CITATION: ██████ v. Ontario (Disability Support Program), 2016 ONSC 6212
DIVISIONAL COURT FILE NO.: 16/53
DATE: 20161024

2016 ONSC 6212 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

SWINTON, H. SACHS and PATTILLO JJ.

BETWEEN:	)	
████████	)	*Jackie Esmonde* and *Emily Hill*, for the Appellant
Appellant	)	
– and –	)	
DIRECTOR OF THE ONTARIO DISABILITY SUPPORT PROGRAM	)	*Michelle Schrieder*, for the Respondent
Respondent	)	
	)	**HEARD at Toronto:** September 19, 2016

H. SACHS J.:

Introduction

[1] The Appellant appeals a decision of the Social Benefits Tribunal (the "Tribunal"), dated January 5, 2016, that dismissed his appeal from a decision of the respondent Director of the Ontario Disability Support Program (the "Director"), to provide him with a mileage rate of only 18 cents per kilometre for medically necessary travel. That decision arose from the Director's statutory obligation to compensate disability support recipients for the "cost of transportation" for medical treatment pursuant to s. 44(1)1(iii.1) of O. Reg. 222/98 (the "Regulation").

[2] At issue in this appeal is whether the "cost of transportation" under the Regulation is limited to the operating costs associated with the Appellant's use of his vehicle or includes both operating and ownership costs. The Tribunal found that it was not reasonable to interpret the Regulation so as to include the right of a recipient to be reimbursed for the costs associated with the ownership of a vehicle.

[3] The issue involves a question of law. For this reason, and based on jurisprudence from this Court and the Court of Appeal, both parties submitted that the Tribunal's decision should be reviewed on a standard of correctness.

[4] For the reasons that follow, I find that, given the Supreme Court's decision in *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, [2015] 2 S.C.R. 3 ("*Saguenay*"), the Tribunal's decision should be reviewed on a standard of reasonableness. I also find that the Tribunal's decision to interpret the Regulation so as to exclude the possibility of reimbursing a disability support recipient for his or her ownership costs is an unreasonable one that is inconsistent with both the plain meaning of the applicable provision in the Regulation and a purposive and contextual reading of that provision.

2016 ONSC 6212 (CanLII)

Background

The Medical Transportation Benefit

[5] The Ontario Disability Support Program (the "ODSP") is a social assistance program that provides income and other supports to eligible persons with disabilities. It is governed by the *Ontario Disability Support Program Act*, *1997*, S.O. 1997, c. 25, Sched. B (the "*Act*") and regulations under it, including the Regulation.

[6] As already noted, this appeal concerns s. 44(1)1(iii.1) of the Regulation, which provides that a "medical transportation benefit" (a type of "mandatory special necessity benefit") shall be paid to eligible persons. It reads as follows:

> **Benefits**
> 44. (1) The following benefits shall be paid with respect to each of the members of a recipient's benefit unit if the Director is satisfied that he or she meets the criteria for them and income support is being paid on his or her behalf:
>
> **Health Benefits**
> 1. An amount for health benefits equal to the sum of, …
>
> iii.1 the cost of transportation that is reasonably required in any month for medical treatment for members of the benefit unit and that is not otherwise reimbursed or subject to reimbursement, if the cost of that transportation in the month is $15 or more, …

[7] The Regulation does not define the "cost of transportation" nor does it provide a rate at which the "cost of transportation" is to be reimbursed.

[8] The ODSP reimburses recipients for medically necessary travel according to the policies and rates set out at pp. 3-6 of ODSP Directive 9.12 – Mandatory Special Necessities (the

"Directive").[1] According to the Directive, the amount of the benefit should be based on "the most economical mode of transportation that [an] approved health professional indicates a person's condition enables him/her to use" (Directive at p. 3). The "amounts that ODSP will pay for different modes of transportation" are set out at p. 5 of the Directive:

Mode of Transportation	Coverage available
Public Transportation	The lesser of the cost of all return trips per month or the cost of a monthly transit pass.
Private vehicle	18 cents per kilometer/18.5 cents in the North and North East Regions. Parking costs are covered with receipts.
Agency Driver	Agency fee or 18 cents per kilometer/18.5 cents in the North and North East Regions where there is no established fee.
Taxi	Return trip fare door to door. [Note regarding taxis waiting for recipients during appointments is omitted.]
Ambulance	Scheduled travel by ambulance.

[9] The 18-cent mileage rate for transportation by private vehicle was established by policy in 2000 and has not been increased since that time. However, the evidence before the Tribunal was that the cost of driving has increased steadily. For example, the price of gas has increased by 132 percent between 1995 and 2014.

The Appellant

[10] The Appellant is an Aboriginal man with multiple and complex health issues, including chronic pain. He is a recipient of income and other supports from the ODSP.

[11] Because of his medical condition, the Appellant travels frequently from his home in Oshawa to Toronto for specialized treatments. According to his evidence, his average medically-necessary travel mileage is about 4000 to 5000 kilometres per month.

[12] There is no dispute that the Appellant's travel to Toronto is medically necessary. According to the evidence, the Appellant is precluded by his disabilities from travelling by public transportation. Travel by taxi or by agency driver would be more expensive than the Appellant driving himself to his medical appointments in his own car.

[13] In recognition of the above factors, the ODSP approved the Appellant's travel by car. By policy, the mileage rate is set at 18 cents per kilometre. The Appellant estimated that his actual driving costs are in the range of 45 cents per kilometre. These costs encompass two categories of costs: "operating costs", which include gasoline, routine maintenance and tires, and "ownership

[1] The version of the Directive that was before the Tribunal was dated August 2013. There is now a February 2016 version. The portions referred to in this paragraph have not changed between the two versions.

2016 ONSC 6212 (CanLII)

costs", which may include insurance premiums, licence and registration fees, taxes, leasing costs and depreciation.

[14] According to the Canadian Automobile Association ("CAA"), the average annual costs for operating a vehicle in 2013 ranged between 14.53 and 16.67 cents per kilometre, depending on the size of the car. When ownership costs are factored in, the average cost of driving ranged between 37 and 66 cents per kilometre.

[15] The Appellant asked the ODSP to review its mileage rate of 18 cents per kilometre and to compensate him for his medical travel at a rate of 45 cents per kilometre. That request was denied, as was the Appellant's internal review request. The Appellant then appealed to the Tribunal.

2016 ONSC 6212 (CanLII)

The Tribunal Decision

[16] The Tribunal denied the Appellant's appeal. In doing so, it noted that there had been conflicting Tribunal decisions dealing with the costs of transportation by private car. The Tribunal adopted the reasoning used in one of the earlier Tribunal decisions (2015 ONSBT 511) in which the earlier Tribunal stated (at para. 13):

> In interpreting the 'cost of transportation' … [there is] a distinction between the costs of operating a vehicle and the cost of owning a vehicle (e.g. licensing, insurance, depreciation, etc.) and … it is not reasonable to expect the Director to reimburse a person for costs associated with the ownership of a vehicle.… [I]f it had been the intent of the Legislature to provide for such reimbursement, then the wording of the legislation would have been different and more specific.

[17] The Tribunal, in deciding the Appellant's appeal, found that this conclusion was supported by the ordinary meaning of "costs of transportation", the context in which these words appear in the Regulation and the purpose of the *Act*. It was of the view that to include in the benefit an amount to cover ownership costs would assist the Appellant in the ownership of his vehicle, "as opposed to just transporting him to and from his appointments – in effect, paying him a benefit on top of what other recipients of the Program receive who do not own a vehicle." The Tribunal found that the Appellant had not shown that 18 cents per kilometre was insufficient to cover his operating costs of transportation and held that this was a reasonable amount to cover the costs of transportation.

Court's Jurisdiction

[18] Section 31 of the *Act* provides that a Tribunal decision may be appealed to the Divisional Court on a question of law.

[19] While the Director submits that the issue raised by the Appellant is really a question of fact, as already noted, I find that the issue in this appeal turns on the statutory interpretation of

the phrase "cost of transportation" in s. 44(1)1(iii.1) of the Regulation. This is a question of law. Thus, this Court has jurisdiction to hear this appeal.

Standard of Review

[20] Both parties agreed that the standard of review on this appeal is correctness. In doing so, they relied on the following cases:

- *Surdivall v. Ontario (Disability Support Program)*, 2014 ONCA 240, 119 O.R. (3d) 225, leave to appeal refused, [2014] S.C.C.A. No. 238, in which the Court of Appeal agreed with the parties in that case (without further analysis) that the standard of review on an appeal of the Tribunal's decision is correctness (at para. 67).

- *Fournier v. Ontario (Ministry of Community and Social Services)*, 2013 ONSC 2891, 309 O.A.C. 186 (Div. Ct.), in which the Divisional Court explicitly considered the standard of review on appeals from the Tribunal in light of the post-*Dunsmuir* jurisprudence and interpreted the Supreme Court's decision in *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53, [2011] 3 S.C.R. 471 at paras. 30-31 as standing for the principle that when a court is hearing a statutory appeal (as opposed to a judicial review) from an administrative decision-maker's decision, the standard of review on questions of law is correctness. On this basis, the Court agreed with the parties in that case that the appropriate standard was correctness (at paras. 38-45).

[21] In 2015, after these decisions, the Supreme Court confirmed in *Saguenay*, at para. 38, (citations omitted):

> Where a court reviews a decision of a specialized administrative tribunal, the standard of review must be determined on the basis of administrative law principles. This is true regardless of whether the review is conducted in the context of an application for judicial review or of a statutory appeal.

[22] Under administrative law principles, there is a presumption of deference that is owed to tribunals when they are engaged in questions of law that involve the interpretation or application of their "home" statutes (*McLean v. British Columbia (Securities Commission)*, 2013 SCC 67). In the present case, the presumption has not been rebutted. Given this, the applicable standard of review in this case is reasonableness.

Was the Tribunal's Decision Reasonable?

[23] The *Act* is remedial, social benefits legislation. The approach to interpreting its provisions is well-settled. The words used must 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

2016 ONSC 6212 (CanLII)

of [the legislature]" (*Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 38 O.R. (3d) 418, at para. 21, quoting Elmer Driedger, *Construction of Statutes* (2nd ed. 1983), at p. 87).

[24] In light of these principles of statutory interpretation, the Tribunal appropriately started by considering the plain meaning of the provision at issue. In doing so, it focused on the dictionary definition of the word "transportation" as being "to take or carry a person/goods/troops/baggage etc. from one place to another" and found that "[i]n the Appellant's situation, the expenses directly related to the process of being conveyed [include] his gas and maintenance costs – the expenses taken into consideration by CAA when calculating a reasonable amount for operating costs per kilometer". According to the Tribunal, "[t]he use of this word does not, at least on its own, lead to a probable conclusion that the benefit should extend to expenses related to ownership".

[25] The difficulty with this analysis is that there is nothing in the wording of the Regulation that supports the proposition that the costs of transportation should be limited so as to exclude ownership costs. Section 44(1) of the Regulation begins with the phrase "The following benefits **shall** be paid" (emphasis added), implying that the obligation to pay the benefit is mandatory, not discretionary. In terms of the quantum of the benefit, the provision regarding "costs of transportation" contains no maximum; it contains a minimum (costs must be at least $15 per month before they are required to reimbursed) and a direction that the cost must be "reasonably required" and not subject to reimbursement from another source. Nothing in these words calls for the exclusion of ownership costs.

[26] The dictionary definition of "transportation" does not provide a rational basis for concluding that the phrase "costs of transportation" should be limited to operating costs. Nowhere is there a suggestion in this definition or in the Regulation that the costs should be limited to "direct" costs. Further, the Tribunal gives no rational basis for deciding that "direct" costs should be limited to gas and maintenance. If the Tribunal was attempting to delineate those costs that the Appellant had to incur to drive his car to his medical appointments, there is no rational basis for limiting those costs to gas and maintenance. The Appellant could not drive his car unless he incurred what the CAA and the Tribunal have characterized as ownership costs. For example, he could not drive his car without paying licence fees, registration fees and insurance.

[27] Since there is nothing in the wording of the Regulation that directs that the "costs of transportation" associated with the use of a private vehicle exclude ownership costs, it would be rational to examine whether this limitation has been imported in other contexts. When this examination is undertaken, the answer is that it has not. The CAA calculates the costs of driving as including two categories of costs – operating costs and ownership costs. Ontario's Northern Health Travel Grant program has a mileage rate of 41 cents per kilometre, and, thus, compensates for both operating and ownership costs. Effective 2009, the Workplace Safety and Insurance Board paid 38 cents per kilometre for medical travel, again compensating for operating and ownership costs. Finally, in *Mullin v. R.*, [1999] 2 C.T.C. 2750, 99 D.T.C. 748, the Tax Court of Canada ruled that the reasonable expense incurred for the use of a private vehicle should take into account both operating and ownership costs.

2016 ONSC 6212 (CanLII)

[28] The meaning attributed to the Regulation by the Tribunal is also inconsistent with the Director's past policy and practice when it comes to the payment of the costs of transportation associated with the use of a private vehicle. The Directive itself explicitly commits to covering the "actual" cost of transportation and has used such language since 1999. Further, and very significantly, the per kilometre rate of 18 cents was set in 2000. That rate is more than the average operating costs for a vehicle in 2013, by which time gas costs had increased substantially. Thus, it is clear that when the rate was set by the Director in 2000, it did include an amount for ownership costs.

[29] The Tribunal went on to consider the context of the phrase under consideration and found that because it appeared in the section dealing with health benefits and not in the section dealing with income support, "the expense as a 'benefit' is more specific". In particular, the Tribunal noted that other benefits in the section "have limits or specific criteria to be met. For example, [dental care] is not available to a dependent adult. It is therefore reasonable that this benefit 'cost of transportation' also has limits."

[30] I agree with the Tribunal that it is reasonable that the benefit in question has limits. What is not reasonable is to read in limits to the benefit that are not specified in the Regulation. Contrary to the conclusion reached by the Tribunal, what the context the Tribunal refers to tells us is that if there are limits to the benefit that the Director is to have regard to, they are specified in the Regulation.

[31] The Tribunal also had regard to the purpose of the *Act* as set out in s. 1 of the *Act*, more specifically, the need to balance the effective delivery of income support to persons who qualify with the responsibility to be accountable to the taxpayers of Ontario.

[32] Section 1 of the *Act* reads:

> **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.

[33] The Tribunal is correct that these purposes do require a balancing. On the one hand, there is a need to effectively serve some of the most vulnerable residents of Ontario, people with disabilities, a purpose that the Court of Appeal found to be "especially significant" in *Surdivall*, at para. 38. On the other hand, the program must be accountable to the people of Ontario, a purpose that can be accomplished if "pubic funds are spent fairly, honestly and reasonably" (*Surdivall*, at para. 44).

2016 ONSC 6212 (CanLII)

[34] What the Tribunal does not explain is how this balancing reasonably results in the conclusion that ownership costs should be completely excluded from the calculation when it comes to reimbursing a recipient for the costs of travel to medical appointments by private vehicle. In this regard, the evidence before the Tribunal was clear. Those costs, even when ownership costs were factored in, are considerably lower than the cost of the alternative modes of travel available to the Appellant – namely, taxi or agency driver. Thus, in the face of a mandatory obligation to pay the benefit, if the Appellant did not use his car, the taxpayers of Ontario would incur a greater cost than they would incur by reimbursing the Appellant for the expenses associated with the use of his personal vehicle, even if those expenses include ownership expenses.

Conclusion

[35] For these reasons, I would allow the appeal, set aside the order of the Tribunal and remit the matter back to the Tribunal for redetermination of the reasonable costs of transportation, having regard to the fact that the Regulation does not exclude consideration of both the operating and the ownership costs as part of the "cost of transportation" for the purposes of the medical transportation benefit. Since neither party is seeking costs for this appeal, there will be no order as to costs.

___

H. SACHS J.

I agree

___

SWINTON J.

I agree

___

PATTILLO J.

Released: 20161024

2016 ONSC 6212 (CanLII)

CITATION: [redacted] v. Ontario (Disability Support Program), 2016 ONSC 6212
DIVISIONAL COURT FILE NO.: 16/53
DATE: 20161024

2016 ONSC 6212 (CanLII)

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

SWINTON, H. SACHS and PATTILLO JJ.

BETWEEN:

[redacted]

Appellant

– and –

DIRECTOR OF THE ONTARIO DISABILITY SUPPORT PROGRAM

Respondent

REASONS FOR JUDGMENT

H. SACHS J.

Released: 20161024