

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

E.F.

Appellant

and

**DIRECTOR OF THE ONTARIO DISABILITY SUPPORT PROGRAM OF THE
MINISTRY OF COMMUNITY & SOCIAL SERVICES**

Respondent

FACTUM OF THE APPELLANT

DATE: October 31, 2012

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PART I: IDENTIFYING STATEMENT

1. This is an appeal by E.F. from a decision of the Social Benefits Tribunal (“the Tribunal”) made on October 17, 2011, upheld on January 25, 2012 following a reconsideration request, concluding that she was ineligible to receive the Ontario Disability Support Program (“ODSP”) medical travel benefit to cover the cost of travel for medical treatment.

PART II: OVERVIEW STATEMENT

2. Ms. E.F. suffers from severe and persistent mental health disabilities, which are exacerbated by congestive heart failure, epilepsy, migraines, hypertension, osteoporosis and chronic pain. At the recommendation of her physicians and physiotherapist, she takes part in a therapeutic Aquafitness program offered by the local mental health agency. Her participation in the program, described as a “Mental Health Peer Support Group”, has improved her symptoms of depression, assisted with pain management and resulted in the reduction of her medications. The program is also an important part of her cardiac physiotherapy program.

3. The therapeutic Aquafitness program is prescribed by a physician, monitored by a psychiatrist as well as Ms. E.F.’s family physician and is only available to patients with severe mental illness. The therapeutic program was developed based on best practices recommended by the Ontario government as part of its provincial mental health strategy. Travel is provided by an agency that specializes in medical transportation. Due to her rural residence and poverty, Ms. E.F. cannot attend the program without the assistance of the ODSP medical travel benefit.

4. In at least three other cases, the Director is providing the medical travel benefit to permit an ODSP recipient to attend the very Aquafitness program that is in issue in this appeal.

5. It is submitted that the Tribunal erred in concluding that the therapeutic Aquafitness program does not qualify as “medical treatment” for the purposes of ODSP’s medical travel benefit.

PART III: STATEMENT OF FACTS

A. Background

6. Ms. E.F. is a 62 year-old ODSP recipient who suffers from depression, epilepsy, congestive heart failure, hypertension, severe osteoporosis and chronic migraines.

Appeal Book, Tab 8, p. 15 [Record, p. 29]: Internal Review Request (January 13, 2010).

Appeal Book, Tab 12, p. 21 [Record, p. 50]: Letter from Dr. Leonard Bloom (December 29, 2010).

7. Ms. E.F. lives in a rural community without access to public transportation. Due to her low-income and location, she faces significant barriers to accessing services.

B. The therapeutic program delivered by Mental Health Services

8. Mental Health Services is a program of the Pembroke Regional Hospital, which offers services exclusively for individuals who suffer from severe and persistent mental illness. Mental Health Services is funded by the Ministry of Health.

Appeal Book, Tab 13, p. 22 [Record, p. 52]: Letter from Diane O’Kane-McHugh (July 22, 2010).

9. As part of its therapeutic treatment program, Mental Health Services offers a once-weekly Aquafitness “Mental Health Peer Support Group”. While the program is built around physical activity, the “main focus of this program is to address the therapeutic needs relating to their mental illness”, including through “peer support, counselling, and social integration”. The Aquafitness program is run by a mental health caseworker employed by Mental Health Services, under the supervision of the programs’ psychiatric consultant, Dr. Michael Ferri. The mental health caseworkers “provide the referrals, as well as ongoing support and encouragement to assist in overcoming the barriers to participation relevant to persons with a serious mental illness.”

Appeal Book, Tab 5, p. 12 [Record, p. 38]: Letter from Dr. Michael Ferri (January 2, 2006).

Appeal Book, Tab 14, p. 23 [Record, p. 58]: Letter from Dr. Michael Ferri (February 11, 2010).

Appeal Book, Tab 13, p. 22 [Record, p. 52]: Letter from Diane O’Kane-McHugh (July 22, 2010).

Appeal Book, Tab 15, p. 24 [Record, p. 55]: Letter from Diane O’Kane-McHugh (October 20, 2009).

Appeal Book, Tab 16, p. 28 [Record, p. 94]: Affidavit of Diane O’Kane-McHugh (September 30, 2011).

10. At the recommendation of her family doctor, mental health caseworker and physiotherapist, Ms. E.F. attends the therapeutic Aquafitness program delivered by Mental Health Services. The program supplements the Cardiac Rehabilitation program that Ms. E.F. participates in at the Pembroke Regional Hospital, and her physiotherapist has encouraged her to continue.

Appeal Book, Tab 12, p. 21 [Record, p. 50]: Letter from Dr. Leonard Bloom (December 29, 2010).

Appeal Book, Tab 17, p. 29 [Record, p. 51]: Letter from Physiotherapist Roger Hurdle (September 16, 2010).

Appeal Book, Tab p. 13, p. 22 [Record, p. 52]: Letter from Diane O’Kane-McHugh (July 22, 2010).

Appeal Book, Tab 15, p. 24 [Record, p. 55]: Letter from Diane O’Kane-McHugh (October 20, 2009).

Appeal Book, Tab 16, p. 28 [Record, p. 94]: Affidavit of Diane O’Kane-McHugh (September 30, 2011).

11. The therapeutic Aquafitness program takes place approximately 30 kilometers off-site due to the lack of pool facilities in the community. Transportation is provided by Carefor, an agency funded by the Ministry of Health. Carefor charges clients a small user fee, with the remainder of the travel costs covered by the Local Health Integration Network.

Appeal Book, Tab 13, p. 22 [Record, p. 52]: Letter from Diane O’Kane-McHugh (July 22, 2010).

Appeal Book, Tab 18, p. 30 [Record, p. 93]: Letter from Steve Perry (September 29, 2011).

12. Thus, the therapeutic Aquafitness program is recommended by a physician, monitored by a psychiatrist and provided as treatment for individuals with significant mental illness.

C. The Health Benefit application

13. As is elaborated further below, the Ontario Disability Support Program Regulation (“*ODSPR*”) requires the Director of ODSP (“Director”) to provide “Health Benefits” to cover the cost of medically-necessary equipment and services (referred to as “Mandatory Special Necessities”). The Health Benefit covers the cost of travel to medical appointments. To qualify, an ODSP recipient must submit a form completed by a licensed physician, Registered Nurse (Extended Class) or psychologist (for addiction related travel only). The health professional completing the form must indicate the number of appointments for medical treatment required each month as well as the location of the appointment.

O Reg 222/98, s. 44(1)(1)(iii.1) [“*ODSPR*”].

Appeal Book, Tab 4, p. 10 [Record, pp. 36-37]: MSN Benefit Request (October 20, 2009).

14. On October 20, 2009, Ms. E.F. submitted an application form, signed by her family physician, confirming the need for the medical travel benefit to cover the travel cost of attending the therapeutic Aquafitness program. The form was accompanied by a letter from Dr. Ferri confirming that he provides supervision for the entire Community Mental Health program.

Appeal Book, Tab 15, p. 24 [Record, pp. 36-37]: MSN Benefit Request (October 20, 2009).

Appeal Book, Tab 5, p. 12 [Record, p. 38]: Letter from Dr. Michael Ferri (January 2, 2006).

15. The Director denied Ms. E.F.'s application for the medical travel benefit but did not advise her until Ms. E.F.'s mental health worker requested a decision in writing. The written decision was provided on December 30, 2009, denying the application for the medical travel benefit on the grounds that the therapeutic Aquafitness program was "of a social or recreational nature." Ms. E.F. requested an internal review of this decision on January 13, 2010. The Director upheld the original decision on January 15, 2010.

Appeal Book, Tab 6, p. 13 [Record, p. 35]: Letter from Shelly Parks (December 18, 2009).

Appeal Book, Tab 7, p. 14 [Record, p. 27]: Letter from Heather Warren (December 30, 2009).

Appeal Book, Tab 8, p. 15 [Record, p. 29]: Internal Review Request (January 13, 2010).

Appeal Book, Tab 9, p. 16 [Record, p. 30]: Letter from Kathy Jennings (January 15, 2010).

16. As a result of this decision, the Director provides a medical travel benefit for Ms. E.F. to attend at Mental Health Services, but not for the additional cost of travel to an off-site program.

Appeal Book, Tab 17, p. 40 [Record, p. 17]: Submission of the Director at p. 17.

D. The Social Benefits Tribunal appeal

17. Ms. E.F. appealed to the Tribunal. The hearing took place on August 16, 2011. Ms. E.F.'s appeal was heard together with three other appeals brought by three different appellants, all with respect to the same therapeutic Aquafitness program.¹ The testimony of Diane O'Kane-McHugh, a caseworker with Mental Health Services and the co-ordinator of the therapeutic Aquafitness program, was applicable to all four appeals. She testified that the program is administered under the supervision of a psychiatrist, and is only available to clients of Mental Health Services. The evidentiary record also included letters from a family physician, two psychiatrists, a physiotherapist, the medical transportation agency and additional evidence from Ms. O'Kane-McHugh.

Appeal Book, Tab 10, p. 17 [Record, pp. 11-12]: Appeal Form.

Appeal Book, Tab 2, p. 5 [Record, p. 102]: Tribunal Decision (October 17, 2011).

Appeal Book, Tab 11, p. 19 [Record, pp. 59-60]: Letter from Dr. Chris Rae (October 30, 2009).

Appeal Book, Tab 13, p. 22 [Record, p. 52]: Letter from Diane O'Kane-McHugh (July 22, 2010).

Appeal Book, Tab 15, p. 24 [Record, pp. 53-56]: Letter from Diane O'Kane-McHugh (October 20, 2009).

Appeal Book, Tab 14, p. 23 [Record, p. 58]: Letter from Dr. Ferri (February 11, 2010).

Appeal Book, Tab 18, p. 30 [Record, p. 93]: Letter from Steve Perry (September 29, 2011).

Appeal Book, Tab 16, p. 28 [Record, p. 94]: Affidavit of Diane O'Kane McHugh (September 30, 2011).

Appeal Book, Tab 12, p. 21 [Record, p. 50]: Letter from Dr. Leonard Bloom (December 29, 2010).

Appeal Book, Tab 17, p. 29 [Record, p. 51]: Letter from Physiotherapist Roger Hurdle (September 16, 2010).

Appeal Book, Tab 19, p. 33 [Record, p. 97]: Record of Hearing (August 16, 2011).

¹ Two of the appellants who had their cases heard at the same time as Ms. E.F.'s have also initiated appeals to this Honourable Court. These are: *M.V. v. Director of the Ontario Disability Support Program* (Divisional Court File No. DC-12-1810-0000) and *P.S. v. Director of the Ontario Disability Support Program* (Divisional Court File No. DC-12-1811-0000). As per the direction by the Tribunal in releasing its decision, the non-appellant specific testimony from these appeals is applicable to Ms. E.F.'s appeal. The fourth appellant did not commence an appeal to this Court (SBT File No. 1001-05943).

18. Ms. E.F. gave evidence that the therapeutic Aquafitness program assists with her depression and chronic pain management. She testified that her family doctor, who monitors her once per month, strongly encourages her to participate in the program as does her cardiac physiotherapist. When she does not participate, her mental capacity suffers and her medication levels are higher.

Appeal Book, Tab 8, p. 15 [Record, p. 29]: Internal Review Request (January 13, 2010).

Appeal Book, Tab 19, pp. 34-35 [Record, p. 98]: Record of Hearing (August 16, 2011).

19. The Tribunal dismissed Ms. E.F.'s appeal. The key passages of the Tribunal's reasons are as follows:

The Tribunal notes that the previous Tribunal decisions are not binding on the Tribunal; however, the Division [sic] Court decision is. The Court stated, in determining medical transportation costs the Director is to look at the nature of the activities, not just at their benefit. In this regard the Tribunal agrees with Member Murray's reasoning in part as set out in the Social Benefits Tribunal decision of 0808-07296R where he notes the following: "that her attendance at the health club is therapeutic and of medicinal benefit to her may well be so, however that fact alone is not sufficient for a finding that her attendance constitutes treatment". Additionally, "finally what the Director may or may not do with respect to medical transportation costs for addicts and or alcoholics has no probative value in relation to the matter under appeal". The Tribunal is concerned with the facts of this case only, not that of another type of treatment or program.

The Caseworker had stated that other programs within the CMH centre are also beneficial, such as outings to the beach and lunches out, and yet no request is made for medical transportation costs for these programs. The Tribunal therefore questions the difference in the nature of these programs. The Tribunal also questions, if the aqua fitness program is as beneficial, or even more so as the Appellant states, why CMH covers the transportation costs for other programs and not the aqua fitness program? Therefore the Tribunal finds that it is not the benefits of the program which is the delineating factor, which, according to the Appellant, Caseworker and doctors is the reason for the Appellant's attendance in the program. In this regard the Tribunal also agrees with Member Hummelen's reasoning in part as set out in the Social Benefits Tribunal decision of 0809-07981R where she states "Also, while the program may help in her isolation and weight management, the Appellant has failed to satisfy the Tribunal that the benefits she achieves are not available in other ways."

Appeal Book, Tab 2, pp. 7-8 [Record, pp. 104-105]: Tribunal's Reasons (October 17, 2011).

20. Ms. E.F. requested a reconsideration of this decision on November 18, 2011, which was denied on January 25, 2012.

Appeal Book, Tab 22, pp. 51-56 [Record, pp. 106-111]: Application for Reconsideration (November 18, 2011).

Appeal Book, Tab 3, p. 9 [Record, p. 134]: Letter from Beverly Moore (January 25, 2012).

PART IV: ISSUES AND LAW

21. The issue to be determined on this appeal is whether the Tribunal erred in its interpretation of the term “medical treatment” for the purposes of eligibility for ODSP’s medical travel benefit.

A. Standard of Review

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

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

23. It is well-established that the standard of review on appeals from the Tribunal is correctness.

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

B. ODSP Health Benefits

24. The ODSP is a program of last resort that provides income and other supports for deeply impoverished individuals with disabilities. One of the stated purposes of the program is to serve people with disabilities “effectively”:

1. The purpose of this Act is to establish a program that,
 - (a) provides income and employment supports to eligible persons with disabilities;
 - (b) recognizes that government, communities, families and individuals share responsibility for providing such supports;
 - (c) effectively serves persons with disabilities who need assistance; and
 - (d) is accountable to the taxpayers of Ontario [emphasis added].

Ontario Disability Support Program Act, 1997, SO 1997, c 25, Sch B, at ss. 1, 4.

25. One of the ways in which ODSP effectively serves people with disabilities is through the provision of a Health Benefit. In recognition of the fact that many ODSP recipients will face extraordinary costs related to their disabilities, the program includes a “Health Benefit” to assist in defraying these expenses. The *ODSPR* prescribes the costs that can be covered, including items such as medications, hearing aids, diabetic supplies and assistive devices. The ODSP Health Benefit is not discretionary. Where an ODSP recipient meets the eligibility requirements set out in the *ODSPR*, the Director is obligated to provide the benefit.

ODSPR, s. 44(1).

26. The cost of travel for medical treatment can be a serious barrier to access, particularly in Ontario’s rural communities. As a result, the Health Benefit also provides for the cost of travel for medical treatment. The section of the *ODSPR* addressing medical travel states as follows:

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:

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 ... [emphasis added].

ODSPR, s. 44(1)(1)(iii.1).

27. Thus, the *ODSPR* establishes a four-part test for eligibility for the medical travel benefit:

- a. The transportation cost must be reasonably required;
- b. The travel must be for the purposes of medical treatment;
- c. The cost must not be otherwise reimbursed;
- d. The cost must be greater than \$15 per month.

28. The only part of the test in dispute is whether the therapeutic Aquafitness program is “medical treatment”. The legislation does not define “medical treatment,” and thus the principles of statutory interpretation must be relied upon in order to determine the meaning of this term in the context of a program for individuals with disabilities.

C. The interpretation of “medical treatment”

29. The *ODSPA* is “remedial legislation” that must be interpreted with a liberal and purposive approach. 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.

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

30. The Health Benefit is particularly suited to a liberal interpretive approach. Clearly an interpretation of eligibility for the medical transportation benefit that allows people with disabilities to access medical treatments that ameliorate their disabilities is consistent with the purpose of the *ODSPA* to serve recipients effectively.

31. There is only one court case that has directly addressed the interpretation of entitlement to the ODSP medical travel benefit: *Director of ODSP v. Billotte*. In that case, Mr. Billotte applied for the medical travel benefit to attend a program for adults with developmental disabilities. The decision does not describe Mr. Billotte’s activities in the program in any detail. However, participation in the program was not prescribed by a medical professional – to the contrary, his attendance was described as “voluntary.” In addition, there was no indication that the program was supervised by a medical professional.

Ontario (Disability Support Program, Director) v. Billotte, [2009] O.J. No. 1108 (Div. Ct.).

32. The Court granted the Ministry’s appeal from a Tribunal decision approving a travel allowance. The Court’s reasons were brief:

The Social Benefits Tribunal was incorrect in law in finding the voluntary attendance by Mr. Billotte at the Almaguin Highlands Community Living Day program to be medical treatment.

While Mr. Billotte’s attendance at the program is a benefit to him – and an important one, the current activities in which he participates at the Centre cannot, we find, be viewed as medical treatment. Such a conclusion would torture the grammatical meaning of the words “medical treatment” and moreover, exceed the intention of the legislation.

Ontario (Disability Support Program, Director) v. Billotte, [2009] O.J. No. 1108 (Div. Ct.) at paras. 2-3.

33. It is apparent from the above judgment that the Court was of the view that an applicant must establish something more than a “benefit” from a program in order to satisfy the conditions for eligibility for the medical travel benefit. However, the Court’s decision in *Billotte* did not explicitly define the parameters of “medical treatment.”

34. The ODSP Directive 9.12 (“Mandatory Special Necessities”) is a potentially useful interpretive source. While the Director’s policy directives interpreting the legislation are not binding upon this Honourable Court, they outline the interpretation that has been adopted by the administrators of the program:

The cost of transportation to attend mental health therapy and mental health counselling programs is covered, provided that the treatment has been prescribed by a professional designated under the *Regulated Health Professions Act, 1991* (e.g. physician, psychiatrist, psychologist) and the program is provided under the supervision of a physician, psychiatrist or psychologist. Coverage for programs that are solely of a social or recreational nature cannot be provided.

...

The cost of transportation to attend drug and alcohol recovery groups (e.g. Alcoholic’s Anonymous, Narcotics Anonymous) are covered, provided the recipient’s doctor or psychologist has prescribed it, and the program is available locally.

ODSP Directive 9.12: Mandatory Special Necessities (November 2006) at p. 3-4.

35. Thus, the Director funds travel for mental-health related treatment when the following circumstances have been met:

- The treatment has been prescribed by a regulated health professional;
- The treatment need not be provided directly by a regulated health professional, so long as the treatment is supervised by a physician, psychiatrist or psychologist;
- Programs of a solely social or recreational nature are not “medical treatment.”

36. It is submitted that the above eligibility factors are a reasonable approach to eligibility, so long as the interpretation of “medical treatment” incorporates current best practices, rather than

antiquated notions of medical treatment that are confined to the four corners of a doctor's office or hospital.

37. A flexible approach is particularly important in the context of treatments for mental health, which have undergone significant evolution and can be quite different from treatments for physical disabilities (although these categories are often intermingled or overlap). For example a "prescription" for "mental health therapy and mental health counseling" is not something that is written out on a prescription pad and taken to a pharmacy for dispensing. Rather, a prescription for mental health therapy can take the form of recommendations and appropriate referrals that form part of the patient's overall medical treatment plan.

38. In the course of developing a 10-year Mental Health and Addictions Strategy, Ontario's Ministry of Health has identified a series of best practice goals for the provision of mental health treatment within the province. The Ministry notes that while it is important to continue to offer traditional services such as hospital-based treatments, medications and case management services, the system can integrate "other evidence-based, person-directed approaches to care, including healthy development, psychosocial rehabilitation, recovery, harm reduction and trauma-informed services."

Ontario (July 2009), *Every Door is the Right Door: Towards a 10-Year Mental Health and Addictions Strategy, A Discussion Paper* (Ontario: Ministry of Health) at p. 32.

39. The reference to "psychosocial rehabilitation" is of particular relevance in this case. The Ministry of Health defines "psychosocial rehabilitation" as services that assist individuals with a psychiatric diagnosis to re-establish normal roles and re-integrate into community life: "These

services include pharmacologic treatment, independent living and social skills training, psychological support to clients and their families, housing, vocational rehabilitation, social support, and access to leisure activities. Psychosocial rehabilitation helps people develop personal support networks, and encourages them to be involved in community activities, such as school and work.” Psychosocial rehabilitation is a best practice that “must be used throughout the system.” Peer-support services are specifically and repeatedly recommended.

Ontario (July 2009), *Every Door is the Right Door: Towards a 10-Year Mental Health and Addictions Strategy, A Discussion Paper* (Ontario: Ministry of Health) at pp. 26, 30, 32-33, 35, 36, 39, 40, 42.

40. The Ministry of Health also recognizes that Ontarians with mental health issues need opportunities to lead healthier lives and that physical activity can form an important part of the treatment of certain illnesses. Exercise increases the production of neurotransmitters in the brain that are associated with mood. Regular physical exercise can decrease mild to moderate depression as well as the odds of cognitive impairments and dementia. However, people with disabilities can require programs that are specifically tailored to their needs, including qualified staff who can modify or adapt exercise programs and support client participation.

Ontario (July 2009), *Every Door is the Right Door: Towards a 10-Year Mental Health and Addictions Strategy, A Discussion Paper* (Ontario: Ministry of Health) at p. 44.

James H. Rimmer and Alexandre C. Marques (July 21, 2012), “Physical activity for people with disabilities” *The Lancet* Vol. 380 193-195 at 193.

41. The Ministry of Health notes that investments in treating mental illnesses save money: “Every \$1 spent on mental health and addictions saves \$7 in health costs and \$30 dollars in lost productivity and social costs.” As part of its 10-year plan, the Ministry of Health calls upon all government ministries to align their policies and programs:

All ministries must work closely together, share a common understanding of the importance of the social determinants of health, and align their policies and program.

....

To make every door the right door, all organizations that provide services for people who are vulnerable or have lived experience – government ministries, municipalities, community leaders, schools, family health providers, social and justice service providers, and workplaces – have a part to play in promoting mental health and well-being, and providing integrated, person-directed services. To make this shift, these organizations need structures that make it easier for them to provide integrated services. Right now, each ministry and sector has its own definitions, protocols and eligibility criteria for services – which can open or close doors.

Ontario (July 2009), *Every Door is the Right Door: Towards a 10-Year Mental Health and Addictions Strategy, A Discussion Paper* (Ontario: Ministry of Health) at pp. 43-48; see also pp. 16, 43.

42. Thus, an interpretation of “medical treatment” that includes psychosocial rehabilitation and peer support aligns the ODSP program with best practices set out by the Ministry of Health for the treatment of mental illness. In addition, investments that facilitate access to mental health treatments, such as the medical travel benefit, are consistent with another key “purpose” of ODSP: accountability to tax-payers. Conversely, a narrow definition of “medical treatment” closes doors to treatment.

43. Dorland’s Illustrated Medical Dictionary defines “treatment” as “the management and care of a patient for the purpose of combating disease or disorder.” Current best practices for the management of mental illness include the provision of integrated services and psychosocial rehabilitation.

Appeal Book, Tab 21, p. 50 [Record, p. 56]: “Dorland’s Illustrated Medical Dictionary (31st Edition)” [not paginated in Tribunal Record]].

44. A liberal and purposive interpretation of the eligibility for the medical travel benefit requires an inclusive approach to the definition of “medical treatment” that recognizes and

supports the unique needs of people with mental health disabilities. A narrow interpretation based on models developed for the treatment of physical disabilities would undermine the purpose of the program and discriminate against people with mental health disabilities.

D. Participation in Mental Health Services' therapeutic Aquafitness program is "medical treatment"

45. The Tribunal dismissed Ms. E.F.'s appeal based on two conclusions. Firstly, the Tribunal dismissed the appeal on the basis that a therapeutic benefit is not sufficient to constitute treatment. In doing so, the Tribunal relied upon the *Billotte* case, which was referenced above.

Appeal Book, Tab 2, p. 7 [Record, pp. 104-105]: Tribunal's Reasons (October 17, 2011).

46. While the Divisional Court's judgment in *Billotte* could be interpreted to have held that a "benefit" is not sufficient to constitute treatment, *Billotte* does not stand for the proposition that a "benefit" is irrelevant to the analysis. While perhaps something more must be demonstrated to qualify as "treatment", surely a therapeutic benefit is, at the very least, relevant to the question of whether a program constitutes medical treatment. In this case, the Tribunal states that "it is not the benefits of the program which is the delineating factor" but fails to specify what *are* the delineating factors to determining what is or is not medical treatment.

47. By policy, the Director takes the position that activities of a "solely" social or recreational nature are not eligible for the medical travel benefit. The use of the word "solely" is important. The Director's own policies recognize that looking at activities in isolation does not tell the whole story. Rather, it is submitted that the purpose of prescribed activities and their role in a person's medical treatment plan must also form part of the analysis. For example, stretching

in a physiotherapist's office and stretching by oneself at home before going for a walk may be the very same activity, but can be characterized quite differently based on the context. One would clearly be considered "medical treatment"; the other would not.

48. Thus, the Tribunal erred by failing to assess the evidence about the context and purpose of the therapeutic Aquafitness program, as well as its role in the appellant's medical treatment plan in order to determine whether it is medical treatment.

49. The second basis upon which the Tribunal dismissed the appeal was its finding that Ms. E.F. had failed to satisfy the Tribunal that the benefits she experienced were unavailable in other ways. With the greatest of respect, the Tribunal fundamentally erred in its interpretation of the eligibility requirements for the medical travel benefit. There is no statutory basis for the Tribunal to impose a requirement that Ms. E.F. prove that a therapeutic program is her one remaining option to obtain a therapeutic benefit before she can be eligible for the medical transportation benefit. Rather, the question is whether the therapeutic program itself is a mental health treatment.

Ontario (Disability Support Program, Director) v. Billotte, [2009] O.J. No. 1108 (Div. Ct.).

50. Unfortunately, the Tribunal never evaluated the evidence in order to answer the question of whether the therapeutic program is mental health treatment. This analysis should have been its central task.

51. It is submitted that there was ample evidence before the Tribunal establishing that the therapeutic Aquafitness program constitutes a mental health treatment that is entirely consistent

with best practices in the delivery of mental health services as defined by the Ministry of Health. The therapeutic Aquafitness program is a mental health peer support group providing “psychosocial rehabilitation” in order to treat symptoms associated with mental health disabilities.

52. Diane O’Kane-McHugh is the mental health caseworker who developed the therapeutic Aquafitness program. Her evidence made specific reference to the Ministry of Health’s ten-year mental health strategy referenced above, noting that the Aquafitness program was developed based on the best practices recommended as part of that strategy:

Most recently the Minister of Health and Long-Term Care released a discussion paper published in July of 2009 entitled Every Door is the Right Door: Towards a 10-Year Mental Health and Addictions Strategy. It provides clear strategies that are based on identified best practices for community-based services for the mentally ill. These strategies inform how our local Community Mental Health Service designs and delivers appropriate and relevant services. There are a number of recommendations which address the area of developing and encouraging programs which promote social interaction, integration within the community, and improved physical and mental health as part of our overall therapeutic goals. The Renfrew/Arnprior Aquafitness program is in keeping with these recommendations.

...

The Renfrew/Arnprior Aquafitness program has been developed with these identified best practices and guiding principles in mind. Research prior to starting this program identified water fitness programs as the most suitable for our clients, many of whom struggle with additional physical limitation such as obesity, diabetes, auto-immune disorders (fibromyalgia, various forms of arthritis) as well as the general lack of regular exercise characteristic for this population. Full participation is possible immediately in water because of buoyancy and the lack of weight bearing ...

While I realize that ODSP transportation does not cover recreational activities, I hope it is now clear that this program, while called Aquafitness, is much more accurately if [sic] termed a Mental Health Peer Support Group, in accordance with best practices in community mental health therapy.

Appeal Book, Tab 15, pp. 24-26 [Record, pp. 53-56]: Letter from Diane O’Kane-McHugh (October 20, 2009).

53. Dr. Chris Rae, describes the Aquafitness program as a “therapeutic program” that he has ordered for a large number of his patients. He notes that exercise has “well documented preventative and therapeutic benefits in ... depression (where sufficient exercise with an expert is as good treatment as most others), many anxiety conditions (particularly panic disorders), and in general has an almost immediate increase in vital neurotransmitters, particularly norepinephrine, dopamine and serotonin.” The program’s supervising psychiatrist, Dr. Ferri, strongly endorsed Dr. Rae’s opinion in this respect.

Appeal Book, Tab11, pp. 19-20 [Record, pp. 59-60]: Letter from Dr. Chris Rae (October 30, 2009).

Appeal Book, Tab 14, p. 23 [Record, p. 58]: Letter from Dr. Michael Ferri (February 11, 2010).

54. Ms. E.F.’s family physician also observed that “aquafitness is a beneficial and excellent therapy for Ms. E.F. She already takes numerous medications and this is an option for a therapy not involving medication. Exercise has been shown by the Canadian Consensus Study on Hypertension to be effective in lowering blood pressure. It is also an excellent therapy for stress and anxiety.” Her cardiac physiotherapist also supported her participation in the program as part of her prescribed exercise program.

Appeal Book, Tab 12, p. 21 [Record, p. 50]: Letter from Dr. Leonard Bloom (December 29, 2010).

Appeal Book, Tab 17, p. 29 [Record, p. 51]: Letter from Physiotherapist Roger Hurdle (September 16, 2010).

55. The Director’s decision to refuse the medical travel benefit in this case is arbitrary and contradicts its treatment of other ODSP recipients. The Director is providing the medical travel benefit to other recipients to attend the Aquafitness program run by Mental Health Services. A recent Tribunal appeal involving this very therapeutic Aquafitness program held that the program constitutes “medical treatment,” and that to deny the medical travel benefit “would be an affront

to [the purposes of ODSF].” In addition, there are two other positive Tribunal cases ordering payment of the medical travel benefit for this Aquafitness program that were decided by the same Tribunal member who authored the decision now under appeal. None of these Tribunal decisions were appealed to the Divisional Court.

0912-11007 (October 7, 2010) (Dudley).

0912-10905 (October 7, 2010) (Dudley).

0912-10907R (August 15, 2012) (Wood).

56. The evidentiary record established that there are numerous features to the therapeutic Aquafitness program that confirm the program is medical treatment, distinguished from the general recommendation that all people should engage in exercise:

- a. A family physician, two psychiatrists and a physiotherapist have recommended that Ms. E.F. participate in this program in order to directly treat and ameliorate symptoms associated with Ms. E.F.’s disabilities.
- b. The program was identified as medical treatment by the physician who completed the application for the medical travel benefit.
- c. The program is supervised by a psychiatrist.
- d. The program is run by qualified mental health caseworkers who modify and adapt exercise classes to meet the needs of people with severe mental health disabilities.
- e. Ms. E.F.’s family physician monitors the impact of the program on an individual basis with monthly follow-ups.
- f. The program includes peer and professional counseling.
- g. The program is only available for individuals with severe mental illness and who are clients of Mental Health Services.

- h. The program has a clear medical benefit in alleviating symptoms associated with Ms. E.F.'s disabilities.
- i. Transportation to the program is provided by an agency that is funded by the Ministry of Health to supply medical transportation.
- j. The program is consistent with best practices for mental health treatment as defined by the Ministry of Health.

57. The therapeutic Aquafitness program is clearly distinguishable from the program that was the subject of the *Billotte* case, which had none of the above features. Based on the foregoing factors, even by the narrow approach to eligibility set out in the ODSP Policy Directives, the therapeutic Aquafitness program qualifies as “medical treatment.”

58. Interpreting “medical treatment” to include participation in the therapeutic Aquafitness program offered by Mental Health Services is consistent with the purpose of the *ODSPA*, which recognizes Ontario’s obligation to provide supports to people with disabilities. Funding travel to participate in this medical treatment contributes to the dignity, health and well-being of people with disabilities.

59. To conclude otherwise would create barriers to access for effective mental health treatments recommended by the Ministry of Health and thereby undermine the purpose of the ODSP program.

PART V: ORDER SOUGHT

60. It is therefore respectfully requested that this appeal be allowed and the Director ordered to provide the medical travel benefit to cover the cost of travel to the therapeutic Aquafitness program.

Date: October 31, 2012

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

BETWEEN:

E.F.

Appellant

and

**DIRECTOR OF THE ONTARIO DISABILITY SUPPORT PROGRAM OF THE
MINISTRY OF COMMUNITY & SOCIAL SERVICES**

Respondent

CERTIFICATE

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

DATED THIS 31st day of October 2012

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SCHEDULE A: List of Authorities

1. *Ontario v. Favrod*, 2006 CanLII 4898 (ON S.C.D.C.).
2. *Ontario v. Ansell*, 2011 ONCA 309.
3. *Ontario (Disability Support Program, Director) v. Billotte*, [2009] O.J. No. 1108 (Div. Ct.).
4. ODSP Directive 9.12: Mandatory Special Necessities (November 2006).
5. Ontario (July 2009), *Every Door is the Right Door: Towards a 10-Year Mental Health and Addictions Strategy, A Discussion Paper* (Ontario: Ministry of Health).
6. James H. Rimmer and Alexandre C. Marques (July 21, 2012), “Physical activity for people with disabilities” *The Lancet* Vol. 380 193-195.
7. 0912-11007 (October 7, 2010) (Dudley).
8. 0912-10905 (October 7, 2010) (Dudley).
9. 0912-10907R (August 15, 2012) (Wood).

SCHEDULE B: Legislation

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

Purpose of Act

1. The purpose of this Act is to establish a program that,
- (a) provides income and employment supports to eligible persons with disabilities;
 - (b) recognizes that government, communities, families and individuals share responsibility for providing such supports;
 - (c) effectively serves persons with disabilities who need assistance; and
 - (d) is accountable to the taxpayers of Ontario.

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.

Appeal to Court

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

O. Reg 222/98.

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:
- 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 ...