

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

B E T W E E N :

S. L.

**Appellant
(Appellant in appeal)**

and

DIRECTOR OF THE ONTARIO DISABILITY SUPPORT PROGRAM

**Respondent
(Respondent in appeal)**

APPELLANT'S FACTUM

DATE: February 15, 2013

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

Jackie Esmonde (LSUC 47793P)

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

Halton Community Legal Services
72 Mill Street
Georgetown, Ontario
L7G 2C9

Brenda Culbert (LSUC 38558U)

Tel: 905-877-5256
Fax: 905-877-8223
Email: culbertb@lao.on.ca

Lawyers for the Appellant

TO: Ministry of Community and Social Services
Legal Services Branch, 17th Floor
56 Wellesley Street West
Toronto, Ontario
M7A 1E9

Mimi Singh

Tel: (416) 327-9731
Fax: (416) 327-0568
Email: Mimi.N.Singh@ontario.ca

Lawyer for the Respondent

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PART I: IDENTIFYING STATEMENT

1. This is an appeal by S.L. from a decision of the Social Benefits Tribunal (“the Tribunal”) made on May 9, 2012 and upheld on September 7, 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. S.L. suffers from severe mental health disabilities. At the recommendation of her physician, Ms. S.L. has been undergoing psychotherapy with two mental health counsellors. Ms. S.L.’s family physician provides ongoing monitoring of the mental health therapy. Her mental health status has improved as a result of the counselling. Due to her disabilities, as well as the location of her counsellors, Ms. S.L. requires the assistance of the ODSP medical travel benefit in order to access this recommended therapy.

3. After receiving the medical travel benefit for over two years, the Director of ODSP (“the Director”) required Ms. S.L. to re-apply. Although her application was in essence the same as previously, the Director denied the application. Ms. S.L. appealed that decision to the Tribunal. The Tribunal concluded that Ms. S.L.’s psychotherapy does not qualify as “medical treatment” and that her travel costs were less than the \$15 per month required for eligibility.

4. It is submitted that the Tribunal erred, first, in concluding that psychotherapy does not qualify as “medical treatment” unless the provider is a registered health professional. Such a finding is not supported by the legislative language and does not accord with the Ministry of

Health's best practices in mental health treatment. Second, the Tribunal erred by ignoring evidence that Ms. S.L.'s travel costs were greater than \$15 per month. Instead, the Tribunal relied upon irrelevant evidence about her costs at the date of hearing – well after her medical travel benefit had been cut and she had reduced the number of medical appointments she attended. The Tribunal erred by not considering her costs at the time of application.

PART III: STATEMENT OF FACTS

A. Background

5. Ms. S.L. has been diagnosed with severe Post-Traumatic Stress Disorder, Obsessive-Compulsive Disorder and dissociative episodes. She is described as being “in constant mental health crisis” and having “debilitating fears that make daily living extremely challenging.” As a result of her disabilities, Ms. S.L. can require as much as five hours of preparation just to leave her home. Ms. S.L.'s mental health struggles arose due to sexual abuse both as a child and an adult. She has been a recipient of ODSP benefits since 1999.

Appellant's Appeal Book, Tab 9: Letter from Dr. Hajcsar (July 22, 2011), p. 18.

Appellant's Appeal Book, Tab 13: Letter from Marilyn Ellis (August 3, 2011), p. 23.

Appellant's Appeal Book, Tab 12: Letter from Clare Freeman, MSW (August 2, 2011), p. 22.

Appellant's Appeal Book, Tab 7: Typed Letter from S.L. (June 9, 2011), p. 16.

Appellant's Appeal Book, Tab 16: Record of Hearing, pp. 37-39.

6. In light of her serious mental health concerns, Ms. S.L.'s physician of almost two decades, Dr. Hajcsar, recommended counselling as part of her treatment plan. Ms. S.L. sought counselling in Burlington, where she lives. However, she was turned away by many agencies and individuals. After a six year search, two counsellors in Hamilton agreed to treat Ms. S.L. The

first is a counsellor from Interval House of Hamilton, a shelter for abused women and children, who is supervised by a Director with a Master's of Social Work. The second is a therapist in private practice at Willow Stream Counselling, Marilyn Ellis, whom Ms. S.L. sees weekly.

Appellant's Appeal Book, Tab 9: Letter from Dr. Hajcsar (July 22, 2011), p. 18.

Appellant's Appeal Book, Tab 13: Letter from Marilyn Ellis (August 3, 2011), p. 23.

Appellant's Appeal Book, Tab 7: Typed Letter from S.L. (June 9, 2011), p. 16.

Appellant's Appeal Book, Tab 6: Handwritten Letter from S.L. (June 9, 2011), p. 15.

7. Dr. Hajcsar manages Ms. S.L.'s treatment plan and "oversees the other professionals who assist her". In respect of the two counsellors, Dr. Hajcsar stated that: "Both of these therapists are providing a valuable service to Susan – both doing psychotherapy of an intensive nature for her long standing PTSD. Susan is not seeing them for social or recreational purposes. I believe their work is beneficial to Susan's health and have recommended that she continue both" (emphasis added).

Appellant's Appeal Book, Tab 11: Letter from Dr. Hajcsar (June 13, 2011), p. 21.

Appellant's Appeal Book, Tab 9: Letter from Dr. Hajcsar (July 22, 2011), p. 18.

8. Dr. Hajcsar confirmed that as a result of her disabilities, Ms. S.L. requires a close friend to take her to her psychotherapy appointments. Ms. S.L.'s friend provides transportation in his private vehicle.

Appellant's Appeal Book, Tab 11: Letter from Dr. Hajcsar (June 13, 2011), p. 21.

Appellant's Appeal Book, Tab 7: Typed Letter from S.L. (June 9, 2011), p. 16.

Appellant's Appeal Book, Tab 6: Handwritten Letter from S.L. (June 9, 2011), p. 15.

B. The application for the "Medical Travel Benefit"

9. As is elaborated further below, the Ontario Disability Support Program Regulation (“*ODSPR*”) requires the Director to provide “Health Benefits” to cover the cost of medically-necessary equipment and services (referred to as “Mandatory Special Necessities”). Amongst other things, 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”].

10. If approved, the cost of travel by private vehicle is compensated at a rate of \$0.18 per kilometre.

ODSP Income Support Directive 9.12: Mandatory Special Necessities (November 2011), p. 4

11. In 2009, Ms. S.L. applied for the medical travel benefit to attend appointments with her family doctor, Interval House and group therapy at the Good Sheppard Centre. The application was approved for a two year period. When Ms. S.L. began seeing Ms. Ellis in 2010, she received coverage for this travel.

Appellant’s Appeal Book, Tab 15: Note Detail (April 2, 2009), p. 32.

12. After two years had elapsed, the Director required Ms. S.L. to re-apply. Ms. S.L.’s new application for the medical travel benefit was dated May 10, 2011, and requested the benefit to attend appointments with her family doctor and the two therapists. Depending upon the number

of appointments she attended in a month, Ms. S.L.'s travel costs were between \$30.60 and \$42.84 per month.

Appellant's Appeal Book, Tab 4: Mandatory Special Necessities Benefit Request, pp. 11-13.

Appellant's Appeal Book, Tab 10: Appeal Form, p. 29.

13. In a reversal of its prior position, the Director denied the application for the medical travel benefit on the grounds that "your travel costs to attend the listed medical appointments would not exceed \$15.00 per month." The basis for this decision was not apparent from the application form, which clearly identified costs exceeding \$15.00. Ms. S.L. has not received compensation for the costs of her medical travel since the date of that decision.

Appellant's Appeal Book, Tab 5: Denial of MSN Travel application (June 1, 2011), p. 14.

14. Ms. S.L. requested an internal review. The internal review request was denied, although the reason provided for denying the benefit had changed. On review, the reason provided for the denial was that:

According to Directive 9.12 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.

Appellant's Appeal Book, Tab 7: Typed Letter from S.L. (June 9, 2011), p. 16.

Appellant's Appeal Book, Tab 6: Handwritten Letter from S.L. (June 9, 2011), p. 15.

Appellant's Appeal Book, Tab 8: Internal Review decision (July 6, 2011), p. 17.

C. The Social Benefits Tribunal appeal

15. Ms. S.L. appealed to the Tribunal. In its submission to the Tribunal, the Director identified a third, and new, basis upon which to deny Ms. S.L. the medical travel benefit it had previously approved: “This is because the locations in question are not programs that are medical in nature, and are not programs/services that are provided *under the supervision* of a designated medical professional” (emphasis in original).

Appellant’s Appeal Book, Tab 9: Appeal Form, pp. 19-20.

Appellant’s Appeal Book, Tab 14: Report to the Tribunal, p. 28.

16. Ms. S.L. testified at the hearing, which took place on April 12, 2012. The hearing was conducted by telephone in order to accommodate her disabilities. Ms. S.L. explained that as of December 20, 2011, she was no longer attending therapy sessions in person at Interval House, although she maintained telephone contact with her counsellor. Her therapeutic relationship with Marilyn Ellis was ongoing. Ms. S.L. explained that she had been referred to Ms. Ellis by a friend after she had been unsuccessful in a search for therapeutic services in Burlington. She testified that at the time of the hearing, she was paying her friend \$10 per month to drive her to her medical appointments, which was all she could afford.

Appellant’s Appeal Book, Tab 16: Record of Hearing, pp. 37-38.

Appellant’s Appeal Book, Tab 17: Reconsideration application, p. 46.

17. Marilyn Ellis of Willow Stream Counselling also testified at the hearing. She confirmed that she is an experienced counsellor, and has been treating Ms. S.L. weekly since July 2010. Marilyn Ellis testified that Ms. S.L. had shown improvement while under her care.

Appellant’s Appeal Book, Tab 16: Record of Hearing, pp. 38-39.

18. Despite this evidence, the Tribunal denied the appeal on the basis that Marilyn Ellis is not a “prescribed medical practitioner” and that Ms. S.L.’s costs failed to meet the eligibility requirement that medical travel costs exceed \$15 per month.

Appellant’s Appeal Book, Tab 9: Tribunal Decision, p. 8.

PART IV: ISSUES AND LAW

19. The issues to be determined on this appeal are:
- a. Whether the Tribunal erred in law in its statutory interpretation of the term “medical treatment” for the purposes of eligibility for ODSP’s medical travel benefit;
 - b. Whether the Tribunal erred in law by in concluding that Ms. S.L.’s “reasonably required” medical travel costs were less than \$15 per month.

A. Standard of Review

20. The *Ontario Disability Support Program Act* (“ODSPA”) provides that the parties to a hearing before the Tribunal may appeal to the Divisional Court on “a question of law” only. It is well-established that the standard of review on appeals from the Tribunal is correctness.

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

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

B. ODSP Health Benefits

21. ODSP is a program of last resort that provides income and other supports for deeply impoverished individuals with disabilities. The stated purposes of the program include an obligation 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.

22. 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).

23. The cost of travel for medical treatment can be a serious barrier to access. As a result, the Health Benefit also provides compensation 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).

24. 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 reasonable cost must be greater than \$15 per month.

25. Two prongs of the test are in issue: 1) whether the travel is for the purposes of medical treatment; and, 2) whether the reasonable travel cost is greater than \$15 per month.

C. The Tribunal erred in its statutory interpretation of “medical treatment”, and in particular in concluding that psychotherapy prescribed and monitored by a family physician is not “medical treatment”

26. The Tribunal interpreted the term “medical treatment” in s. 44(1)(iii.1) as requiring that treatment be provided by a “prescribed medical practitioner” designated under the *Regulated*

Health Professions Act, 1991:

... the therapist is not one that is recognized as a prescribed medical practitioner
 The Appellant argues that there is no definition of, “Medical Practitioner”, in the Act or Regulation. However, the Member finds that “Medical Practitioner”, is defined as those professionals designated under the Regulated Health Professions Act, 1991 (e.g. physician, psychiatrist, psychologist), and the Appellant’s therapist does not fall under this designation.

It is submitted that in so finding, the Tribunal erred in five ways.

Appellant’s Appeal Book, Tab 2: Tribunal’s Reasons, p. 8.

27. First, the legislative provision establishing the medical travel benefit makes no reference to the term “prescribed Medical Practitioner”, nor does it reference the *Regulated Health Professions Act, 1991*. Rather, the *ODSPR* merely requires that the cost of transportation be reasonably required “for medical treatment.” There is no requirement to be found anywhere in the legislation that the “medical treatment” be provided by a “prescribed Medical Practitioner”; and as a corollary, there are no medical practitioners that have been “prescribed” for the purposes of the medical travel benefit.

28. Thus, the Tribunal read-in an onerous requirement that is not justified by a plain reading of the statutory language.

29. Second, the Tribunal’s decision is inconsistent with ODSP Directive 9.12 (“Mandatory Special Necessities”). While the Director’s policy directives are not binding upon this Honourable Court, they outline the interpretation that has been adopted by the administrators of the program in respect of “medical treatment” and mental health counselling:

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 2011) at p. 3-4.

30. This approach was further clarified in a memorandum provided to all ODSP caseworkers:

Question: Can transportation costs to attend mental health therapy and mental health counselling programs be covered if the program itself is not directly supervised by a physician, psychiatrist or psychologist?

Response: ... Such supervision does not have to be “on site”. Rather, coverage for transportation will be provided as long as the recipient’s doctor or psychiatrist has referred the recipient to the program and will be monitoring the recipient’s treatment and progress.

Appellant’s Record, Tab 18: Clearinghouse Q&A, p. 48.

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

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

32. It is submitted that the above eligibility factors, while narrow, represent a reasonable approach to the interpretation of the phrase “medical treatment”, with the *caveat* that the interpretation must incorporate current best practices, rather than antiquated notions of medical treatment that are confined to the four corners of a doctor’s office or hospital. Such an approach is particularly important in the context of treatments for mental health, which have undergone significant evolution. Indeed, community-based mental health counselling is a key aspect of the Ministry of Health’s 10-year Mental Health and Addictions Strategy.

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. 18, 26-27, 32, 34.

33. Third, as part of its 10-year 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 following types of services fall within the "continuum of health services" that should be available to Ontarians with a mental illness: "supportive counselling ... offered by family health providers, peers, community-based health and addiction services." The Ministry of Health has advanced a mental health strategy in which Ontarians can move easily from one level of service to another or access more than one level at the same time, depending on their needs: "For example, a person may be managed by his or her family physician, in consultation with a mental health or addiction specialist, and occasionally need more intensive 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 pp. 18, 26-27, 32, 34.

34. Thus, not only was the Tribunal's requirement that mental health therapy be provided by a "regulated health professional" unsupported by the legislation and policy, it was at complete odds with the modern approach to treating mental health.

35. Fourth, the Tribunal erred in relying upon the *Billotte* case to support its interpretation that "medical treatment" can only be provided by a "prescribed medical practitioner." The Tribunal stated as follows: "Additionally, in the *Billotte* decision [citation omitted] the court ruled: 'That while Mr. Billotte's attendance at the program is a benefit to him – and an important one, the current activities in which he participated at the Centre cannot, we find, be viewed as medical.'" The Tribunal did not further explain why *Billotte* was relevant to Ms. S.L.'s case.

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

36. In *Billotte*, the appellant applied for the medical travel benefit to attend a program for adults with developmental disabilities. The Court’s decision was brief and did not describe Mr. Billotte’s activities in the program in any detail:

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.

37. It is apparent from the 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.” It is not even apparent whether the “benefit” that Mr. Billotte experienced was medical in nature. *Billotte* does not stand for the proposition that the benefit is only available for medical treatment provided by a regulated health professional. It simply does not state such.

Appellant’s Appeal Book, Tab 2: Tribunal’s Reasons, p. 9.

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

38. In any event, Ms. S.L.’s psychotherapy is clearly distinguishable from the program that was the subject of the *Billotte* case. In *Billotte*, participation in the particular program in issue 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. Based on the following factors, even by the narrow approach to eligibility set out in the ODSP Policy Directives, Ms. S.L.'s psychotherapy qualifies as "medical treatment":

39. A regulated health professional has prescribed the treatment: Ms. S.L.'s family physician has explicitly confirmed that she recommends ongoing psychotherapy with both the counsellor at Interval House and Marilyn Ellis. The Tribunal was simply wrong to conclude that a regulated health professional had not recommended the treatment, based on the fact that a friend had recommended Ms. Ellis to Ms. S.L. The fact that Ms. S.L. was provided with Marilyn Ellis's name by a friend – in a context in which Ms. S.L. was having difficulty accessing mental health counselling – does not undermine the evidence that the family physician both recommended psychotherapeutic counselling and endorsed Ms. Ellis as a provider. Notably, the Tribunal's decision makes no reference to Ms. S.L.'s counsellor at Interval House.

Appellant's Appeal Book, Tab 9: Letter from Dr. Hajcsar (July 22, 2011), p. 18.

Appellant's Appeal Book, Tab 11: Letter from Dr. Hajcsar (June 13, 2011), p. 21.

Appellant's Appeal Book, Tab 16: Record of Hearing, pp. 37-39.

40. A regulated health professional supervises the treatment: Ms. S.L.'s family physician monitors her mental health treatment on an ongoing basis.

Appellant's Appeal Book, Tab 9: Letter from Dr. Hajcsar (July 22, 2011), p. 18.

Appellant's Appeal Book, Tab 11: Letter from Dr. Hajcsar (June 13, 2011), p. 21.

41. A regulated health professional completed the application form: Ms. S.L.'s family physician identified the counselling as medical treatment on the application for the medical travel benefit.

Appellant's Appeal Book, Tab 4: Mandatory Special Necessities Benefit Request, pp. 11-13.

42. The treatment is mental health therapy provided by qualified mental health counsellors:

As noted, one of Ms. S.L.'s counsellors is affiliated with a highly reputable non-governmental organization that provides shelter and services to abused women and children. She is overseen by a Director with a Master's of Social Work. The second mental health counsellor is an experienced therapist in private practice. Both therapists are sanctioned and recommended by Ms. S.L.'s family physician.

Appellant's Appeal Book, Tab 9: Letter from Dr. Hajcsar (July 22, 2011), p. 18.

Appellant's Appeal Book, Tab 13: Letter from Marilyn Ellis (August 3, 2011), p. 23.

Appellant's Appeal Book, Tab 12: Letter from Clare Freeman, MSW (August 2, 2011), p. 22.

43. The treatment has a clear medical benefit: The evidentiary record clearly establishes that

Ms. S.L.'s disabilities have improved as a result of her therapy. The evidence also establishes that her mental health would suffer if she could no longer attend. The Executive Director of Interval House wrote as follows:

As you may or may not be aware, Ms. S.L. has complex mental health concerns and is in constant mental health crisis. If she is unable to afford the transportation to attend her counselling appointments she will suffer greatly and this would be a step back in her treatment. It would also result in her accessing much more expensive crisis services like police, hospitals, and mental health residential services. Her attending her regular outreach counselling appointments is in line with developing long term health promotions and efficiency in health care services and provides better client focused health care. Finally, by not supporting this claim it creates a barrier to accessing services and is not in keeping with the new Ontario for Accessibilities Act [sic].

Appellant's Appeal Book, Tab 12: Letter from Clare Freeman, MSW (August 2, 2011), p. 22.

44. All of these characteristics of Ms. S.L.'s mental health therapy establish that her counselling qualifies as "medical treatment" for the purposes of the medical travel benefit.

45. Finally, interpreting "medical treatment" to include psychotherapy provided by mental health counsellors is consistent with the purpose of the *ODSPA*, which recognizes Ontario's obligation to provide supports to people with disabilities. 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.

46. The Commission for the Review of Social Assistance found that mental health issues account for a significant portion of the growth in ODSP applications. Approximately 60 percent of the ODSP applications granted in 2009-2010 involved a mental health issue. The Commission also recognized that there is a growing need for specialized supports for people with disabilities related to mental illness: "early supports can improve wellbeing and prevent social exclusion resulting from long absences from the labour force."

Commission for the Review of Social Assistance (2012), *Brighter Prospects: Transforming Social Assistance in Ontario*, pp. 47-48.

47. Clearly an interpretation of eligibility for the medical transportation benefit that allows people with disabilities to access treatments that ameliorate their disabilities and potentially support a return to the workforce is consistent with the purpose of the *ODSPA* to serve recipients

effectively. The Tribunal's interpretation would have the opposite effect: it would create significant barriers to accessing necessary medical interventions and aggravate the impact of mental health disabilities.

48. It is therefore respectfully submitted that the Tribunal erred in its statutory interpretation of "medical treatment" and incorrectly denied Ms. S.L. access to the travel benefit.

D. The Tribunal erred in concluding that Ms. S.L.'s reasonable travel costs are less than \$15 per month

49. The Tribunal concluded that Ms. S.L.'s travel costs were less than \$15 per month, and she was thus ineligible for the benefit. It is submitted that the Tribunal erred in two ways.

50. First, the Tribunal ignored relevant evidence and relied upon irrelevant evidence.

51. The Tribunal must be correct in both its interpretation of the law and in the manner in which it approaches the evidence. Indeed, as the Supreme Court has stated, there are a number of circumstances in which the "mishandling of evidence" may constitute errors of law:

- a. A finding of fact for which there is no evidence;
- b. An error in the legal effect of findings of fact;
- c. An assessment of the evidence based on a wrong legal principle;
- d. Failure to consider the evidence as a whole;
- e. Failure to consider relevant evidence;
- f. Ignoring relevant factors or relying on irrelevant factors.

g. Misapprehending the evidence in a way that amounts to a palpable and overriding error;

h. Failure to provide adequate reasons.

R. v. J.M.H., 2011 SCC 45 at paras. 24-32.

Siegel v. Ontario (Disability Support Program), 2011 ONSC 5916 (Div. Ct.) at para. 58.

52. The above approach to appeal jurisdiction is consistent with ODSP's remedial purpose. As both the Court of Appeal and this Honourable Court have noted, "the ODSPA is remedial legislation and a claimant is entitled to have his or her claim assessed on the basis of an accurate understanding of the crucial aspects of the evidence."

Siegel v. Ontario (Disability Support Program), 2011 ONSC 5916 at para. 58.

Ontario (Director, Disability Support Program) v. Crane 2006 CanLII 38348 (C.A.) at para. 36.

53. In the context of an appeal of a denial of the medical transportation benefit, this Court has granted an appeal where the Tribunal failed to reference uncontradicted evidence that was inconsistent with its factual findings:

The Tribunal member made no reference to the appellant's uncontradicted evidence that he had filed an MSN form in October 2007, and the member made no finding as to whether the Ministry had received a request for benefits in October 2007.

In the circumstances, it is unavailable for the Ministry to argue that the Tribunal implicitly rejected the appellant's evidence and found the form was not submitted.

In our view, the Tribunal erred in law in failing to address the appellant's evidence about the filing of the form in October 2007. On the uncontradicted evidence before the Tribunal, the appellant had provided the necessary information from his doctor to support his claim for medical transportation benefits in October 2007. Therefore, he was entitled to an allowance for such benefits.

Torok v. Ministry of Community and Social Services Director, 2011 ONSC 7308 at paras. 5-7.

54. The Tribunal made a similar error in this case. In its decision, the Tribunal states: “The Appellant is most frequently driven to appointments by a friend, whom she pays about \$10.00 per month, to reimburse him for gasoline expenses.” It is significant that the language used by the Tribunal in describing Ms. S.L.’s testimony was in the present tense. In other words, at the time of the hearing, she was paying her friend \$10 per month.

Appellant’s Appeal Book, Tab 2: Tribunal’s Reasons, p. 8.

55. The fact that Ms. S.L. was testifying about the amount she was paying at the time of the hearing is supported by the Tribunal’s own notes from the hearing: “Financial arrangements – She gives about 10.00 per month to cover travel costs – i.e. gas.”

Appellant’s Appeal Book, Tab 16: Record of Hearing, p. 38.

56. However, Ms. S.L.’s situation was quite different at the time of the hearing than it was when she originally submitted her application for the medical travel benefit. At the time of the hearing, she was only seeing one of therapist, and more significantly, she had lost access to the medical travel benefit. As a result, she could only pay what she could spare from all of her other daily needs and what her driver would agree to accept in the interim. Thus, her travel costs at the time of the hearing were not relevant to the question of whether the decision to deny her the medical travel benefit on June 1, 2011 was correct.

57. The Tribunal made no reference to the only relevant evidence of what her travel costs were at the time of her application, which was captured on her Tribunal Appeal Form:

As my counselling takes place in Hamilton and is a 36 km round trip each week, at the cost of \$0.18 per km the weekly total is \$6.48. Directive 9.12 points out that requests under \$15 per month will not be reviewed but this one weekly

appointment adds up to between \$25.92 and \$32.40 depending if I have 4 or 5 appointments in the month. I also see Dr. Hajcsar twice a month with the total mileage being 26 km (\$4.68) per month and my appointment to The Women's Centre of Hamilton with Interval House is 32 km every other month.

Appellant's Appeal Book, Tab 10: Appeal Form, p. 20.

58. For over two years prior to the new application, the Director had been providing Ms. S.L. with the medical travel benefit, having accepted that Ms. S.L.'s medical travel costs were both greater than \$15 per month and reasonable. However, the Tribunal made no reference to this uncontradicted evidence. As in *Torok*, the Director cannot assert that the Tribunal implicitly rejected the appellant's evidence. Rather, the Tribunal considered evidence from an irrelevant time period and ignored the only material evidence on the record: that her reasonable travel costs are \$0.18 per kilometre.

59. Secondly, the Tribunal erred in law by failing to consider Ms. S.L.'s statutory entitlement to "the cost of transportation that is reasonably required in any month for medical treatment."

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

60. A mileage rate of \$0.18 was established by provincial policy as compensation for the "the cost of transportation that is reasonably required" by those recipients who must travel by private vehicle. This rate, based on 2000 costs, is already well below the actual cost of travel, and well below mileage rates provided in other medical travel programs.¹ ODSP recipients are not

¹ The mileage rates found in the current ODSP Policy has not changed since 2000. The policy from that time states that the transportation assistance "is based on actual costs."

The Workplace Safety and Insurance Board covers the cost of attendance at health care appointments for special clinical investigations or examinations. The permitted mileage rate is 38¢ per kilometre.

Through the Medical Expenses Tax Credit, the federal government offers a tax break for taxpayers who use their private vehicle to travel more than 40 kilometres to receive medical services that are unavailable locally. Vehicle expenses include: Operating expenses such as fuel, oil, tires, license fees, insurance, maintenance, and

obligated to “cut deals” below even this low level, or arrange sub-standard transportation in order to minimize the cost of travel to medical appointments. They are entitled to travel in safety and dignity.

ODSP Directive 9.12: Mandatory Special Necessities (November 2011) at p. 4.

ODSP Policy Directive 0605-06 (December 1999).

Workplace Safety and Insurance Act, 1997, S.O. 1997, CHAPTER 16, Schedule A at s. 33.

WSIB Policy No. 17-01-09, “Policy: General: Table of Rates, Document Number: 18-01-05” (January 2, 2013).

WSIB Policy No. 17-01-09, “Travel and Related Expenses” (November 3, 2008).

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), ss. 118.2(2)(g), 118.2(4).

CRA, “Meal and Vehicle Rates used to calculate travel expenses for 2012 and previous years”.

Mullin v. R., [1999] 2 C.T.C. 2750 at para. 9.

61. A rate of \$10 per month for transportation to all of Ms. S.L.’s medical appointments does not represent the “cost of transportation that is reasonably required.” She is entitled to the same rate as other ODSP recipients.

62. It is submitted that the Tribunal erred in ruling that Ms. S.L.’s reasonable travel costs were less than \$15 per month.

PART V: ORDER SOUGHT

repairs; Ownership expenses such as depreciation, provincial tax, and finance charges. The tax credit compensates a taxpayer for their “reasonable” expenses. If the taxpayer elects to use the “detailed” method of claiming the credit they must submit detailed receipts. If they do so, they are compensated for their actual costs. If they elect to use the “simplified” method, they are compensated at a rate of 55¢ per kilometre in Ontario. The rate has increased periodically to account for rising costs, following a Tax Court of Canada ruling in 1999 in *Mullin*, that 16¢ per kilometre was not reasonable, as both ownership and operating costs should be considered when compensating for “reasonable” travel expenses.

63. 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 Ms. S.L.'s mental health therapy.

Date: February 15, 2013

Jackie Esmonde (LSUC 47793P)

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

B E T W E E N :

S. L.

**Appellant
(Appellant in appeal)**

and

DIRECTOR OF THE ONTARIO DISABILITY SUPPORT PROGRAM

**Respondent
(Respondent in appeal)**

CERTIFICATE

1. An order under subrule 61.09(2) is not required.
2. The Appellant estimates that 1.0 hours will be required for oral argument.

DATED THIS 15th day of February 2013

Jackie Esmonde

Income Security Advocacy Centre

425 Adelaide St. W., 5th Flr.

Toronto, ON M5V 3C1

Tel: 416-597-5820 (extension 5153)

Fax: 416-597-5821

Email: esmondja@lao.on.ca

Lawyer for the Appellant

SCHEDULE A: List of Authorities

1. *Ontario v. Favrod*, 2006 CanLII 4898 (ON S.C.D.C.).
2. ODSP Directive 9.12: Mandatory Special Necessities (November 2011).
3. 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).
4. *Ontario (Disability Support Program, Director) v. Billotte*, [2009] O.J. No. 1108 (Div. Ct.).
5. *Ontario v. Ansell*, 2011 ONCA 309.
6. Commission for the Review of Social Assistance (2012), *Brighter Prospects: Transforming Social Assistance in Ontario*, pp. 47-48.
7. *R. v. J.M.H.*, 2011 SCC 45.
8. *Siegel v. Ontario (Disability Support Program)*, 2011 ONSC 5916 (Div. Ct.).
9. *Ontario (Director, Disability Support Program) v. Crane*, 2006 CanLII 38348 (C.A.).
10. *Torok v. Ministry of Community and Social Services Director*, 2011 ONSC 7308.
11. ODSP Policy Directive 0605-06 (December 1999).
12. WSIB Policy No. 17-01-09, “Policy: General: Table of Rates, Document Number: 18-01-05” (January 2, 2013).
13. WSIB Policy No. 17-01-09, “Travel and Related Expenses” (November 3, 2008).
14. CRA, “Meal and Vehicle Rates used to calculate travel expenses for 2012 and previous years”.
15. *Mullin v. R.*, [1999] 2 C.T.C. 2750.

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 ...

Workplace Safety and Insurance Act, 1997, S.O. 1997, CHAPTER 16, Schedule A.

33. (1) A worker who sustains an injury is entitled to such health care as may be necessary, appropriate and sufficient as a result of the injury and is entitled to make the initial choice of health professional for the purposes of this section.

Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.

118.2(2) For the purposes of subsection 118.2(1), a medical expense of an individual is an amount paid

...

(g) to a person engaged in the business of providing transportation services, to the extent that the payment is made for the transportation of

- o (i) the patient, and
- o (ii) one individual who accompanied the patient, where the patient was, and has been certified by a medical practitioner to be, incapable of travelling without the assistance of an attendant

from the locality where the patient dwells to a place, not less than 40 kilometres from that locality, where medical services are normally provided, or from that place to that locality, if

- o (iii) substantially equivalent medical services are not available in that locality,
- o (iv) the route travelled by the patient is, having regard to the circumstances, a reasonably direct route, and
- o (v) the patient travels to that place to obtain medical services for himself or herself and it is reasonable, having regard to the circumstances, for the patient to travel to that place to obtain those services;

118.2(4) Where, in circumstances in which a person engaged in the business of providing transportation services is not readily available, an individual makes use of a vehicle for a purpose described in paragraph 118.2(2)(g), the individual or the individual's legal representative shall be deemed to have paid to a person engaged in the business of providing transportation services, in respect of the operation of the vehicle, such amount as is reasonable in the circumstances.