

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

DIRECTOR, ONTARIO DISABILITY SUPPORT PROGRAM

Appellant

- and -

**ROBERT TRANCHEMONTAGNE and
NORMAN WERBESKI**

Respondents

-and-

**ONTARIO HUMAN RIGHTS COMMISSION
THE EMPOWERMENT COUNCIL
INCOME SECURITY ADVOCACY CENTRE
DUFFERIN-PEEL CATHOLIC DISTRICT SCHOOL BOARD
ONTARIO ENGLISH CATHOLIC TEACHERS ASSOCIATION**

Intervenors

FACTUM OF THE INTERVENOR

THE EMPOWERMENT COUNCIL

January 29, 2010

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Part I. - Overview

1. This is a case about people who are disabled by addictions and who live in grinding poverty; who are among the most vulnerable and marginalized; who are in dire financial straights because they are unable to work as a result of their disability and who, because of the nature of their disability face discrimination in all aspects of their life. These same people have also been told they are not eligible for the Ontario Disability Support Program (ODSP), which Minister Ecker described as providing “opportunities for real and positive change in the lives of people with disabilities in Ontario”.

2. This Court must consider these people, who have been excluded from ODSP, in their socio-political and legal context in order to decide whether the Ontario Government has discriminated against them.

3. The Empowerment Council is a provincial organization in Ontario that is composed of, and advocates on behalf of, people living with mental health and addictions disabilities. Because of its composition and mandate, the Empowerment Council understands the realities faced daily by persons with these disabilities and the impact on them when they are denied the Ontario Disability Support Program benefits that are available to other people with disabilities.

Part II. – Facts

4. The Empowerment Council takes no position on the facts.

Part III. – Issues

5. The Empowerment Council submits that the analysis of discrimination must include an understanding of the social context of individuals whose sole disability is addiction. To fully appreciate the discriminatory impact of s. 5(2) of the ODSP, the Court must consider the following:

- A. disability as a Social Concept
- B. what is an addiction disability;
- C. attitudinal discrimination;
- D. ODSP and OW – income discrimination
- E. employment supports and discrimination
- F. mandatory treatment
- G. social discrimination

Part IV - Legal Argument

A. Disability as a Social Concept

When examining the issue of discrimination on the basis of disability, the Supreme Court has considered disability as a social concept, taking into account the social, economic, political and legal context of the person with a disability.

In *Granovsky*, the Supreme Court undertook its first post Law analysis of disability under s. 15(1) of the *Canadian Charter of Rights and Freedoms*. The Court stated:

"many of the difficulties confronting persons with disabilities in everyday life do not flow ineluctably from the individual's condition at all but are located in the problematic response of society to that condition. A proper analysis necessitates unbundling the impairment from the reaction of society to the impairment, and a recognition that much discrimination is socially constructed... Exclusion and marginalization are generally not created by the individual with disabilities but are created by the economic and social environment and, unfortunately, by the state itself".

Granovsky v. Canada (Minister of Employment and Immigration), [2000] 1 S.C.R. 703, 2000 SCC 28 Empowerment Council Book of Authorities Tab 1, paras. 29-30..

Understanding the context in which persons with addiction disabilities live is therefore an essential part in understanding the discrimination they face.

The Empowerment Council will argue that persons with an addiction disability face attitudinal, economic, employment and social discrimination.

The Supreme Court has also endorsed the individualized approach to the analysis of discrimination:

In the context of the Act, and given the nature of [addiction], this differential treatment is discriminatory. It is discriminatory because it does not correspond to the actual needs and circumstances of [persons with addiction disabilities], who are deprived of any individual assessment of their needs and circumstances... the denial of the reality of the pain suffered by the affected workers reinforces widespread negative assumptions held by employers, compensation officials and some members of the medical profession, and demeans the essential human dignity of [persons with addiction disabilities].

Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur, 2003 SCC 54, [2003] 2 S.C.R. 504 Respondent's Book of Authorities Tab 16, para. 5.

While it may not be possible for government to tailor legislation to every single individual's unique situation, neither can it exclude an entire group of people with a particular disability holus bolus from the operation of a piece of legislation that applies to every other person with a disability. To do so is to invite a charge of discrimination.

Gallier v. The Director of the Ontario Disability Support Program Empowerment Council Book of Authorities Tab 2, para 12.
Respondents' Book of Authorities Tab 16 at para 5
Appellant's Factum paras 48 - 49

B. What is an Addiction Disability

There is no dispute that addiction is a disability.

Appellant's Factum para 19

Entrop v. Imperial Oil (2001), 50 O.R. (3d) 18 (C.A.), Respondents' Book of Authorities Tab 10, para. 89

Dr. Selby describes addiction as “a primary, chronic, neurobiological disease with genetic, psychosocial, and environmental factors influencing its development and manifestations.”

Dr. Peter Selby affidavit, Respondents' Compendium Tab 7-A, para. 9

The medical view of addictions has evolved since the Temperance movement: alcoholism is considered to be a disease, not a reflection of someone's flawed moral character. Nevertheless, some people still view addicts as lazy, undeserving or responsible for their disability.

World Health Organization Report “Neuroscience of Psychoactive Substance Use”, Empowerment Council Factum Tab 1, p. 248

Dr. Selby Affidavit, Empowerment Council Factum Tab 2 paras. 84, 85

Not everyone who consumes a substance will become addicted. Addiction, like many other disabilities, exists on a continuum. Indeed, only a small minority of those who are substance users will at some point in their lives be far enough along the continuum to meet the criteria for a disease.

Dr. Selby Affidavit, *supra* para.13 , 33 and 49.

Dr. Patricia Erickson Affidavit, Empowerment Council Factum Tab 3 para. 4

There is no doubt that addiction, understood as a chronic, relapsing condition, can, where sufficiently serious, be a disability that meets the medical eligibility criteria in s. 4(1) of the *ODSPA*. Indeed this Court has said:

the current definition of “person with a disability” in the *ODSPA* was intended to encompass a broader segment of society and to provide benefits to persons with *significant* but not *severe* long-term functional barriers.

Gray v. Director of the Ontario Disability Support Program 59 O.R. (3d) 364, Empowerment Council’s Book of Authorities Tab 3, para 15
Appellant’s Factum, paras. 7, 8, 18(a), 18(b)
ODSPA s. 4(1), Respondents’ Factum Schedule “B”, p. 18
Dr. Erickson *supra*, para. 15

Under ODSP there are also periodic medical reviews, which would identify people whose addiction no longer meets the eligibility criteria. People with addictions are not necessarily on ODSP for life.

. **Attitudinal Discrimination**

Stigma, which refers to shame or disgrace attached to something regarded as socially unacceptable, is a way for society to “blame the victim”. The behaviour causing such a response in the victim is discrimination. Stigma imposes individual responsibility, rather than characterizing societal attitudes as discriminatory, thereby avoiding a breach or a potential breach of the Code.

Liz Sayce “Stigma, discrimination and social exclusion: What’s in a word? *Journal of Mental Health* (1998); 7, 4, Research Library, Empowerment Council’s Factum Tab 4, p. 331

The Director views people with addictions as totally in control of their disability. If they stopped drinking or using substances, they would not face barriers to employment or other activities of daily living. They are weak characters who are undeserving of society’s help.

Dr. Erickson Affidavit, *supra*, para. 6
Dr. Philip Berger, Empowerment Council Factum Tab 5 para. 37

Even the language the Director uses to describe people whose disability is an addiction, the “sole impairment group”, denies them the recognition that they are people with disabilities.

Appellant’s Factum paras. 18, 35, 56-59, 61-65

People with addictions who are also poor face intersectional discrimination. It has been recognized that those in receipt of welfare, as opposed to disability benefits, encounter more discriminatory attitudes. People on welfare are seen as lazy people who are simply looking for a hand-out. Receiving ODSP removes this social barrier as they now become part of those in society who are deserving of assistance.

Annette Keogh Affidavit , Empowerment Council's Factum Tab 6 para 21

Divisional Court Decision, ABC Tab 4, paras 49, 80, 81

Dr. Jacyk, cross examination, Respondent's Compendium, Tab 5-D pp. 1349-1353, q. 827-842

For people with addiction disabilities, one of the greatest barriers to reintegration into society are the attitudinal barriers created by society – recovering addicts are viewed suspiciously because at any moment they could relapse, creating problems in housing, becoming violent, engaging in criminal behaviour to get their next “fix”.

Dr. Erickson Affidavit, *supra*, para. 16

The Director argues that putting people with an addiction disability onto ODSP will promote a “spirit of infirmity”. This phrase is only used for poor people with an addiction. This label reminds us why the government removed the “permanently unemployable” category from the *ODSPA*: People with disabilities told the government that they want to work and that the label was hurtful and wrong. Why is it acceptable to now label people with addiction disabilities as the only group who does not want to work? This is yet another example of discrimination based on stereotype.

Appellant's Factum para 20.

The Director argues that if people with addictions are given a higher income under ODSP they will spend it on a substance. This argument is based on stereotype and a deep misunderstanding of both addiction and poverty. It is more likely that additional money would be spent on food and shelter or other things to stabilize one's life.

Dr. William Jacyk cross-exam., Empowerment Council Factum Tab 7, pp. 1346-1347, q 813-817.
Dr. Gerry Cooper direct exam., Empowerment Council Factum Tab 8, pp. 268-269
Dr. Berger Affidavit, *supra*, para. 18, 21

Finally, not all people with addictions are treated equally. Even within the group of people whose sole disability is addiction, some are eligible for or in receipt of, ODSP: those who were “grand parented” from the former *Family Benefits Act*; those in receipt of Canada Pension Plan Disability Benefits who become a “prescribed class”; those with “concurrent disorders” despite whether their other condition was caused by alcohol or not; and those who are addicted to substances that are prescribed. No “blame” is attached to them

SBT Decision , ABC Tab 6 pp. 21-22.

Despite all of this, people with addictions are still excluded from ODSP even though they meet the criteria under s. 4(1) of the *ODSPA*. Although the Director states that OW is a “better fit”, it is clear that some of the stereotypes underlying addiction played a role in the creation of s. 5(2) of the *ODSPA*. Otherwise, people with addictions would be treated in the same manner as people with other disabilities. For example, we do not refuse ODSP to smokers who have Chronic Obstructive Pulmonary Disease. We do not force these people into mandatory treatment programs. But we do tell people with addictions that they are not disabled and that they must seek mandatory treatment for their disability. The exclusion of

people with addiction disabilities is obviously discriminatory – some disabilities are deserving of recognition but theirs is not.

. **The Two Programs: ODSP and OW**

The expressed purpose of the ODSPA reflects a social context analysis of disability. The ODSPA recognizes that because of barriers, people with disabilities require income, employment supports and social supports. It also recognizes that "government, communities, families and individuals share responsibility for providing such supports".

ODSPA Section 1 Respondent's Factum Tab B p. 18
Tranchemontagne v. Ontario (Director, Disability Support Program), [2006] 1 S.C.R. 513
Respondent's Book of Authorities Tab 22 at paragraph 3.

On the other hand, the OWA is a program designed to provide "temporary financial assistance", the fastest route to employment and to recognize the "individual's responsibility" for their financial situation.

OWA section 1 Respondent's Factum Tab B p. 48
Hansard, McMullin Affidavit, Ex. 1, Respondent's Compendium, Tab 1-B, p.1758
Tranchemontagne supra para 3.

The income supports under ODSP are much higher than under OW. At the time that Messrs. Werbeski and Tranchemontagne were denied benefits, the income and shelter amount under ODSP totaled \$959.00 for a single person, while under OW it is only \$536.00. In addition, under ODSP, a recipient could have:

- an asset level of up to \$4,000.00, while an OW recipient must deplete their assets and can only have a total of \$536.00 in savings.
- ODSP recipients receive dental, vision and hearing care. OW recipients did not.

- an ODSP recipient may receive gifts of up to \$4,000.00 in any 12 month period. OW recipients cannot
- an ODSP recipient can receive an inheritance up to \$100,000.00 and can use this money for disability related expenses. This benefit is not available to OW recipients.

There are a myriad of ways in which ODSP income support and benefits are better than OW benefits.

ODSPR Sections 28(1)19 and 20, 28(3), 43(1); 43(4),(5) and (6) , 44 (1).

Having less money will have a cascading effect on other areas of life such as housing, food security, transportation, childcare and other basic necessities of life.

By arguing that people whose disability is caused solely by an addiction are better served under the OWA, the Director is promoting and reinforcing the stereotypical attitudes that they are lazy, irresponsible people who are the authors of their own misfortune; they are not deserving of the income support and safety net in the program designed for other persons with disabilities. This is discrimination.

. ODSP Employment Supports Meet the Needs of People with Disabilities

An examination of the differences between employment supports offered under the ODSP and those under the OW program serves to reinforce the distinct purposes of the two programs.

The preamble to Employment Supports ODSP Policy states:

The Employment Supports component of the [ODSP] was implemented in January 1999 in order to provide goods and/or services to remove disability-related barriers to competitive employment and assist people with disabilities to prepare for, obtain and maintain competitive employment.

The type of Employment Supports offered under ODSP are intended to meet individual needs, and are tailored to individual circumstances, in order to assist in the removal of barriers to employment. These include: the provision of assistive devices; the services of a job coach; modified workplaces; employment or self-employment planning assistance, preparation and training; and on the job training.

As a condition of eligibility for financial assistance under OW, recipients are required to agree to the terms of a participation agreement [PA] which outlines the activities the person will undertake in order to find employment. These include: resume writing tips; referrals to education or training programs; access to telephones, faxes, computers and job banks. These services are not designed to remove barriers to employment. Moreover, failure to fulfill the requirements of the PA will result in a suspension of financial assistance.

Ontario Works Policy Directive 2.5 Participation Requirements, Empowerment Council's Factum,
Tab 10

Ontario Works Policy Directive 7.4 Employment and Participation Benefits, Empowerment
Council's Book of Authorities, Tab 11

In many circumstances, due to the relapsing and recurring nature of an addiction disability, there will likely be a substantial impact on people's ability to continue to function in a workplace and meet the demands of regular full-time employment.

Dr. Selby Affidavit *supra*, para. 18
Dr. Erickson Affidavit, *supra*, paras. 16, 21
Dr. Berger Affidavit, *supra*, para. 8
Dr. Cooper direct exam., *supra*, p. 270

At the time of the Director's decision if an OW recipient were fired from or quit employment, they faced the "quit/fire" rule, which denies benefits in their entirety to people who quit or were fired from employment without just cause for up to six months. For a person receiving ODSP, however, the response would be rapid re-intstatement of benefits.

Section of old OWA Empowerment Council Factum Tab 11

It must also be recognized that people whose disability is caused by an addiction, like others with disabilities, may require on going support and services after they have gained control of their addiction and secured employment. Such on-going supports are only available through the ODSP Employment Support Program.

SBT Decision , ABC Tab 6 p. 15
World Health Organization Report "Neuroscience of Psychoactive Substance Use", supra
ODSP Employment Supports Directive 1.1 Introduction to ODSP Employment Supports,
September 2006, Empowerment Council Factum Tab 12

Despite this, the Director maintains that OW is a "better fit". It is in no way "beneficial" to a person with a disability to force them into a program with no access to supports that could assist in removing the barriers to employment and then to deny them any further assistance should they fail to meet the requirements of their PA or should they fail to maintain their employment as a result of their disability. This is clearly discrimination.

E. Mandatory Treatment

The Employment Council argues that addiction treatment should be included as an employment support under ODSP as these supports would recognize the nature of the disability as chronic, long term, relapsing, in need of individualized support to properly remove the barriers to employment.

At the time that the OWA and ODSPA were enacted, there were no addiction treatment programs available through the OW employment assistance activities and it is clear that the Minister did not intend to include addiction treatment in the activities covered by OW. In fact, the Minister said that addiction treatment would continue to be covered by the Ministry of Health.

Hansard, McMullin Affidavit, Ex. 1, Respondent's Compendium, Tab 1-B

In 2002-3 the Ministry introduced the Addiction Services Initiative (ASI), as a pilot project with four municipalities under OW. The Ministry again failed to acknowledge that an addiction can be a disability that requires proper support for barrier removal. OW's purpose is to get people back into the workforce by the fastest route possible. This ignores the long-term nature of recovery. Even Dr. Jacyk admits that a simple solution does not always work in cases of addiction disability. Even he admits that some addictions can never be cured.

Annette Keogh affidavit, Empowerment Council's Factum Tab 6, para. 4.
The Mike Harris Government Five-Point Action, Empowerment Council's Factum Tab 13
Treatment Implementation Guidelines Empowerment Council's Factum Tab 14 p.10
Dr. Jacyk Affidavit, Respondents' Compendium Tab 5-A, para. 12

Because ASI is part of the mandatory OW participation activities, the Director is again reinforcing the stereotype that these individuals can work if they would take responsibility and stop using the substance. The barrier to employment will end.

The evidence of most of the experts is that there needs to be different approaches and flexibility to treatment of this disability. For those whose addiction is substantial, treatment is most difficult. Mandatory treatment cannot work for everyone.

Dr. Berger Affidavit, *supra*, para. 29
Treatment Implementation Guidelines *supra*, pp. 13 -16

For those who have addictions that substantially impact their lives and who already live in poverty, the threat of loss of OW income creates little motivation to participate in treatment. Furthermore, removing even the minimal amount of income for this failure has devastating effects. If they are no longer able to pay for any food or shelter, their consumption may increase and they may begin to engage in dangerous activities to support the addiction and may begin to consume ever more harmful substances. It is punitive and discriminatory to create a situation where failing in the OW program could lead to secondary mental health and physical problems which could then make someone eligible for ODSP because they develop a “concurrent” disorder as a result of the stress of having no income at all.

Dr. Selby Affidavit *supra*, para. 33
Dr. Berger Affidavit, *supra*, paras. 18, 20, 26
Dr. Jacyk Affidavit, Respondents’ Compendium Tab 6-A, para. 14
Dr. Cooper direct exam., *supra*, p. 269
Dr. Erickson Affidavit, *supra* para. 34

F. ODSP Provides Social Supports to Meet the Needs of People with Disabilities

Good health is no longer viewed as simply being well, and free from disease or illness. Good health has been expanded to take into account a myriad of social factors and life circumstances that have an impact on people's health. These are called the "social determinants of health", explained by the World Health Organization as follows:

"Poor social and economic circumstances affect health throughout life. People further down the social ladder usually run at least twice the risk of serious illness and premature death than those near the top ... Disadvantage has many forms ... It can include having few family assets, having a poorer education during adolescence, having insecure employment, becoming stuck in a hazardous or dead-end job, living in poor housing, trying to bring up a family in difficult circumstances and living on an inadequate retirement pension... Poverty and social exclusion increase the risks of divorce and separation, disability, illness, addiction and social isolation and vice-versa, forming vicious circles that deepen the predicament that people face.

2003 World Health Organization Report entitled "Social Determinants of Health: the Solid Facts" Empowerment Council's Book of Authorities, Tab 15 page 10

ODSP provides social supports including childcare, transportation, tailored employment supports, adequate finances, food security and housing. People in receipt of ODSP are more likely to enter into treatment and have a higher chance of recovery than those whose social determinants of health are compromised. This is true of all people who have chronic disabilities. It makes common sense – it is difficult to think of treatment when you are living on the margins.

Dr. Selby Affidavit, *supra*, paras. 26-28
Dr. Berger Affidavit, *supra*, paras. 21-24
Dr. Erickson, *supra*, paras. 37, 41, 42

Conclusion

The only real explanation for the section 5(2) exclusion from ODSP benefits is a deep set discriminatory attitudes towards persons with addiction disabilities. It is based on the stereotypes associated with addiction. It this Court engages in an analysis that looks at the

realities of life for Mr. Werbeski and Mr. Tranchemontagne and treats them as individuals, it can reach no other conclusion that section 5(2) discriminates against them.

PART – ORDER REQUESTED

The Empowerment Council Requests that the Order of the Divisional Court be upheld and the decision of the Social Benefits Tribunal maintained.

January 29, 2010

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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