

Court File No.

701/18

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

**BETWEEN :**

**XXXXXXX**

**Appellant**

**and**

**DIRECTOR OF THE ONTARIO DISABILITY SUPPORT PROGRAM**

**Respondent**

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**FACTUM OF THE APPELLANT**

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## **PART I: IDENTIFYING STATEMENT**

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

## **PART II: OVERVIEW STATEMENT**

2. Ms. XXX is a 36 year-old single mother of four young children. She has a history of childhood sexual abuse, as well as sexual and domestic assault as an adult. She suffers from major depressive disorder (chronic and severe), obsessive compulsive disorder, carpal tunnel syndrome and chronic pain syndrome.
3. Ms. XXX has been receiving psychiatric treatment since 2013 for mental health impairments including poor concentration and memory, suicidal thoughts, auditory hallucinations and paranoia, anxiety and fear of germs.
4. The Director denied Ms. XXX’s application for Ontario Disability Support Program (“ODSP”) benefits and the Tribunal upheld that denial on appeal. Despite the evidence about her multiple functional impairments and difficulties with her activities of daily living, the Tribunal concluded that any restrictions Ms. XXX faces are the result of social, and not medical factors.
5. The Tribunal made three significant errors in law. First, it pre-judged the appeal, as demonstrated by the fact that the Member interrupted Ms. XXX early in her

testimony and suggested that she consider withdrawing her appeal. The Member's conduct raised a reasonable apprehension of bias.

6. Second, this pre-judgement led the Tribunal to misapprehend the evidence that demonstrated that Ms. XXX's restrictions prevented her from functioning in the community or the workplace.
7. Third, the Tribunal applied the wrong legal test for assessing "substantial restriction" by failing to apply the "whole person" test required by the *ODSPA*.<sup>1</sup>

### **PART III: SUMMARY OF FACTS**

#### **A. Background**

8. Ms. XXX is a thirty-six year old single mother raising four children, aged 10, 6, 3 and 2. Originally from Vietnam, she migrated to Vancouver when she was 19 years old to study English.<sup>2</sup> Sadly, the promise of new opportunities for Ms. XXX was cut short when she was sexually assaulted by her landlord on multiple occasions.<sup>3</sup>
9. Having survived sexual assault as a child in Vietnam, Ms. XXX experienced continued feelings of shame.<sup>4</sup> She had hoped coming to Canada would enable her to learn English and move forward in life, until she re-experienced sexual trauma

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<sup>1</sup> *Crane v. Ontario (Director, Disability Support Program)*, [2006] O.J. No. 4546 (C.A.), at para. 25 [*Crane*].

<sup>2</sup> Appeal Book, Tab 2: Tribunal Decision at p. 10, para. 16.

<sup>3</sup> Appeal Book, Tab 4: Transcript at p. 23.

<sup>4</sup> Appeal Book, Tab 4: Transcript at p. 23; Tab 8: Progress Notes of Dr. YYY, May 10, 2017-April 25, 2018 at p.56.

here. With no supports in Vancouver she moved to Toronto and began English classes. Unfortunately, due to fear of crowds and anxiety around other people, she was unable to continue her studies after a few months.<sup>5</sup>

10. Ms. XXX completed grade 12 in Vietnam and speaks limited English.<sup>6</sup> She has few social supports and is in receipt of Ontario Works. She receives no support, financial or otherwise, from the fathers of her children,<sup>7</sup> one of whom was physically abusive towards her and is currently incarcerated in Montreal for murder.<sup>8</sup> The other was deported from Canada in 2014.<sup>9</sup>

11. Ms. XXX suffers from major depressive disorder (chronic), obsessive-compulsive disorder, carpal tunnel syndrome and chronic pain syndrome.<sup>10</sup>

12. Ms. XXX worked as a seamstress for two years but could not return to her job after her maternity leave ended in 2011 due to the pressures of single parenting.<sup>11</sup> She began psychiatric treatment in 2013 but her mental and physical health deteriorated significantly in the following years.<sup>12</sup> She applied for ODSP benefits in 2017.

13. At the time of the Director's decision (August 2017), her psychiatrist described her depression as "chronic, severe with psychosis and passive suicidal thoughts" and

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<sup>5</sup> Appeal Book, Tab 4: Transcript at p. 24.

<sup>6</sup> Appeal Book, Tab 6: Psychiatric Consultation of Dr. YYY at p. 52.

<sup>7</sup> Appeal Book, Tab 8: Progress Notes of Dr. YYY at p.56.

<sup>8</sup> Appeal Book, Tab 8: Progress Notes of Dr. YYY at p.54.

<sup>9</sup> Appeal Book, Tab 7: Progress Note of Dr. P Tran at p. 53.

<sup>10</sup> Appeal Book, Tab 2: Tribunal Decision at p. 8, para. 8.

<sup>11</sup> Appeal Book, Tab 4: Transcript at pp. 29-30.

<sup>12</sup> Appeal Book, Tab 5: Health Status Report at pp. 39-50.

her obsessive compulsive disorder as moderate.<sup>13</sup> Her family physician also confirmed that she was unable to walk more than one block due to chronic pain in her back or lift more than two pounds due to carpal tunnel syndrome in her hands.<sup>14</sup> She struggled to take care of her children and often felt she would be better off dead.<sup>15</sup>

## **B. The Ontario Disability Support Program Application**

14. The Director denied Ms. XXX's application for ODSP benefits on August 29, 2017 and subsequently denied her Internal Review request.

## **C. The decision of the Social Benefits Tribunal**

15. Ms. XXX appealed to the Tribunal. The Tribunal accepted that her numerous listed impairments were continuous or recurrent and verified by medical professionals. These included: decreased mood, anhedonia, poor sleep and appetite (lost weight), low energy, poor concentration and memory, feelings of helplessness and hopelessness, passive suicidal thoughts, auditory hallucinations and paranoia, washing hands because of fear of germs, easily anxious, liking things in order, easily

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<sup>13</sup> Appeal Book, Tab 9: Letter from Dr. YYY at p. 57.

<sup>14</sup> Appeal Book, Tab 10: Clarification Chart of Dr. Nathan T. Tong at p. 59.

<sup>15</sup> Appeal Book, Tab 4: Transcript at p. 34.

startled<sup>16</sup>, anxiety, poor hand movement, weakness in both hands and painful back with poor movement.<sup>17</sup>

16. The Tribunal accepted that the following restrictions to Ms. XXX's daily life were verified by medical professionals: unable to lift more than two pounds or walk more than one block.<sup>18</sup> The Tribunal also accepted that Ms. XXX has restrictions in the following areas: bodily functions; consciousness; emotion; impulse control; insight; intellectual function; judgement; learning; memory; motivation; perception; and thinking<sup>19</sup> and restrictions to: recognizing within normal limits common dangers in the home, workplace or community; the ability to comprehend, express or communicate orally; normal functioning with respect to impulse control and behavior; responding within normal limits to situations requiring memory; attention span; physical strength; ability to participate in sustained activity; and housekeeping.<sup>20</sup>

17. Nevertheless, the Tribunal denied the appeal on the basis that Ms. XXX's restrictions were not "substantial" as required by the legislation.<sup>21</sup>

18. In reaching this conclusion the Tribunal relied on findings that:

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<sup>16</sup> The Tribunal decision reads "easily sparkled (? Illegible)" but elsewhere in the record, for e.g. Tab 8: Progress Note of Dr. YYY at p. 54 we see reference to the Appellant being "easily startled."

<sup>17</sup> Appeal Book, Tab 2: Tribunal decision at p. 8, para. 8.

<sup>18</sup> Appeal Book, Tab 2: Tribunal decision at p. 8, para. 9.

<sup>19</sup> Appeal Book, Tab 5: Health Status Report at p. 43.

<sup>20</sup> Appeal Book, Tab 5: Health Status Report at p. 48.

<sup>21</sup> Appeal Book, Tab 2: Tribunal decision at p. 9, para. 14 [emphasis added].



1. It was social factors, such as lack of childcare that prevented Ms. XXX from working and not her disability<sup>22</sup> and
2. Ms. XXX's testimonial evidence was not clear and was contradictory, and her medical evidence was exaggerated<sup>23</sup>

#### **PART IV: ISSUES AND LAW**

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

- i. Whether the Tribunal erred in law by pre-judging the issue of Ms. XXX's disability thereby raising a reasonable apprehension of bias
- ii. Whether the Tribunal misapprehended the evidence that demonstrated that Ms. XXX's restrictions prevent her from functioning in the community or the workplace or attending to personal care
- iii. Whether the Tribunal applied the wrong legal test for assessing "substantial restriction" by failing to consider Ms. XXX's restrictions in the context of the "whole person" as required by the *ODSPA*

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<sup>22</sup> Appeal Book, Tab 2: Tribunal decision at p. 10, para. 17.

<sup>23</sup> Appeal Book, Tab 2: Tribunal decision at p. 10, paras 16-17.

## A. Standard of Review

20. The *ODSPA* provides a statutory right of appeal from a decision of the Tribunal to the Divisional Court on a question of law.<sup>24</sup> The question of whether the Tribunal's decision raised a reasonable apprehension of bias is a question of natural justice and procedural fairness. As such, the court is not required to engage in a determination of the appropriate standard of review. If the decision is tainted by bias it must be set aside.<sup>25</sup>

21. The Tribunal also makes an error of law if it applies the wrong test or principle; fails to apply an applicable legal principle or applies it unreasonably; ignores relevant factors or relies on irrelevant factors; disregards, misapprehends or fails to appreciate relevant evidence; or makes a finding without evidence.<sup>26</sup>

22. The question of whether the Tribunal misapprehended the evidence or applied the wrong legal test in its assessment of "substantial restriction" involves the interpretation and application of the *ODSPA*, the Tribunal's "home" statute. On these questions, the standard of review is reasonableness.<sup>27</sup>

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<sup>24</sup> *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sched. B, s. 31(1) [*OSDPA*].

<sup>25</sup> *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249, at paras. 74-75; *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623, at para. 40.

<sup>26</sup> *Jennings v. Minister of Social Services of Ontario*, 2015 ONSC 6689, at para. 41.

<sup>27</sup> *Corrigan v. Ontario (Disability Support Program)*, 2016 ONSC 6212, at para. 22.

## B. The definition of “person with a disability” under the *ODSPA*

23. ODSP provides “income support” to individuals who qualify as a “person with a disability” under s. 4(1) of the Act:

### Person with a disability

4. (1) A person is a person with a disability for the purposes of this Part if,

(a) the person has a substantial physical or mental impairment that is continuous or recurrent and expected to last one year or more;

(b) the direct and cumulative effect of the impairment on the person’s ability to attend to his or her personal care, function in the community and function in a workplace, results in a 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.<sup>28</sup>

24. The *ODSPA* is intended to support persons with significant, but not necessarily severe, long-term functional barriers.<sup>29</sup> The Tribunal must look at the “whole person” in making its determination as to whether an individual is a “person with a disability,” including her ability to function in the areas of personal care, community and workplace.<sup>30</sup> This is an individual assessment that should take into account “the varying circumstances of each individual case in a manner consistent with the purposes of the Act.”<sup>31</sup>

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<sup>28</sup> *ODSPA, supra*, s. 4(1).

<sup>29</sup> *Gray v. Director of the Ontario Disability Support Program*, 2002 CanLII 7805 (ON CA), at para. 15 [*Gray*].

<sup>30</sup> *Crane, supra*, at para. 25 [*Crane*].

<sup>31</sup> *Siegel v. Ontario (Director, Disability Support Program)*, [2011] O.J. No. 5385 (Div. Ct.), at para. 13 [*Siegel*]; *Crane, supra*, at para. 20; *Gray, supra* at para. 16.

**C. The Tribunal pre-judged the issue of Ms. XXX's disability, raising a reasonable apprehension of bias**

25. The test routinely applied by courts in assessing whether there has been a reasonable apprehension of bias is “whether a reasonably informed bystander could reasonably perceive bias on the part of the adjudicator.”<sup>32</sup> The objective of the test is to ensure both the reality, and the appearance of a fair process.<sup>33</sup> While there is a presumption of impartiality on part of adjudicator, the analysis of whether there is an apprehension of bias is contextual and fact-specific.<sup>34</sup>

26. In this case the Member made explicit remarks early in the hearing demonstrating a predisposition to a finding that Ms. XXX was not a person with a disability. The Member went so far as to suggest that Ms. XXX consider withdrawing her appeal. This occurred after Ms. XXX testified about her work situation in 2011 (years before the Director's decision). The exchange between the Tribunal and Ms. XXX's counsel went as follows:

Tribunal: Okay, Miss Li [referring to Ms. XXX's representative] the problem I'm going to be having now with your case, is that your client has been clear that the reason she is not working is because she was to stay home to care for her children, and it's not related in any way to her medical conditions.

Susanna Li: Yeah, I understand that but I'm...

Tribunal: So I'm wondering if you want to have a conversation with your client about whether or not she wants to withdraw this application? Because I cannot get over the restriction aspect if

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<sup>32</sup> *Newfoundland Telephone*, *supra* at para. 22.

<sup>33</sup> *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, at para. 22 [*Yukon Telephone*].

<sup>34</sup> *Ibid.* at para. 26.

your client's testimony is in direct contradiction to all the other evidence that was provided.

Susanna Li: We haven't got that far yet. I think she's...

Tribunal: Well we have actually. So not working because staying at home to care for children. Yes. After child I was on maternity leave. Had to stay home to take care of children. I tried to go back but I could not find anyone to take care of my children. The worker said she would help me with that when my children are older.

Susanna Li: Mm-hmm.

Tribunal: This is not related to any medical condition, and while I would sympathize with you client for being a single mom, it's not a medical condition that would meet the criteria.

Susanna Li: I believe she will have more to say about that...

Tribunal: So the difficulty you're going to have is how much weight I can put on any other...evidence, in light of that.<sup>35</sup>

27. The legal question before the Tribunal was whether Ms. XXX met the definition of "person with a disability" as of the date of the Director's decision: August 29, 2017. However, at this juncture Ms. XXX was testifying about her work history and was answering questions *specific to the period she stopped work*, which was six years *before* the Director's decision.<sup>36</sup> Ms. XXX testified that following her maternity leave in 2011, the company she was working for did not have a lot of work and additionally she did not have childcare.<sup>37</sup> The Tribunal erroneously concluded that from 2011 onwards, a lack of childcare was the primary reason she could not work.

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<sup>35</sup> Appeal Book, Tab 4: Transcript at p. (220), lines 28-30; p. (221), lines 1-17.

<sup>36</sup> Appeal Book, Tab 4: Transcript at p. (219), line 10; p. (220), lines 11-12.

<sup>37</sup> Appeal Book, Tab 4: Transcript at p. (220), lines 17-18.

28. The Member's interventions raise serious concerns about the appearance of fairness of the hearing. The Member interrupted counsel's attempts to respond to the Member's stated concern on at least three occasions and explicitly suggested that Ms. XXX consider withdrawing her appeal, even though she had only testified about her background and work history at that point. The timing and the content of the Tribunal's statements signals a disinterest in hearing further from Ms. XXX, notwithstanding that it had not yet heard evidence about her impairments or restrictions at the time of the Director's decision.
29. In the context of legal proceedings, bias is the manifestation of a closed mind. It results in a predisposition to decide an issue in a particular manner, rendering the adjudicator unable to exercise her function impartially, as it did here.<sup>38</sup> This exchange alone warrants setting aside the decision.
30. Ms. XXX's representative objected immediately, explaining that Ms. XXX would be providing more evidence relevant to why she could not work (i.e. at the time of the Director's decision).<sup>39</sup>
31. However, the Member continued to demonstrate impatience, if not skepticism during Ms. XXX's testimony. For example, at one point, Ms. XXX (who testified through an interpreter) was explaining her lengthy relationship history and had already testified

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<sup>38</sup> *R. v. Bertram*, [1989] O.J. No. 2123.

<sup>39</sup> Appeal Book, Tab 4: Transcript, p. 221.

that she was a survivor of sexual violence.<sup>40</sup> The Tribunal rebuked Ms. XXX as follows:

Tribunal: Okay, how about you just answer the question I'm asking instead of every, everything else around it? I just want to know when you met, when did you marry your second husband?<sup>41</sup>

32. This statement must be considered in context and in relation to the particular facts and circumstances of the hearing, including the fact that Ms. XXX is a survivor of violence and has memory and concentration impairments.<sup>42</sup> Ms. XXX was not evading questions. Nevertheless, the Tribunal took an adversarial position with her and concluded that she was “not clear and often contradictory” in explaining where the fathers of her children were.<sup>43</sup>

33. This court has cautioned that “while the Board's process is often inquisitorial in nature, the Board should not take an adversarial position vis-à-vis an applicant.”<sup>44</sup> To do so may give rise to a reasonable apprehension of bias.<sup>45</sup>

34. Assessed cumulatively, and in light of the record in its totality, the nature of the Member's interventions rebut the presumption of the Tribunal's impartiality with

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<sup>40</sup> Appeal Book, Tab 4: Transcript, p. 213, 215.

<sup>41</sup> Appeal Book, Tab 4: Transcript at p. (216), lines 26-28.

<sup>42</sup> *Canadian College of Business and Computers Inc. v. Ontario (Private Career Colleges)*, 2010 ONCA 856, at para. 30 [*Canadian College*].

<sup>43</sup> Appeal Book, Tab 2: Tribunal decision, p. 10, para. 16.

<sup>44</sup> *S.G. v. Criminal Injuries Compensation Board*, 2016 ONSC 7485, at para 22 [S.G.].

<sup>45</sup> *Ibid.*

respect to the proceeding.<sup>46</sup> Given the significant misapprehensions of evidence that are replete through the Tribunal's decision, there is a reasonable apprehension that the Tribunal was biased and that Ms. XXX was denied a fair assessment of her appeal.

#### **D. The Tribunal misapprehended the evidence**

35. The Tribunal misapprehended the evidence, making at least five unsupported conclusions that were central to its decision to dismiss Ms. XXX's appeal.

##### **i. The Tribunal relied on evidence from 2011, six years before the Director's decision**

36. Quite critically, the Tribunal entirely relied on irrelevant evidence when it concluded that Ms. XXX had no substantial restrictions that prevented her from functioning in the workplace.

37. As noted above, Ms. XXX testified that it was a lack of childcare that prevented her from returning to work in 2011. However, her reasons for not working in 2011 were not relevant to her ODSP application, which was submitted in 2017.

38. As of 2017, Ms. XXX explained that she was no longer able to work due to pain and numbness in her hands, as well as voices in her head, sleeplessness, feelings of

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<sup>46</sup> *Wewaykum Indian Band v. Canada*, 2003 SCC 45 (CanLII), at paras. 60, 76-77. See also: *Canadian College*, *supra* at para. 25 citing *Chippewas of Mnjikaning First Nation v. Ontario (Minister of Native Affairs)*, 2010 ONCA 47 (CanLII), at para. 230.



sadness and wanting to die, and back pain, all of which were verified impairments at the time of the Director's decision.<sup>47</sup>

39. The Tribunal both ignored this evidence and misconstrued the evidence that Ms. XXX did provide. It stated that "the Appellant testified that she could not work because she had no one to care for her four children and I find that this is most likely the reason she is not pursuing employment."<sup>48</sup> However, Ms. XXX did not testify that she could not work because she had no one to care for her "four children." The time period that she was testifying about was following her maternity leave in 2011, when she did not yet *have* four children.

**ii. The Tribunal made findings about Ms. XXX's participation in the community without any evidentiary foundation**

40. The doctor who completed Ms. XXX's ODSP application completed two charts that address the extent of her intellectual and emotional impairments and difficulties completing her activities of daily living: the Intellectual and Emotional Wellness Scale (IEWS) and the Activities of Daily Living Index (ADLI). The ratings on both of these charts indicated significant disability.<sup>49</sup>

41. Nevertheless the Tribunal concluded that she "was capable of attending her appointments, doing her groceries, attending school functions and interviews with her children's teachers as well as taking her children to the park or for walks."<sup>50</sup>

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<sup>47</sup> Appeal Book, Tab 4: Transcript at p. 32.

<sup>48</sup> Appeal Book, Tab 2: Tribunal Decision at p. 10, para. 17.

<sup>49</sup> Appeal Book, Tab 5: Health Status Report at pp. 43, 48.

<sup>50</sup> Appeal Book, Tab 2: Tribunal decision at p. 11, para. 19 [emphasis added].

42. This is completely at odds with the evidence. Rather, Ms. XXX testified that she usually seeks the assistance of her friend's son to accompany her to doctor's appointments as she has difficulty taking public transport on her own, and she schedules her appointments according to his schedule.
43. She further testified that she receives assistance from her neighbours for grocery shopping.<sup>51</sup> She explained that while she makes an effort to attend parent-teacher interviews she asks for the last appointment when there are no other people around.<sup>52</sup> This is consistent with medical evidence which states she avoids social contact, is easily startled and anxious<sup>53</sup> and directly refutes the Tribunal's assertion that "while socializing was minimal it was not clear that this was due to her medical conditions."<sup>54</sup> This last conclusion is at direct odds with the evidence from Ms. XXX's family doctor stating that as a result of her depression, her "loss of social contact is severe."<sup>55</sup>
44. Furthermore there is no evidence that Ms. XXX attends other school functions or takes her children for walks as stated in the decision. In fact, Ms. XXX testified that apart from doctor's appointments or shopping she does not go out,<sup>56</sup> and the

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<sup>51</sup> Appeal Book, Tab 4: Transcript at p. 33.

<sup>52</sup> Appeal Book, Tab 4: Transcript at p. 34.

<sup>53</sup> Appeal Book, Tab 8: Progress Notes of Dr. P Tran at p. 56; Tab 5: Health Status Report at pp. 39-40.

<sup>54</sup> Appeal Book, Tab 2: Tribunal decision, p. 11, para. 19.

<sup>55</sup> Appeal Book, Tab 10: Clarification Chart of Dr. XXX at p. 59.

<sup>56</sup> Appeal Book, Tab 4: Transcript at p. 34.

uncontradicted evidence from Dr. XXX indicated that she cannot walk for more than one block.<sup>57</sup>

**iii. The Tribunal ignored crucial evidence about Ms. XXX's impairments in concluding she could do housework**

45. The Tribunal found that despite evidence regarding the pain in Ms. XXX's hands she could nevertheless clean her home and in fact said she cleans the house "all the time."<sup>58</sup>

46. However it was clear from the totality of the evidence that Ms. XXX's obsessive cleaning is the result of her medical conditions. Dr. Tran had already verified her fear of germs, obsessive hand washing and need to have things in order as impairments arising from her obsessive compulsive disorder.<sup>59</sup> Further, Ms. XXX testified about her immense feelings of shame as a result of her past sexual history and described feeling dirty all the time.<sup>60</sup> She cleaned both herself and her home obsessively, often showering five to six times a day, and whenever she thinks of her past sexual trauma.<sup>61</sup> Rather than evidence that Ms. XXX is not a person with a disability, her constant cleaning is a symptom of a serious medical condition.

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<sup>57</sup> Appeal Book, Tab 10: Clarification Chart of Dr. XXX at p. 59.

<sup>58</sup> Appeal Book, Tab 2: Tribunal decision at p. 11, paras. 18, 20.

<sup>59</sup> Appeal Book, Tab 5: Health Status Report at p. 39.

<sup>60</sup> Appeal Book, Tab 4: Transcript at pp. 32-33.

<sup>61</sup> Appeal Book, Tab 4: Transcript at p. 33.

**iv. The Tribunal made selective reliance on the evidence in concluding that Ms. XXX was restricted by social, and not medical factors**

47. The Tribunal made selective reliance on the evidence in making two erroneous conclusions that Ms. XXX's restrictions were the result of social factors. First, the Tribunal found that "it was not clear"<sup>62</sup> that the IEWS and ADLI completed by Ms. XXX's doctor were "based solely on medical conditions"<sup>63</sup> because he rated her communication a "three" but the reason he listed was "poor English."<sup>64</sup>
48. However it is unclear what, *other than* medical conditions, the charts could be based on. The other elevated ratings relate to physical strength, ability to participate in physical activity, memory and attention span.<sup>65</sup> Social factors cannot explain these ratings.
49. Even if the Tribunal was correct that the "communication" rating was influenced by Ms. XXX's poor English skills, there were other aspects of the medical evidence that pointed to additional medical reasons. There was a great deal of evidence of her difficulty in concentration, memory and limited attention span.<sup>66</sup>
50. Second, the Tribunal also concluded that it was factors related to her children, and not her disability, that prevented her from sleeping:

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<sup>62</sup> Appeal Book, Tab 2: Tribunal decision at p. 11, para. 21.

<sup>63</sup> Appeal Book, Tab 2: Tribunal decision at p. 11.

<sup>64</sup> Appeal Book, Tab 2: Tribunal decision at p. 11

<sup>65</sup> Appeal Book, Tab 5: Health Status Report, at p. 48

<sup>66</sup> Appeal Book, Tab 5: Health Status Report at pp. 40, 43, Tab 10: Clarification Chart of Dr. XXX at p. 59.

[S]he stated she didn't sleep at night, the clinical note indicates her youngest child waking her up in the middle of the night as the reason for lack of sleep."<sup>67</sup>

51. By cherry picking particular facts the Tribunal misapprehended the evidence on Ms.

XXX's inability to sleep. Ms. XXX testified, through an interpreter, as follows:

And my head is always, there is some sounds there. And, somebody's talking, and I am unable to sleep...somebody's talking in my ears.<sup>68</sup>

52. That is, auditory hallucinations (verified by her psychiatrist, Dr. Tran) were the main cause of her sleeplessness.<sup>69</sup> While Dr. Tran's August 2017 clinical note did acknowledge that her youngest sons woke up at night, other evidence from Dr. Tran explained that her sleeplessness was caused by her depression<sup>70</sup> and recalling her past sexual trauma.<sup>71</sup>

53. Furthermore, the preceding lines of Dr. Tran's August 2017 clinical note stated "mood has been very sad, with some crying and wishes to die, due to pain and not able to do much." Dr. Tran's assessment was that Ms. XXX had major depressive disorder that was "severe with psychosis" and that despite several interventions, treatment has not proven successful. None of this was acknowledged by the

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<sup>67</sup> Appeal Book, Tab 2: Tribunal decision at p. 11, para. 18 [emphasis added].

<sup>68</sup> Appeal Book, Tab 4: Transcript at p. 31.

<sup>69</sup> Appeal Book, Tab 5: Health Status Report at p. 40.

<sup>70</sup> Appeal Book, Tab 5: Health Status Report at p. 39.

<sup>71</sup> Appeal Book, Tab 8: Progress Note of Dr. YYY at p. 56.

Tribunal. While the Tribunal need not refer to every piece of evidence before it, it must explain why it reached the decision it did in light of the record before it.<sup>72</sup>

**v. The Tribunal relied on a literal interpretation of Ms. XXX's testimony in making conclusions that were not rationally supported by the evidence**

54. The Tribunal found that Ms. XXX exaggerated and provided contradictory statements. However this was because it interpreted her testimony in a literal manner devoid of context:

She stated her ten year old son cared for himself and helped her a lot, noting that she just takes care of the younger children. This did not seem credible to me, in particular given that ten is very young and he would be in school during the day. Further, it contradicts her statement that she cooks and cleans the house "all the time."<sup>73</sup>

55. Ms. XXX's actual testimony was more consistent with the fact that her eldest child (a daughter, not son), was 10 years old and thus more independent than her significantly younger siblings and could bathe herself and help Ms. XXX with her siblings.<sup>74</sup>

56. Elsewhere in the decision the Tribunal noted:

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<sup>72</sup> *Siegel, supra* at para. 56.

<sup>73</sup> Appeal Book, Tab 2: Tribunal decision at p. 11, para. 20 [emphasis added].

<sup>74</sup> Appeal Book, Tab 4: Transcript at p. 32.

She tended to exaggerate the frequency of the voices which she states was all the time. The clinic notes however indicate that in August 2017 these voices or buzzing sounds were occurring “sometimes” only....<sup>75</sup>

57. The Tribunal’s suggestion that that Ms. XXX contradicted herself because she stated that she cooked and cleaned or heard voices “all the time” is absurd.<sup>76</sup> “All the time” in this context was a figure of speech and did not refer to an activity taking place continuously, 24 hours a day. With respect to her frequent cleaning Ms. XXX’s testimony was that because of her past sexual history she felt dirty and cleaned obsessively, leading her child to ask “why are you cleaning all the time mom?”<sup>77</sup>

58. These errors were critical because they were central to the grounds upon which the appeal was denied. It is settled law that “the *ODSPA* is remedial legislation and a claimant is entitled to have her claim assessed on the basis of an accurate understanding of the crucial aspects of the evidence.”<sup>78</sup> The Tribunal made multiple conclusions that were unsupported or contradicted by the evidence, and therefore erred in law.

**E. The Tribunal erred in law by applying the wrong legal test for “substantial restriction”**

59. It is fundamental to the statutory test for determining whether an applicant is a “person with a disability”, that the ODSP applicant should be considered “in the

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<sup>75</sup> Appeal Book, Tab 2: Tribunal decision at p. 11, para. 18 [emphasis added].

<sup>76</sup> Appeal Book, Tab 2: Tribunal decision at p. 11, para. 20.

<sup>77</sup> Appeal Book, Tab 4: Transcript at p. 33.

<sup>78</sup> *Siegel, supra* at para. 58.

context of her own situation".<sup>79</sup> That is, whether or not a person has substantial impairments and restrictions is an individualized assessment, based on the circumstances of the person before the Tribunal. The Tribunal must consider the "whole person."<sup>80</sup>

60. In this case the Tribunal failed to view Ms. XXX's activities through the lens of her particular circumstances.<sup>81</sup> For example,

- i. Ms. XXX is a survivor of violence, both as a child and as an adult. These experiences of violence affect her every day. The Tribunal did not refer to this key evidence, which was essential for understanding her compulsive cleaning and fear of germs.
- ii. As the mother of four young children, Ms. XXX had no choice but to maintain *some* level of activity to ensure their well-being. That she was "capable" of doing her groceries, attending school interviews or on occasion taking her children to the park is not tantamount to functioning in the workplace.<sup>82</sup>

61. Rather than asking itself whether Ms. XXX's impairments were substantial or cumulatively substantial for her, the Tribunal examined the evidence separate and apart from her lived experience. This is not the correct test under s. 4(1) of the

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<sup>79</sup> *Ontario (Director, Disability Support Program) v. Gallier*, [2000] O.J. No. 4541 (QL), at para. 12.

<sup>80</sup> *Crane, supra*, at para. 25.

<sup>81</sup> *Gray, supra*.

<sup>82</sup> *Ibid.* at para. 25.



*ODSPA*. In this case Ms. XXX's medical impairments, coupled with her family circumstances, history of abuse, limited education and English language facility, substantially restricted her ability to work. In failing to consider Ms. XXX's "whole person" the Tribunal applied the wrong legal test for "person with a disability."

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

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

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

64. Ms. XXX is not seeking costs in this appeal.

February 8, 2019

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**CERTIFICATE**

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

DATE THIS 8<sup>th</sup> day of February, 2019

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**SCHEDULE A: LIST OF AUTHORITIES**

1. *Moreau-Bérubé v. New Brunswick (Judicial Council)*, [2002] 1 S.C.R. 249
2. *Jennings v. Minister of Social Services of Ontario*, 2015 ONSC 6689
3. *Corrigan v. Ontario (Disability Support Program)*, 2016 ONSC 6212
4. *Crane v. Ontario (Director, Disability Support Program)*, [2006] O.J. No. 4546 (C.A.)
5. *Siegel v. Ontario (Director, Disability Support Program)*, [2011] O.J. No. 5385 (Div. Ct.)

6. *Gray v. Director of the Ontario Disability Support Program*, 2002 CanLII 7805 (ON C.A.)
7. *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623
8. *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25
9. *R. v. Bertram*, [1989] O.J. No. 2123
10. *Canadian College of Business and Computers Inc. v. Ontario (Private Career Colleges)*, 2010 ONCA 856
11. *S.G. v. Criminal Injuries Compensation Board*, 2016 ONSC 7485
12. *Wewaykum Indian Band v. Canada*, 2003 SCC 45 (CanLII)
13. *Ontario (Director, Disability Support Program) v. Gallier*, [2000] O.J. No. 4541 (QL)

**SCHEDULE B: LEGISLATION****A. Ontario Disability Support Program Act, 1997, S.O. 1997, c. 25, Sched. B,**

- 4. (1)** A person is a person with a disability for the purposes of this Part if,
- (a) the person has a substantial physical or mental impairment that is continuous or recurrent and expected to last one year or more;
  - (b) the direct and cumulative effect of the impairment on the person's ability to attend to his or her personal care, function in the community and function in a workplace, results in a substantial restriction in one or more of these activities of daily living; and
  - (c) the impairment and its likely duration and the restriction in the person's activities of daily living have been verified by a person with the prescribed qualifications.

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

XXXX

- and -

**DIRECTOR OF THE ONTARIO  
DISABILITY SUPPORT PROGRAM**

Appellant

Respondent

**Court File No. 701/18**

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

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**FACTUM OF THE APPELLANT**

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