10.

20. On July 27, 2009, the Director made a request to the Tribunal for a reconsideration, which was denied on September 18, 2009. The Director now appeals to this Honourable Court.

PART THREE: ISSUES AND LAW

21. On appeal, the Director raises four issues:

a. Whether the Tribunal erred by admitting and considering evidence pre-dating the Director's decision on the grounds that the evidence was irrelevant and therefore inadmissible pursuant to s. 64 of the Regulation.

b. Whether the Tribunal committed a jurisdictional error by considering medical evidence submitted on a previous application for ODSP benefits.

c. Whether the Tribunal erred by finding Mr. Tremblay suffers from impairments and restrictions that had not been verified by a medical professional.

d. Whether the Tribunal erred by conflating the tests for "substantial impairment" and "substantial restriction" as defined by the Act.

22. It is submitted that the Tribunal did not err as alleged. As is described below, the Tribunal properly exercised its discretion to admit and consider relevant evidence and followed the jurisprudence of this Honourable Court and the Court of Appeal in applying the "disability test".

A. Standard of Review

23. The *ODSPA* provides that the parties to a hearing before the Social Benefits Tribunal may appeal to the Divisional Court on "a question of law." As a result, questions of fact or of mixed fact and law are immune to scrutiny unless the error is of such significance as to constitute an error of law. For example, whether there is *any* evidence to support a finding of fact or whether the correct legal standard was applied to the facts are questions of law, and hence, are open to appellate review. The *sufficiency* of the evidence, its adequacy or otherwise to sustain the standard of proof required of it, is beyond appellate scrutiny. A question of mixed fact and law is only open to review where there has been a "palpable and overriding" error.

> *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sched. B., s. 31(1).
>
> *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235 at paras. 26-37.
>
> *Director of the Ontario Disability Support Program v. Favrod*, 2006 CanLII 4898 (Ont. Div. Crt.) at para. 12 and 17.

24. The Supreme Court in *Dunsmuir* held that deference is appropriate where legal and factual issues are intertwined and where a tribunal is interpreting its own statute, with which it will have particular familiarity. The Social Benefits Tribunal is a specialized tribunal interpreting its enabling legislation and thus deference will normally be afforded in these circumstances.

> *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at para. 53-54.
>
> *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339 at para. 44.
>
> *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1 at para. 34.

25. The Legislature has explicitly provided that the Director may only appeal on questions of law. As a result, the Director has framed all of its legal issues as questions of law. However, as is

elaborated further below, a closer examination of the issues reveals that in essence the Director takes issue with the Tribunal's exercise of its discretion to admit relevant evidence filed late and with the manner in which it weighed that evidence. It is submitted that the weighing of evidence is at the heart of the Tribunal's role, and as noted by the Court of Appeal, "the task of the court is not to second guess the weight accorded by the Tribunal to various pieces of evidence."

> *Director of the Ontario Disability Support Program v. Favrod*, 2006 CanLII 4898 (Ont. Div. Crt.) at para. 12 and 17.
>
> *Oliveira v. Ontario (Director, Disability Support Program)*, [2008] O.J. No. 622 (Ont. C.A.) at para. 33.
>
> See also: *Ontario Disability v. Ekman*, 2010 ONSC 6068 at para. 44.

26. The Director relied upon generic written submissions and did not appear at the Tribunal hearing. The Director did not take advantage of his opportunity to make submissions on whether the Tribunal ought to exercise its discretion to admit additional medical evidence or to make submissions on how to resile the medical evidence. The statutory appeal process ought not to be used to give the Director a second chance to make arguments that should have been raised at the hearing. Absent a palpable and overriding error, this appeal ought not to be allowed.

B. General principles governing a determination of disability under the *ODSPA*

27. It is well-established that the Ontario Disability Support Program Act ("*ODSPA*") is "remedial legislation" and should be interpreted with a liberal and purposive approach in order to ensure the program attains its goal of providing support to people with disabilities. The words of the *ODSPA* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the Legislature. Any ambiguity should be resolved in the claimant's favour.

> *Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F at s. 64.

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27 at para. 21.

Gray v. Director of the Ontario Disability Support Program, 2002 CanLII 7805 (ON C.A.) at para. 9-10.

28. Section 4(1) of the *ODSPA* governs access to the program by defining a "person with a disability" as follows:

> **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.
>
> *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sched. B, s. 4(1).

29. Therefore, an applicant must meet three criteria in order to qualify for benefits: 1) a substantial impairment that is continuous or recurrent and expected to last one year or more; 2) a substantial restriction in an activity of daily living; 3) both substantial impairments and substantial restrictions having been verified by a health professional. The program is intended to include persons with significant, but not necessarily severe long-term functional barriers. The word "substantial" should be given a flexible meaning in accordance with the varying circumstances of each individual case. While the core of the concept of impairment is medical, what is a substantial impairment for one person may not be a substantial impairment for another.

Gray v. Ontario (Director, Disability Support Program), [2002] 59 O.R. (3d) 364 (C.A.) at para. 8-10, 15-16.

Crane v. Ontario (Director, Disability Support Program), [2006] O.J. No. 4546 (C.A.) at paras. 18-25.

30. Significantly for this case, and consistent with the fundamental nature of the benefits conferred by this legislation, the test is not whether the impairments or restrictions are objectively substantial, but whether they are substantial for the individual applicant.

Ontario (Director, Disability Support Program) v. Gallier, [2000] O.J. No. 4541.

C. The Tribunal reasonably exercised its discretion to admit and consider relevant evidence (Response to paragraphs 54 to 62 of the Appellant's factum).

31. Section 64 of the *Regulation* sets out the circumstances under which the Tribunal must consider new medical evidence on an appeal of the denial of ODSP benefits: 1) the evidence relates to the person's condition at the effective date of the Director's decision respecting the ODSP application; 2) the new medical evidence was submitted to the Tribunal and the Director at least 30 days before the date of the hearing:

> 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).

32. Where, as in this case, an appellant does not submit the new medical evidence 30 days prior to the hearing, section 65(3) of the *Regulation* grants the Tribunal the discretion to admit the evidence "on the terms and conditions it considers appropriate":

> 65(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 [emphasis added].

O. Reg. 222/98, s. 65(3).

33. The Tribunal in this case chose to exercise its discretion to admit the additional medical evidence submitted at the hearing. In doing so, it considered the following factors:

a) The evidence was relevant to the issue on appeal, that being verification of the impairments of intense back pain, poor concentration and dizziness.

b) The evidence provided "more than a minor elaboration" to the information already before the Tribunal.

c) Mr. Tremblay would be prejudiced if the evidence was not admitted or if the hearing was delayed by an adjournment.

d) The prejudice to Mr. Tremblay outweighed the minimal amount of prejudice that the Director would suffer.

Appellant's Appeal Book, Tab 2: Social Benefits Tribunal decision (July 7, 2009) at p. 7.

34. The Director argues that the additional medical evidence was not admissible because it did not relate to Mr. Tremblay's condition at the effective date of the Director's decision (as required by section 64(1)(b) of the *Regulation*) as the evidence "emanates from a period well before the effective date of the Director's decision" during which time "the condition might have improved, deteriorated or remained the same." The Director argues that, as a result, the Tribunal erred by admitting and considering irrelevant evidence.

See Appellant's factum at paras. 57-59.

35. As a first principle, the Director places too narrow a reading of section 64 of the *ODSPA*. This Honourable Court in *Benoit* held that section 64 is not exhaustive of the conditions for the admissibility of evidence on an ODSP appeal. Rather, section 64 only outlines the conditions

under which the Tribunal must receive the evidence. It does not purport by its terms to determine that evidence must be excluded if the conditions are not met. As stated in *Benoit*:

> Section 64 is a mandatory inclusion section and not a mandatory exclusion section. If the legislature had intended that the evidence was to be excluded unless the conditions of s. 64 were met, it could readily have done so.
>
> *Benoit v. Director of the Ontario Disability Support Program*, [2002] O.J. No. 1007 (Div. Crt.) at para. 4.

36. Thus, even if the Director was correct that Mr. Tremblay's additional medical evidence did not fall within the mandatory inclusion requirements of section 64(1), it is incorrect to assert that this would be determinative of the admissibility of the evidence. Rather, section 65(3) grants the Tribunal the discretion to admit evidence that does not fall within the parameters of section 64.

37. Second, and in any event, the additional medical evidence was relevant to Mr. Tremblay's medical condition on the effective date of the Director's decision.

38. As a practical matter, the Director will always be provided with medical evidence that pre-dates his decision, as it is not possible for a doctor to complete a report, submit it to the Disability Adjudication Unit as part of an ODSP application and have a decision made on the same date. The issue is whether there is a basis upon which to conclude that the medical evidence relates to the applicant's impairments and restrictions at the time of the application.

39. There can be no general rule about the relevance of past medical evidence, or a temporal "relevancy cut-off." To impose such an arbitrary rule about the use of past evidence could pose a

significant barrier to accessing the program for disabled people who have limited access to medical professionals, particularly in northern and rural communities.

40. Rather, the Tribunal must review the evidence to determine whether it is relevant in the particular circumstances of the claimant before them. The weight to be given to earlier evidence may vary significantly, but is a factual finding to be made based on the assessment of the evidence as a whole. Weighing of evidence is precisely the job that the Tribunal is charged with and precisely the area in which no second-guessing by a court is permitted.

41. In this case, there was a basis – arising from the 2008 Limitations to Participation form and Mr. Tremblay's testimony – to conclude that the 2006 application materials were relevant. The Director is incorrect to state that Mr. Tremblay's testimony should be taken to be evidence only of his condition on the date of the hearing. To the contrary, it is apparent that Mr. Tremblay's testimony was not restricted to his condition on the date of the hearing. The Tribunal clearly made a factual determination that Mr. Tremblay provided credible evidence of impairments and restrictions he had suffered "for a number of years", rather than as a recent aggravation of his condition:

> The testimony of the Appellant was entirely consistent with the information in the file materials that are referred to above. The Appellant has <u>suffered for a number of years</u> with chronic headache pain and back pain and <u>continues to</u> suffer pain with any physical strain [emphasis added].
>
> …
>
> The Appellant presented as a motivated man who has worked all his life at various manual labour jobs and construction. Since his accident [in 2000], he has been unable to return to the workplace because of his back pain and headaches.
>
> Appellant's Appeal Book, Tab 2: Social Benefits Tribunal decision (July 7, 2009) at p. 9-10.
>
> See Appellant's factum at para. 61.

42. Moreover, the 2006 application materials were considered relevant and were reviewed by the Disability Adjudication Unit in reaching its decision in respect of the 2008 application. Surely it cannot be an error for the Tribunal to then consider the same information.

43. Ultimately, the Director's real complaint is with the Tribunal's preference of medical evidence other than the evidence on the 2008 application forms. The Tribunal did not "ignore" evidence from the 2008 application. Rather, the Tribunal was required to reconcile the medical evidence, including apparent contradictions in the evidence of Dr. Milner himself. This is a task that the Tribunal is frequently called upon to do, as additional and stronger evidence is typically filed for the Tribunal's consideration on appeal.

44. The Tribunal properly assessed the evidence, determined what evidence was to be preferred and explained its reasons for doing so. The Tribunal noted that the doctor who prepared the 2008 application materials, Dr. Milner, did not discuss with Mr. Tremblay his capabilities with respect to his activities of daily living. Rather, Dr. Milner prescribed his medication and sent him away. In contrast, Dr. Milkovic had been treating Mr. Tremblay since the accident and would be more aware of Mr. Tremblay's limitations. Mr. Tremblay's self-reports (from 2006 and 2008) and testimony were consistent with Mr. Milkovic's evidence and confirmed that his impairments and restrictions had not improved. It was reasonable to prefer Dr. Milkovic's evidence in light of this context.

Jemiolo v. Ontario Disability Support Program (Director), [2009] O.J. No. 884 at para. 13.

Ontario Disability v. Ekman, 2010 ONSC 6068 at para. 53.

Appellant's Appeal Book, Tab 2: Social Benefit Tribunal decision, p. 9.

45. While the Director states that a different "inference could have been drawn" than the interpretation favoured by the Tribunal, in making this argument the Director ventures directly onto the Tribunal's ground. The determination of what inference is to be drawn from evidence is at the heart of the weighing process. In this appeal, the Director asks this Court to weigh the evidence differently and come to a different inference. This is exactly what the Legislature has precluded on appellate review.

See Appellant's factum, para. 60.

D. The admission of relevant medical evidence from a previous ODSP application does not constitute a jurisdictional error (Response to paragraphs 63 to 65 of the Appellant's factum).

46. The Director also takes the position that the Tribunal made a jurisdictional error by admitting medical evidence submitted on a previous ODSP application. The Director argues that in so doing, the Tribunal impermissibly allowed Mr. Tremblay to appeal an earlier decision beyond the one-year statutory time limit. It is submitted that there is no merit to this argument.

See Appellant's factum at paras. 63 to 65.

47. Firstly, it is not accurate to state that the Tribunal's decision was based solely on the 2006 application materials. It is clear from the Tribunal's reasons that the decision was based on all of the following materials:

a. The 2008 application materials;

b. The 2006 application materials;

c. Dr. Ravi's "Limitations to Participation" form (which post-dated the 2006 application);

d. Dr. Milner's "Limitations to Participation" form (which post-dated the 2006 application);

e. Mr. Tremblay's testimony.

48. In particular, the two "Limitations to Participation" forms that post-dated the 2006 application provided a picture of ongoing restrictions due to back pain and headaches.

Appellant's Appeal Book, Tab 2: Social Benefit Tribunal decision, p. 10.

Respondent's Appeal Book, Tab 4: Limitations to Participation Form (Dr. Milner) (June 14, 2008) at p. 25-26.

Respondent's Appeal Book, Tab 13: Limitations to Participation Form (Dr. Ravi) (November 17, 2006) at p. 58-59.

49. Secondly, if the Legislature intends to bar the Tribunal from considering relevant evidence from earlier applications on ODSP appeals, it must state so explicitly. It has not done so. Therefore, if evidence from a prior application is relevant, the Tribunal must consider it. Indeed, as noted, the Director himself considered evidence from the prior application in reaching his conclusion on the 2008 application.

50. Finally, it is apparent that the Tribunal did not conduct an appeal of the 2006 application. The Tribunal's decision related only to the conditions listed in the 2008 application, and moreover, the effect of its decision is only to permit Mr. Tremblay to access benefits dating back to the submission of the 2008 application. Therefore, the Tribunal's hearing was neither *de facto* nor in any other sense an appeal of the prior application.

E. Mr. Tremblay's impairments and restrictions were verified by qualified medical professionals (Response to paragraphs 66 to 67 of the Appellant's factum)

51. The Director further argues that Mr. Tremblay's impairments were not verified by a qualified medical professional as required by the legislation.

52. Section 46 of the *Regulation* prescribes that only certain registered medical professionals can verify that an ODSP applicant has a "physical or mental impairment and its likely duration" and "whether the direct and cumulative effects of an impairment on a person's ability to attend to his or her personal care, function in the community and function in the workplace results in a restriction in one or more of these activities of daily living". Medical doctors appear on both lists:

> **46.** (1) For the purpose of subsection 4 (1) of the Act, the following persons may verify that a person has a physical or mental impairment and its likely duration:
>
> 1. A member of the College of Physicians and Surgeons of Ontario.
>
> …
>
> (2) For the purpose of subsection 4 (1) of the Act, the following persons may verify whether the direct and cumulative effect of an impairment on a person's ability to attend to his or her personal care, function in the community and function in a workplace results in a restriction in one or more of these activities of daily living:
>
> 1. The persons listed in subsection (1).
>
> ...

53. In reviewing the adequacy of the verification, the health professional is not required to verify every aspect of a claimant's condition. Once the existence of impairments and restrictions has been verified, it is for the Tribunal to determine whether the impairments and restrictions are "substantial" as required by the Act. Where the verification indicates an arguable basis for the

impairment, its duration and the restrictions alleged, the Tribunal must then evaluate the whole of the evidence to assess whether the statutory test is met.

> *Sandiford v. Director of the Ontario Disability Support Program*, DV-564-02 (2005/01/21) (Div. Crt.) at para. 17-20.
>
> *Ontario v. Matthews*, [2000] O.J. No. 5305 (Div. Crt.) at para. 16.

54. It is not an error to also consider the testimony from the claimant in respect of the existence of impairments and restrictions. To the contrary, the testimony of the claimant should be a very important part of the analysis and the Tribunal clearly found Mr. Tremblay to be a credible witness. As noted by this Honourable Court in *Gallier*, it is not expected that a health professional completing the application forms will verify "every detail." The Tribunal frequently does and should receive supplementary information from a claimant. As noted above, the test is not whether the impairments or restrictions are objectively substantial, but whether they are substantial <u>for the individual applicant</u>. The claimant's testimony is necessary in order to assess the "substantial" elements of the disability test.

> *Director (Ontario Disability Support Program) v. Gallier* [2000] O.J. No. 4541 (Div. Crt.) at para. 7-8.

55. The individuals who prepared the medical evidence considered by the Tribunal in this case – Dr. Milner, Dr. Milkovic and Dr. Ravi – were all registered medical doctors and thus were qualified to verify Mr. Tremblay's impairments and restrictions for the purposes of an ODSP application. Thus, there is no basis for the Director's statement that by relying upon evidence filed in respect of the 2006 application, the Tribunal made findings of impairments and restrictions that were not verified by a prescribed health professional.

> See Appellant's factum, paragraph 66.

56. It is not accurate, as was argued by the Director, that the verification of the extent and duration of Mr. Tremblay's impairments and restrictions was provided by Mr. Tremblay himself. Verification of the impairments and restrictions was provided by way of the 2006 application forms as well as the Limitations to Participation forms from 2006 and 2008. Mr. Tremblay's evidence was consistent with and supplemented the evidence of the health professionals.

See Appellant's factum at para. 67.

F. The Tribunal did not conflate the tests for "substantial impairment" and "substantial restriction" (Response to paragraphs 68 to 73 of the Appellant's factum)

57. The Director argues that in determining whether Mr. Tremblay's "impairments" met the "substantial" threshold, the Tribunal considered restrictions upon Mr. Tremblay's activities of daily living. In so doing, the Director argues that the Tribunal erred by conflating two distinct steps in the test for a "person with a disability."

See Appellant's factum at paras. 68, 71.

58. While there can be no doubt that the legislation establishes two distinct criteria – substantial impairment and substantial restriction – the jurisprudence has recognized that in practice there is overlap as between these categories. The Court of Appeal in *Crane* held that not only can there be overlap but that at times this overlap will be necessary in order to "take account of the whole person":

> It is important to observe, however, that although the inquiries mandated by paragraph (a) and (b) of s. 4(1) relate to different issues or thresholds, the evidence relevant to the two inquiries can overlap. This is so because in some cases a simple description of the deviation or loss of body function or structure will not answer the question: is this a substantial impairment? To take but one example, the loss of an entire arm or leg would almost certainly constitute, without knowing anything more about the person's activities, a substantial impairment under s. 4(1)(a). However, the loss of a single finger or toe would be a different case. Such an inquiry would be a loss of body structure. But would it

> constitute a substantial impairment? In order to answer this question, the inquiry would have to go beyond simple medical description and take account of the whole person, including some of her activities. This, of course, opens the door to some of the evidence relevant to s. 4(1)(b) also being apposite to the s. 4(1)(a) inquiry.
>
> …
>
> If the inquiry relating to 'substantial impairment' under s. 4(1)(a) of the O*DSPA* must encompass "the particular injured person before the court" (*Meyer v. Bright*), "the varying circumstances of each individual case" (*Gray*), or "the applicant in the context of her own situation" (*Gallier*), it is inevitable that some of the analysis under s. 4(1)(a) will include some of the factors in s. 4(1)(b). It will be impossible, in some cases, to be faithful to the person-specific consideration of substantial impairment mandated by *Gray* and other cases without examining such matters as personal care and the person's functioning in the community and the workplace [emphasis added].
>
> *Crane v. Ontario (Director, Ontario Disability Support Program)*, [2006] O.J. No. 4546 (Ont. C.A.) at para. 20, 24.
>
> See also: *McLaughlin v. Ontario (Director, Disability Support Program)*, [2002] O.J. No. 1740 (Div. Crt.) at para. 2.

59. The Court of Appeal then set out the proper approach to determining whether an applicant has a "substantial impairment." First, the Tribunal must assess the medical evidence relating to the impairment. Second, the Tribunal should consider the medical evidence in the context of the appellant's ability to function in activities of daily living.

> *Crane v. Ontario (Director, Ontario Disability Support Program)*, [2006] O.J. No. 4546 (Ont. C.A.) at para. 27-29.

60. The Tribunal complied with this judicial guidance. First, the Tribunal noted that the medical evidence established that Mr. Tremblay suffered from poor concentration, dizziness and intense pain and that these impairments were continuous or recurrent and expected to last one year or more. The Tribunal noted that the "Intellectual and Emotional Wellness scale" completed by Dr. Milkovic "disclosed severe limitations with respect to emotion, learning and motivation.

Given that a moderate rating is the second most serious or limiting rating, the Tribunal considers all of these ratings as evidence of a significant impairment."

Appellant's Appeal Book, Tab 2: Social Benefit Tribunal decision, p. 9.

61. Only then did the Tribunal turn to the evidence concerning Mr. Tremblay's restrictions in order to assess whether the impairments were "substantial." It is apparent from the decision read as a whole that the Tribunal considered all relevant legal principles and applied them to the facts in order to reach its conclusion that Mr. Tremblay is a person with a disability. There was no palpable or overriding error in the Tribunal's decision.

Director (Ontario Disability Support Program) v. Gallier [2000] O.J. No. 4541 at para. 2.

PART FOUR: ORDER SOUGHT

62. It is therefore respectfully requested that this Honourable Court dismiss this appeal. The Respondent is not seeking his costs on the appeal.

CERTIFICATE

1. An order under subrule 61.09(2) is not required.

2. The Respondent estimates that 1.5 hours will be required for oral argument.

DATED THIS 7th day of March 2011.

_____

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SCHEDULE A: List of Authorities

1. Ontario Works Policy Directive 2.5: Participation Requirements (August 2010).
2. *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235.
3. *Director of the Ontario Disability Support Program v. Favrod*, 2006 CanLII 4898 (Ont. Div. Crt.).
4. *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190.
5. *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339.
6. *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1.
7. *Oliveira v. Ontario (Director, Disability Support Program)*, [2008] O.J. No. 622 (Ont. C.A.).
8. *Ontario Disability v. Ekman*, 2010 ONSC 6068.
9. *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27.
10. *Gray v. Director of the Ontario Disability Support Program*, 2002 CanLII 7805 (ON C.A.).
11. *Crane v. Ontario (Director, Disability Support Program)*, [2006] O.J. No. 4546 (C.A.).
12. *Benoit v. Director of the Ontario Disability Support Program*, [2002] O.J. No. 1007 (Div. Crt.).
13. *Jemiolo v. Ontario Disability Support Program (Director)*, [2009] O.J. No. 884.
14. *Sandiford v. Director of the Ontario Disability Support Program*, DV-564-02 (2005/01/21) (Div. Crt.).
15. *Ontario v. Matthews*, [2000] O.J. No. 5305 (Div. Crt.).
16. *Director (Ontario Disability Support Program) v. Gallier* [2000] O.J. No. 4541 (Div. Crt.).
17. *McLaughlin v. Ontario (Director, Disability Support Program)*, [2002] O.J. No. 1740 (Div. Crt.).

SCHEDULE B: Legislation

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

s. 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 Regulation 222/98

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

***Legislation Act, 2006*, S.O. 2006, c. 21, Sch. F at s. 64.**

s. 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.

(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.

Court File No. 32/11

DIRECTOR OF THE ONTARIO DISABILITY SUPPORT PROGRAM	v.	**RICHARD TREMBLAY**
Applicant		**Respondent**

ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)

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