

1999

Ontario Disability Support Program: Policy and Implementation

Harry Beatty

Follow this and additional works at: <https://digitalcommons.osgoode.yorku.ca/jlsp>

Citation Information

Beatty, Harry. "Ontario Disability Support Program: Policy and Implementation." *Journal of Law and Social Policy* 14. (1999): 1-68.
<https://digitalcommons.osgoode.yorku.ca/jlsp/vol14/iss1/2>

This Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Journal of Law and Social Policy by an authorized editor of Osgoode Digital Commons.

ONTARIO DISABILITY SUPPORT PROGRAM: POLICY AND IMPLEMENTATION

HARRY BEATTY*

RÉSUMÉ

La Loi de 1997 sur la réforme de l'aide sociale constitue le premier changement important aux lois sur l'aide sociale en Ontario depuis les années soixante. Cette loi remplace la Loi sur les prestations familiales, la Loi sur l'aide sociale générale et la Loi sur les services de réadaptation professionnelle par la Loi de 1997 sur le Programme ontarien de soutien aux personnes handicapées et la Loi sur le programme Ontario au travail. Dans cet article, l'auteur présente une analyse préliminaire des politiques et de la mise en oeuvre du Programme ontarien de soutien aux personnes handicapées qui a été présenté en juin 1998. En analysant ce programme, l'auteur le compare à l'ancien Programme de prestations familiales de même qu'à d'autres régimes d'aide sociale spécifiquement à l'intention des personnes handicapées dans d'autres provinces canadiennes. L'auteur affirme que le gouvernement progressiste conservateur de l'Ontario poursuivait deux objectifs fondamentaux mais concurrents dans l'élaboration de ce nouveau programme. D'un côté, en apportant certains changements à l'ancien Programme de prestations familiales, le gouvernement tentait de créer un programme modèle pour ce secteur de la société qui reçoit un appui considérable du public : la communauté des personnes handicapées. D'un autre côté, en durcissant l'administration et les mécanismes d'application, le gouvernement tentait de mettre en application de manière plus stricte le régime d'aide sociale. Les objectifs étant multiples, le Programme a manqué de cohérence et s'est avéré difficile à mettre en oeuvre. L'auteur en arrive à la conclusion que le nouveau Programme a créé des gagnants et des perdants au sein de la communauté des personnes handicapées. Les gagnants ont tendance à provenir d'une partie de la communauté qui bénéficie le plus de soutien familial et de ressources financières tandis que les perdants comptent parmi les membres plus défavorisés de la communauté qui ne jouissent pas de ces soutiens.

* Harry Beatty is a staff lawyer at ARCH: A Legal Resource Centre for Persons with Disabilities. ARCH, based in Toronto, is part of Ontario's community legal clinic system. Much of the research on which this article is based was conducted in 1998 on behalf of the Council of Canadians with Disabilities as part of their "Disability Income, Supports and Services" project funded by Human Resources Development Canada and during a sabbatical leave supported by ARCH. The author gratefully acknowledges this support. However, he is solely responsible for the content of this article, including the opinions expressed and any errors or omissions.

“Another important step in welfare reform will be to move 170,000 of our citizens — seniors and the disabled — out of the ‘welfare system’ altogether. They should never have been there in the first place.

We will establish a new and separate income supplement program, specifically for those unable to work. Funding for this program will be guaranteed at current levels. Aid for seniors and the disabled will *not* be cut.”

— *The Common Sense Revolution*¹

A. INTRODUCTION: THE POLICY BACKGROUND TO THE ONTARIO DISABILITY SUPPORT PROGRAM

The Government of Ontario implemented two new major social assistance programs, Ontario Works and the Ontario Disability Support Program in May and June 1998.² These new programs replaced the previous Family Benefits, General Welfare Assistance and Vocational Rehabilitation Services programs, which had been in effect for over thirty years.³

As the quotation which introduces this article indicates, the ODSP reflects a clear policy decision by the Government of Ontario to create a separate social assistance program for persons with disabilities (and a limited category of seniors). The development of this separate program may be seen as an attempt by the Government to pursue two fundamental, yet competing, objectives.

On the one hand, the Government presents the ODSP as a “model” disability program. In a speech on June 5, 1997, announcing details of the ODSP just one week before the legislation was to be introduced into the Ontario Legislature, the Minister of Community and Social Services, the Honourable Janet Ecker, described the ODSP as a response to the concerns and needs of persons with disabilities.⁴ Minister Ecker portrayed the ODSP as a program which would protect the benefits which persons with disabilities had received under FB, while supporting them in becoming indepen-

-
1. Progressive Conservative Party of Ontario, *The Common Sense Revolution* (Toronto: Progressive Conservative Party of Ontario, 3 May 1994) at 10.
 2. Ontario Works came into effect on May 1, 1998 and the Ontario Disability Support Program on June 1, 1998. See *Ontario Works Act, 1997*, S.O. 1997, c.25, Sch.A; *Ontario Disability Support Program Act, 1997*, S.O. 1997, c.25, Sch.B. Hereinafter, the statutes are referred to as OWA and ODSPA, and the programs are referred to as OW and ODSP.
 3. See *Family Benefits Act*, R.S.O. 1990, c.F.2, as am., as rep. by *Social Assistance Reform Act, 1997*, S.O. 1997, c.25, s.4(1) [hereinafter SARA]; *General Welfare Assistance Act*, R.S.O. 1990, c.G.6, as am., as rep. by SARA, s.4(2); *Vocational Rehabilitation Services Act*, R.S.O. 1990, c.V.5, as rep. by SARA, s.4(3). Hereinafter, the statutes are referred to as FBA, GWAA and VRSA, and the programs are referred to as FB, GWA and VRS. The disability component of FB was sometimes called Guaranteed Annual Income for the Disabled or GAINS-D, although this term did not actually occur in the FBA.
 4. Hon. J. Ecker, “Notes for Remarks at Goodwill: Ontario Disability Support Program” (5 June 1997). Hereinafter, the Ministry of Community and Social Services is referred to as MCSS.

dent and obtaining employment. She went on to describe ways in which the ODSP would contain rules more favourable to persons with disabilities than the FB rules.

By improving ODSP over the provisions of the former FB system which applied to persons with disabilities, the Government's intent was to get the approval of a community which commands considerable public support. Opinion polls consistently show that persons with disabilities have more support with respect to their issues than do other disadvantaged groups.⁵ While this support is still often based on outmoded attitudes towards persons with disabilities, such as charity or pity, rather than on a respect for their capacity to achieve independence and an equal place in society, there is nevertheless a general public perception that persons with disabilities constitute the "deserving poor".

In seeking support for the ODSP, the Government paid particular attention to the concerns of middle- and upper-class parents of persons with disabilities. Traditionally, this group has played a prominent role in large and influential disability organizations. When Minister Ecker announced the ODSP in her June 5, 1997 speech, her Ministry released detailed background information as well.⁶ Significantly, a major section of this information was entitled "Partnership with Families" and set out proposed ODSP rules to make it much easier for families to provide support to their adult sons and daughters without adversely affecting their social assistance entitlement.⁷ Many of the significant improvements in ODSP, as compared with FB, were directed towards those with families both willing and with the financial means to provide "extra" support to them.

While the Government portrayed ODSP as a response to the concerns of people with disabilities in Ontario, a significant number of its provisions addressed another concern: that the program be strictly enforced in order to ensure that people do not receive ODSP unless they can clearly establish their eligibility. Like Ontario Works, ODSP contains a wide range of rigorous provisions relating to administration and enforcement.⁸ Unlike OW, however, these provisions were not emphasized by the Government in its public presentation of ODSP. For example, Minister Ecker's speech announcing the ODSP and the background materials released at the same time did not make specific reference to the enforcement provisions at all.⁹

The Progressive Conservative Party, elected as the Government of Ontario in 1995, had run on a platform of "getting tough" with welfare recipients.¹⁰ It proposed a major

5. See, for example, Louis Harris and Associates Inc., *Public Attitudes Toward People with Disabilities (Study No. 912028)* (New York: May-June 1991). This was a large-scale American study of public opinion in this area. There is no reason to believe that the results would be much different in Canada.

6. Ontario, Ministry of Community and Social Services, *Background: Ontario Disability Support Program (ODSP)* (5 June 1997).

7. For details, see Section F, *infra*.

8. These administration and enforcement provisions are discussed in Section I, *infra*.

9. See *supra* note 4; *supra* note 6.

cut in welfare rates, and in fact the new Government enacted a 21.6% decrease in monthly benefits for all categories of recipients except persons with disabilities (and some seniors) shortly after coming into power. Through Ontario Works, the Government brought workfare to Ontario.¹¹

As the *Common Sense Revolution* document indicates, from the beginning of its development of new social assistance legislation and welfare reform, the Government understood that these new, more restrictive policies would not be acceptable to the public unless persons with disabilities (and, to a lesser extent, seniors) were exempted. Creation of a separate social assistance program for this “deserving poor” group was part of a larger strategy to enforce cutbacks and restrictive rules on other “less deserving” groups. People with disabilities (and a limited class of seniors) would be taken out of “welfare” so that welfare could be cut.

Because its strategy was to portray ODSP in a very positive light, Government spokespersons did **not** emphasize the enforcement provisions in the program. They most definitely **did** emphasize the enforcement provisions in OW. Yet, in many cases, they were the same or virtually the same provisions. In **creating** ODSP, the Government held fast to its philosophy that there was “too much fraud” and “too many overpayments”. Accordingly ODSP, like OW, contains provisions authorizing in-depth review of files, fingerscanning, extensive investigation powers for Ministry officials and sharing of information with other governments. However, in **promoting** ODSP, the Government downplayed the enforcement provisions, while with OW the enforcement provisions were highlighted.

In the analysis of ODSP which follows, we shall return to the interplay of these two competing objectives, the “model program” objective and the “strict enforcement” objective. We shall see that there are significant improvements in ODSP over the FB and VRS programs which it replaced for persons with disabilities. We shall also see, however, important components of ODSP which reflect the same restrictive attitudes and approaches which underlie OW. The result is a system which lacks internal coherence with respect to objectives and policy directions and which has predictably proven difficult for the Government to implement. The outcomes of ODSP for Ontarians with disabilities have consequently been “mixed”. There are many thousands of (actual and potential) “winners”, but also many thousands of (actual and potential) “losers” within ODSP. As already noted, the “winners” will tend to be those with strong family supports and other personal resources, while the “losers” will come from those who lack these advantages.

10. The Progressive Conservative Party’s campaign document *The Common Sense Revolution*, *supra* note 1, proposed a reduction in welfare rates, the introduction of “workfare” and “learnfare” and the elimination of fraud and overpayments.

11. For a detailed discussion of OW and the Government’s general welfare policy, see I. Morrison, “Ontario Works: A Preliminary Assessment” (1998) 13 *J.L. & Social Pol’y* 1.

The identification and analysis of the impact of ODSP on applicants and recipients with disabilities is the main focus of this paper. There will be brief comparisons of ODSP with the other two established “separate” disability social assistance programs in Canada, Alberta’s “AISH” and British Columbia’s “BC Benefits”. The paper will also evaluate the ODSP and suggest proposals for reform. However it should be kept in mind that the program has been in place for less than a year (as of the date of writing). Accordingly, the evaluation and reform proposals in this paper are preliminary and tentative in nature.

B. DEVELOPMENT OF THE ONTARIO DISABILITY SUPPORT PROGRAM

1. *Initial statement of the Government’s approach*

The development of a separate social assistance program for persons with disabilities apparently began shortly after the election of the new Ontario government in June 1995.

The provincial Minister of Community and Social Services at the time, the Honourable David Tsubouchi, made a number of statements about the definition of ‘disability’,” in the Ontario Legislature during the fall of 1995. These statements caused concern in that they appeared to indicate that a more restrictive definition of “disability” than had been used under FB¹² was being considered for the new disability social assistance program.¹³ In speaking of his Ministry’s approach to the issue, for example, Minister Tsubouchi stated, “We’ve clearly gone to a medical definition of ‘disability’,”¹⁴ which appears to exclude social and economic factors in making determinations. Shortly thereafter, Opposition member Dominic Agostino alleged in the Legislature that MCSS officials had stated that 80% of persons with disabilities receiving FB would become ineligible under the new definition.¹⁵ The Minister responded that no decision had been made as yet, but he went on to say that the new program would be for the “truly disabled”.¹⁶

Individuals with disabilities and their organizations were greatly concerned that the definition of “disability” would be much narrower in the new program than under FB, a concern that was to remain in the forefront during the development of the new legislation. They were not much reassured when it was discovered that, on September 28th, 1995, the Ministry had included in a package of regulation changes an amend-

12. As will be discussed in Section D, *infra*, under FB there were really three definitions related to disability: “blind”, “disabled” and “permanently unemployable”. All qualified the individual for the same level of benefits. In this article, when reference is made to persons with disabilities receiving FB, those qualifying under all three categories are included unless otherwise stated.

13. Sometimes it was unclear from the context whether the Minister was discussing a re-definition of “disability” within the existing FB program or a proposed definition under a new program.

14. Ontario, Legislative Assembly, *Debates* (2 October 1995) at 41.

15. Ontario, Legislative Assembly, *Debates* (10 October 1995) at 173.

16. *Ibid.*

ment which would remove persons assessed as “permanently unemployable” from FB altogether. The Honourable Mr. Tsubouchi responded in the Legislature that this was an unintended “drafting error” and that there was never any plan to narrow eligibility in this way.¹⁷ It appeared clear, however, that for the “drafting error” to occur this proposal must have at least been under consideration by the Ministry at some stage.

2. *The consultation process*

By early 1996, Ministry of Community and Social Services officials were ready to hold preliminary meetings with representatives of disability organizations and other community organizations who would be interested in the new program. Meetings were held with two groups of organizations. One group was generally representative of larger disability organizations involved in service delivery. The other group was generally representative of consumer and advocacy groups.¹⁸

These preliminary meetings were described by the Ministry officials presiding as an opportunity for those attending to state what they would like to see in the new program. The officials prepared overheads for the meetings but these were more or less a list of issues, rather than proposals, and participants were not given any printed materials to take away. MCSS staff were careful to make no commitments or definite statements regarding what would be in the new program.

One suggestion raised by MCSS officials, however, was of particular concern to many participants. Those attending were asked whether the *Canada Pension Plan*¹⁹ definition of “disabled” would be an appropriate model for a disability definition in the new program. The *CPP* definition requires that the disability be “severe” and “prolonged”.²⁰ The apparent proposal by MCSS that the new program be restricted to those with severe disabilities gave rise again to concerns that many thousands of people who were on Family Benefits as “disabled” and especially as “permanently unemployable” would not qualify for the new program. Ministry officials, however, emphasized that no decision had been made as yet regarding the definition and this was confirmed by Minister Tsubouchi in the Legislature.²¹

These concerns were renewed when the second round of consultation meetings with disability organizations occurred in October 1996. At these meetings, Ministry officials now presented their proposals for a new disability-specific social assistance program, although it was emphasized that these were *staff* proposals and were not

17. Ontario, Legislative Assembly, *Debates* (16 October 1995) at 253.

18. These meetings were attended by the author.

19. *Canada Pension Plan*, R.S.C. 1985, c.C-8 [hereinafter *CPP*].

20. The *CPP*, *Ibid.*, s.42(2)(i), provides that “a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation”. Subsection 42(2)(ii) provides that “a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death”.

21. Ontario, Legislative Assembly, *Debates* (2 April 1996) at 2032.

necessarily endorsed by the Government. Participants were once again not given the proposals in writing to take away with them.

In these “staff proposals” there was a proposed definition of “disability” which required that the disability be **severe** and that it extend for **two years in duration**. The use of the term “severe” in particular reinforced the concern among community participants that the new program would be limited to a much smaller class of persons than those receiving FB as “disabled” or “permanently unemployable”. A requirement that the disability exist for two years would also be very restrictive and would exclude many persons with recurrent disabilities.²²

The other “staff proposals” for a new program would be improvements over the existing FB program for persons with disabilities. In particular, there would be an increase in the assets that applicants and recipients could have.²³ The basic level of permitted “liquid assets”²⁴ would be increased for the first time since 1980. The proposed levels were \$5,000 for single persons and \$7,500 for couples. The principal residence exemption would be reaffirmed. Applicants and recipients would be allowed to have a motor vehicle of any value, an issue of concern to persons with mobility disabilities who use adapted vans. The amounts of funds permitted from “special sources”, such as inheritances, personal injury awards and life insurance, would be increased.

It was also proposed by staff that the income rules be changed so as to permit families (and others) to give recipients of the new program additional funds to “top-up” the allowance. The same rules would apply to trusts established from inheritances. These proposed rules would greatly benefit upper- and middle-income families in providing “extra” support for their adult sons and daughters.

However, there were few proposals to benefit those who did not have families willing and able to provide this support. In particular, there was no commitment to a rate increase. It was noted by Ministry officials in the consultation meetings that Ontario’s GAINS-D rates were already significantly higher than the national average. The strong implication was that the community of persons with disabilities was fortunate that their rates had not been cut and would not be cut. The officials did indicate, however, that consideration was being given to increasing the coverage given to ODSP recipients by the Ministry of Health’s Assistive Devices Program (“ADP”). ADP covered 75% of the “approved” cost of eligible equipment and supplies for everyone in Ontario who qualified, regardless of their income.²⁵

22. - Recurrent disabilities are those which vary in their impact from time to time, sometimes affecting the person’s ability to function much more than at other times. Multiple sclerosis and mood disorders (particularly manic depression) are examples of recurrent disabilities.

23. These proposals were included in the eventual ODSP and will be discussed in more detail in Section F, *infra*.

24. Under the *Family Benefits Act General Regulation*, R.R.O. 1990, c.366, s.1(1) [hereinafter *FBA General Regulation*], “liquid assets” refer to cash savings and certain other financial property.

Following this “second round” of consultations with the disability community, there were media reports regarding what was being developed and discussed, particularly with respect to the definition of “disability”.²⁶ The Honourable Janet Ecker who replaced Mr. Tsubouchi as the new Minister of Community and Social Services on August 16, 1996, strongly denied that there was any intention to limit the new program to a much more restricted class or to exclude those entirely who were on FB as “permanently unemployable”, although she did state that many in the community objected to the term “permanently unemployable”.²⁷

There was a separate consultation on the employment supports component of the proposed new program with representatives of the disabled community. In broad terms, community representatives supported a program that would be more responsive to consumer wishes and less focused on assessment and counselling than the existing VRS. Ministry officials seemed receptive to this general direction.²⁸

3. *The announcement of the Ontario Disability Support Program*

On June 5, 1997, Minister Ecker released the specific proposals for the new program at a news conference.²⁹ The proposals went some distance towards addressing the concerns around the definition of “disability”. The proposals stated that **substantial** and not just **severe** disabilities would be included. As well, a duration of **one year**, rather than two years, would be all that was required. The background information went on to say explicitly that provision would be made for the fair assessment of persons with degenerative or cyclical conditions. The new definition would focus on restrictions in the ability to perform activities of daily living, and the FB “permanently unemployable” category would be removed. However, people receiving FB disability allowances would be “automatically” transferred to ODSP. They would not have to qualify under the new ODSP “disability” definition, at least initially. The conditions under which they might be re-assessed in the future were left open. CPP disability pensioners would be deemed to qualify for ODSP on medical grounds and would not require a new disability assessment.³⁰

Minister Ecker announced a new “centralized, standardized qualifying system”³¹ which would have better trained adjudicators and clearer guidelines organized into a

25. Many ADP categories have limits or “caps”, so that the reimbursement provided is often less than 75% of the actual cost to the consumer.

26. See, for e.g., T. Walkom, “Stand by for a ‘plausible’ definition of disabled” *The Toronto Star* (12 October 1996) C5.

27. Ontario, Legislative Assembly, *Debates* (15 October 1996) at 4527. This point will be discussed in more detail in Section D, *infra*.

28. The author attended this consultation. See also A.R.C.H., *Vocational Rehabilitation Services under Review* (A.R.C.H., 1996) [unpublished].

29. See *supra* note 4; *supra* note 6.

30. The elements of the ODSP disability definition are discussed in more detail in Section D, *infra*.

31. *Supra* note 4 at 9.

manual. This would ensure a standard approach to applications from across the province. The assessment forms would be revised, and a wider class of health professionals (not just physicians) would be able to complete them. The frequency of routine re-assessments would be reduced in the new system. ODSP recipients would be re-assessed only if their conditions were expected to improve. Those with a “permanent serious disability” would not be retested at all.³²

The improvements to the asset rules were consistent with the “staff proposals” at the October 1996 consultations. The basic level of permitted assets would be increased to \$5,000 for a single person and \$7,500 for a couple, with \$500 for each additional dependant. The exemption for personal injury awards would be increased to \$100,000 from \$25,000. Life insurance policies would also be exempt up to a cash surrender value of \$100,000, and loans would be permitted against life insurance policies to cover the costs associated with the advanced stages of a serious illness. A general commitment was also made to simplify and improve the rules relating to motor vehicles, interest on assets, second properties and other assets.³³

Under the heading “Partnership with Families”, the ODSP “Backgrounder” listed a number of new initiatives directed at allowing families to assist adult sons and daughters receiving ODSP.³⁴ Families would be able to pay for disability-related items, such as assistive devices, health items, support services, home modifications and education, without affecting the ODSP allowance.³⁵ Families would also be able to provide \$4,000 each year for a wider range of uses, whether through gifts or inheritances. The generally permitted level of inheritance trusts would be raised from \$65,000 to \$100,000, and no limit would be imposed on absolute discretionary trusts.³⁶

While no general rate increase was announced for the new program, the 25% co-payment under the Ministry of Health’s ADP program was eliminated.³⁷

For “vulnerable” ODSP recipients who would require assistance in managing their money, the “informal trusteeship” provided for under FB would be continued. However, the trusteeship would be subject to new accountability standards, which were

32. *Supra* note 6 at 3.

33. The ODSP asset rules are discussed in more detail in Section F, *infra*.

34. *Supra* note 6 at 4.

35. This was an extension of a rule that had been developed under FB to apply to inheritance trusts. Under ODSP, however, the support could be provided at any time.

36. These rules relating to family support will be discussed further in Section F, *infra*.

37. This would apply to OW recipients and children in receipt of Handicapped Children’s Benefits, as well as ODSP recipients. Handicapped Children’s Benefits (“HCB”) was a program for children with severe disabilities, which provided funding to their parents to meet their special needs. The support provided ranged from \$25 – \$375 monthly on an income-tested basis. It was established under the same legislation as FB, but in fact had little relationship to the FB income supports program for adults. HCB was continued under ODSP with virtually no change to the program, except that it was renamed “Assistance to Children with Severe Disabilities” (“ACSD”). ACSD is discussed briefly in Section G, *infra*. ODSP benefits are also discussed further in Section G, *infra*.

not specified further. As well, there would be provision for direct payment of rent and utilities if necessary to prevent evictions and termination of services.³⁸

A major focus of the Minister's announcement was on support to employment for persons with disabilities. Within the ODSP income program, there would be three provisions directed at making it easier to work: (1) "rapid reinstatement" for recipients who left the program because of employment and then reapplied; (2) an increased earnings exemption for couples; and (3) an increased level of permitted business assets for those who were self-employed.³⁹

ODSP was also to include a new employment supports system to replace the Vocational Rehabilitation Services program which had been delivered by the Ministry for many years. The new employment supports program was to have a clearer focus on employment than did VRS.⁴⁰ Minister Ecker stated that under VRS clients were required to participate in "extensive counselling and assessment" before receiving direct employment supports, but that the new ODSP system would "emphasize quick service and consumer choice" in making employment supports available, with assessments being conducted only where necessary.⁴¹ There would be employment planning assistance as a first step rather than detailed assessment and this would be followed by the provision of employment supports including technological aids and devices, interpreters, skills development and ongoing job supports. Direct funding to individuals to choose the employment supports required would be provided when feasible. A co-payment would be required for individuals with higher incomes (i.e., income over \$52,000 for a single person).⁴²

Eligibility for ODSP employment supports would be "open to any person for whom a disability presents a substantial barrier to preparing for, seeking or maintaining employment".⁴³ However, while VRS recipients had been eligible for FB in a separate category (referred to as the "VRS training allowance"), ODSP employment supports recipients would not be in a special category and would have to qualify under the same rules as everyone else.⁴⁴

Minister Ecker announced that ODSP employment supports would not be delivered directly by the Ministry as VRS had been, but would be provided by "local service coordinators" which would be "community-based agencies".⁴⁵ While no details were provided as to how the new system would be designed, the Ministry asserted that there

38. The ODSP trusteeship and third-party payment provisions are discussed further in Section H, *infra*.

39. *Supra* note 4 at 11–12.

40. Ontario, Ministry of Community and Social Services, *Background: ODSP Supports to Employment* (5 June 1997) at 1.

41. *Supra* note 4 at 2.

42. *Supra* note 40 at 2.

43. *Ibid.*

44. *Ibid.*

45. *Supra* note 4 at 14–15.

would be substantial administrative savings and that direct expenditures on supports to employment for persons with disabilities would increase from \$18 to \$35 million when the system was fully implemented.⁴⁶

Some supports formerly provided under VRS would be transferred to programs other than ODSP. There would be a new program for home and vehicle modifications. Special needs funding for post-secondary education would be added to the operating grants of colleges and universities. Attendant care services would be provided by the long-term care program of the Ministry of Health.⁴⁷

The announcement of the ODSP was greeted with a somewhat mixed response by representatives of the disability community and the media. There was general support for the liberalization of the asset rules and the focus on competitive employment. At the same time, concerns continued to be expressed about the disability definition in the ODSP and about whether persons who had qualified for FB as “permanently unemployable” would ultimately be found ineligible for the new program.⁴⁸

4. Introduction of the Ontario Disability Support Program Act, 1997 as part of the Social Assistance Reform Act, 1997

On June 12, 1997, one week after the announcement of ODSP, Minister Ecker introduced Bill 142, the *Social Assistance Reform Act, 1997*, into the Ontario Legislature.⁴⁹ SARA was structured as a very short Bill (only six sections) with five extensive Schedules. Schedule B was the *Ontario Disability Support Program Act, 1997*. Schedule A was the *Ontario Works Act, 1997*. Schedule D, which was of considerable importance with respect to the transfer of persons from FB to ODSP, consisted of transitional provisions. Schedule D would govern important aspects of the replacement of the *Family Benefits Act*,⁵⁰ the *Vocational Rehabilitation Services Act*⁵¹ and the *General Welfare Assistance Act*.⁵² Schedule C contained substantive amendments to other Ontario statutes relating to the administration of welfare, while Schedule E contained consequential amendments to other Ontario legislation.

46. *Supra* note 38 at 2.

47. *Ibid.* ODSP Employment Supports are discussed in more detail in Section J, *infra*.

48. For a range of responses, see generally, J. Armstrong, “Tories to change rules on disability benefits” *The Toronto Star* (5 June 1997) A15; C. Mallan, “Program for disabled gets tentative support” *The Toronto Star* (6 June 1997) A10; “Good Tory reforms for the disabled” *The Toronto Star* (6 June 1997) A22; K. McArthur, “Tories to unveil new disability qualifications” *The [Toronto] Globe and Mail* (5 June 1997) A7; M. Philp, “Plans for disabled worry sick woman” *The [Toronto] Globe and Mail* (7 June 1997) A8.

49. Bill 142, *An act to revise the law related to Social Assistance by enacting the Ontario Works Act and the Ontario Disability Support Program Act, by repealing the Family Benefits Act, the Vocational Rehabilitation Services Act and the General Welfare Assistance Act and by amending several other Statutes*, 1st Session, 36th Leg., Ontario, 1997 (assented to 28 November 1997, *supra* note 2).

50. *Supra* note 3.

51. *Ibid.*

52. *Ibid.*

ODSPA, as part of Bill 142, was consistent with Minister Ecker's announcement one week earlier. However, it seemed to have a somewhat different emphasis. While *ODSPA* was a reasonably detailed piece of legislation (it had 57 sections), many of the most important components of both the income and employment supports programs were left to regulation.⁵³ Many of the commitments made in the announcement with respect to improvements over FB were not explicit in *ODSPA*, and would have to await the regulations. At the same time, a significant number of the *ODSPA* provisions in Bill 142 were the same as, or very similar to, the enforcement and overpayment recovery provisions in the *OWA*. In reviewing *ODSPA*, individuals and organizations representing the community of persons with disabilities saw provisions relating to liens on property, agreements to reimburse (assignments), police powers for certain MCSS officials (eligibility review officers), fingerscanning and sharing of personal information between governments and other parties.⁵⁴ The ODSP announcement one week earlier had not mentioned enforcement provisions of this type at all. They were subsequently to become an important issue, however.

5. *Bill 142 hearings held by the Standing Committee on Social Development*

Bill 142 received second reading in the Legislature of Ontario on September 9, 1997 and was referred to the Standing Committee on Social Development. Organizations representing social assistance recipients and other low-income people, including disability organizations, advocated that province-wide hearings be held on *SARA*. The Standing Committee decided that, besides the usual hearings in Toronto, it would spend one week visiting other communities in Ontario. In October 1997, hearings were held in North Bay, Ottawa, London and Niagara Falls.

Organizations representing persons with disabilities were very active in preparing briefs and making presentations to the Standing Committee. In fact, the majority of the presentations made on *SARA* related to *ODSPA*. Generally, these submissions acknowledged the improvements over FB in the announcement, particularly the extension of the asset rules, increased opportunities for families to provide support to adult sons and daughters and coverage of the 25% ADP co-payment. However, the same concerns that had been expressed during the consultation process continued to be raised by the disability groups. The submissions consistently referred to problems with the definition of "person with a disability"⁵⁵ and with the possibility that many would be excluded who should qualify for the program. Those who did not qualify would be left to apply for OW, which would have low benefit rates and workfare requirements. A special provision limiting the eligibility of substance users⁵⁶ was particularly criticized by organizations active in the addictions and mental health fields.

53. See, for e.g., *supra* note 49, s.54, which goes on for 6 pages and lists more than 50 areas in which regulations can be prescribed.

54. ODSP administration and enforcement is discussed in more detail in Section I, *infra*.

55. *Supra* note 49, Sch.B, s.4.

56. *Ibid.*, s.5(2).

Other major concerns of disability organizations with respect to Bill 142 related to the administration, investigation and enforcement provisions of Bill 142, especially the authorization of fingerscanning⁵⁷ which was seen by many groups as demeaning. Many groups expressed strong opposition to the provision allowing for liens to be placed on property as a condition of eligibility,⁵⁸ especially if it were to be applied to the homes of persons with disabilities. Those speaking on behalf of consumer survivors of the mental health system were especially critical of the continuance of informal trusteeships,⁵⁹ and the introduction of a provision authorizing direct third party payments to landlords, utility companies and other debtors of recipients.⁶⁰ These provisions were seen as having too few safeguards, and some objected to their inclusion at all. While there was support for the general direction of the new employment supports component of *ODSPA*,⁶¹ there was concern that the eligibility definition for this program was too narrow.⁶²

The Standing Committee responded to these criticisms, at least partially, by proposing amendments to the *ODSPA* component of Bill 142. As the Government members held a majority on the Committee (as in the Legislature), it was the Government amendments which were adopted. The opposition parties put forward very extensive packages of amendments to *ODSPA* (and to all of Bill 142), but as is usually the case these were rejected by the Government majority on the Committee. That said, the proposals probably had some influence on the Government amendments.

The Standing Committee amendments to *ODSPA* involved a clarification of the definition of “person with a disability” and a rewording of the provision regarding substance users.⁶³ A significant number of new provisions were added to more precisely define the administration and enforcement powers and to introduce “safeguards”, although the powers themselves remained. For example, fingerscanning and related enforcement methods were now defined as “biometric information” and detailed rules were introduced for its collection and use.⁶⁴ There was an amendment which provided that liens would not be attached to the principal residences of ODSP applicants or recipients.⁶⁵ The grounds for appointing an “informal trustee” or “person

57. *Ibid.*, s.54(4)(a), which authorizes regulations requiring applicants and recipients to “provide evidence permitting identification of the person by means of photographic images or encrypted biometric identification... .”

58. *Ibid.*, s.7.

59. *Ibid.*, s.12. Bill 142’s marginal notes refer to this provision as, “Appointment of person to act for recipient”.

60. *Ibid.*, s.13.

61. *Ibid.*, ss.32–36.

62. *Ibid.*, s.32(2).

63. Both of these changes are discussed in Section D, *infra*.

64. *Supra* note 49, Sch.B, ss.2, 54.1. The same changes were made to the *OWA*, *supra* note 49, Sch.A, ss.2, 74.1.

65. See Section I, *infra*.

to act for a recipient” were narrowed, a requirement was introduced that a person so appointed must “report and account” in accordance with the regulations and the appointment of a trustee was made appealable to the new Social Benefits Tribunal.⁶⁶ The Government also amended the provision governing who is eligible for employment supports, with the intent of making it more inclusive.⁶⁷

With these and other amendments, Bill 142 was reported by the Standing Committee back to the Legislature. It received third reading on November 25, 1997 and was given Royal Assent three days later.

6. *Preparation for implementation of the legislation including development of the regulations*

With the legislation in place, the Ministry continued with its preparations to implement it. While there was uncertainty for some time, eventually it was decided that the *OWA* would come into effect on May 1, 1998 and *ODSPA* on June 1, 1998. The MCSS consulted informally during this period with organizations representing the community of persons with disabilities. In May 1998, an informal consultation was held on the *ODSPA* regulations. Participants were told what the regulations would likely contain, but were not given a written copy.⁶⁸

The *ODSPA* regulations were not published in the *Ontario Gazette* until May 30, 1998, two days before *ODSPA* was proclaimed in force. This led to considerable confusion both within MCSS and in the community during the first months of ODSP. Several regulations were proclaimed under *ODSPA*: namely, the *General Regulation*;⁶⁹ the *Employment Supports Regulation*;⁷⁰ the *Assistance for Children with Severe Disabilities Regulation*⁷¹; the *Administration and Cost Sharing Regulation*;⁷² and the *Transition from Family Benefits to Ontario Disability Support Program Regulation*.⁷³

For the most part, the *ODSPA General Regulation* and the other regulations were consistent with the commitments made and directions taken by the Ministry during the development of ODSP. However, there was one major new development. The *General Regulation* provided that persons who were in receipt of FB as of May 31, 1998 as “disabled” or “permanently unemployable” persons would be in a “prescribed class” for ODSP eligibility.⁷⁴ This meant that they would be “grandparented” onto the

66. *Supra* note 49, Sch.B, ss.12(4), 21(1), 21(2)3. The same changes were made to the *OWA*, *supra* note 49, Sch.A, ss.17(5), 26(1), 26(2)4.

67. This provision is discussed in more detail in Section J, *infra*.

68. This consultation was attended by the author.

69. O. Reg. 222/98 [hereinafter *ODSPA General Regulation*].

70. O. Reg. 223/98.

71. O. Reg. 224/98 [hereinafter *ACSD Regulation*].

72. O. Reg. 225/98.

73. O. Reg. 226/98 [hereinafter *ODSPA Transitional Regulation*].

74. *Supra* note 69, s.4(1).

new program. As well, after being transferred to ODSP, they would not be subject to any further medical reviews, so long as they remained eligible on other grounds or left the program for less than one year because they had employment income.⁷⁵ The grandparenting of these FB recipients, particularly those who had qualified as “permanently unemployable”, addressed a major concern of persons with disabilities and their organizations regarding ODSP and led to increased support for the new program in that community.⁷⁶

7. Publication of detailed ODSPA Policy Directives

In June 1998, shortly after the publication of the regulations, a detailed ODSP Policy Directives manual was published by the Ministry.⁷⁷ The *ODSP Policy Directives* covered the same issues as the statute and regulations, but in somewhat more detail. The first publication covered the general ODSP income and benefits program as well as ACSD. The Employment Supports Policy Directives were published separately in January 1999.⁷⁸ A *Disability Adjudication Manual* for ODSP was also developed by MCSS and is scheduled for publication in the first half of 1999.⁷⁹

8. Revisions to the ODSPA General Regulation

On April 10, 1999, new regulations were published amending the *ODSPA General Regulation* and the *Employment Supports Regulation*.⁸⁰ In general, these amendments make improvements to the program, rather than introducing restrictions or limitations. A number will address problems that had arisen as a result of situations not envisaged by the original *ODSPA General Regulation*.

C. FRAMEWORK FOR ANALYSIS OF THE ONTARIO DISABILITY SUPPORT PROGRAM

The analysis which follows will address the following subject areas:

- Categories of Eligibility for Ontario Disability Support Program Income Supports and the Definition of “Person with a Disability” (Section D)

75. *Ibid.*, ss.4(2), 20. Some other groups of FB recipients were grandparented as well. A full discussion is found in Section D, *infra*.

76. However, there was some uncertainty around exactly who qualified for grandparenting, as discussed in Section D, *infra*.

77. Ontario, Ministry of Community and Social Services, *ODSP Policy Directives* (1 June 1998).

78. Ontario, Ministry of Community and Social Services, *Ontario Disability Support Program: Employment Supports Policy Directives* (1 January 1999).

79. The *Disability Adjudication Manual* is discussed in Section E, *infra*. As of the date of writing, it had not yet been “officially” published. However, MCSS has released the document to community legal clinics.

80. The *ODSPA General Regulation* was amended by O. Reg. 167/99. The *Employment Supports Regulation* was amended by O. Reg. 168/99.

- The Ontario Disability Support Program Application Process and the Role of the Disability Adjudication Unit (Section E)
- Financial Eligibility for Ontario Disability Support Program: Improvements in Asset and Income Rules (Section F)
- Other Benefits Under the Ontario Disability Support Program: Health Benefits, Disability-Related Needs, Employment-Related Benefits, Accommodation-Related Benefits and Child-Care Related Benefits (Section G)
- Trusteeship and Third-Party Payments (Section H)
- Administration and Enforcement of the Ontario Disability Support Program (Section I)
- Employment Supports (Section J)
- Internal Reviews and Appeals (Section K).

In analyzing each of these topics, the following six headings will be used:

1. *Provisions of the ODSP dealing with the topic*

The most important provisions of the ODSP dealing with the topic will be set out. In order to emphasize the analysis of these major provisions, not all of the provisions and interpretations will be dealt with in detail. Rather, the principal aspects of the *ODSPA*, regulations and *ODSPA Policy Directives* dealing with the subject will be set out for analysis. Where appropriate, reference will be made to the development of ODSP, as summarized in Section B of this article.

2. *Comparison with the FB/VRS/GWA programs*

ODSP was presented by the Ministry as a significant improvement for people with disabilities over the former FB/VRS/GWA system. Comparisons with the previous system are important to understanding the policy directions underlying ODSP. For an overview of FB in particular, reference will be made to the 1992 report of the Disability Determination Project Team.⁸¹ The Project Team was made up of MCSS officials and a few "external" representatives from the community.⁸² The team reviewed the FB definitions of "disabled" and "permanently unemployable" and the disability determination process involving the Medical Advisory Board. Some significant data regarding FB and related programs was developed for the Project Team.

81. Disability Determination Project Team, *Final Report to the Advisory Group on New Social Assistance Legislation* (Ontario: Ministry of Community and Social Services, 1992) [Hereinafter *Project Team Report*].

82. The author was an "external" representative on the Disability Determination Project Team.

3. *Comparison with Alberta's "AISH" and British Columbia's "BC Disability Benefits" programs*

Besides Ontario, Alberta and British Columbia are the other two Canadian jurisdictions to have developed separate social assistance programs for persons with disabilities. There are a number of useful points of comparison among the three programs.⁸³

Alberta's Assured Income for the Severely Handicapped was started in the late 1970s.⁸⁴ It was and remains a unique program among Canadian jurisdictions. Recently, the Alberta Government has indicated that it plans to make significant changes to AISH, which will form an interesting basis of comparison with ODSP.⁸⁵ Many persons with disabilities in Alberta do not receive AISH, however, but receive the general social assistance program, Supports for Independence.⁸⁶

British Columbia introduced a new social assistance program, BC Benefits, in 1996.⁸⁷ A separate statute for persons with disabilities, the *Disability Benefits Program Act*⁸⁸ is part of BC Benefits. Non-disabled social assistance recipients are under the *BC Benefits (Income Assistance) Act*.⁸⁹ In 1997, a second lower level of disability benefits was introduced into the program.⁹⁰

4. *Major policy decisions in ODSP*

Based on the previous analysis and comparisons, this section will attempt to identify the most important policy decisions that the Government has made in designing and implementing ODSP. The focus will be on the impact of these policy decisions, rather than on the detailed provisions of the program.

83. For a more detailed comparison, see H. Beatty, *Comparison of Disability-Specific Social Assistance Programs (and Related Programs) in Alberta, British Columbia, and Ontario* (Winnipeg: Council of Canadians with Disabilities, 1999).

84. See *Assured Income for the Severely Handicapped Act*, R.S.A. 1980, c.A-48, as am. [hereinafter *AISHA*]; *Assured Income for the Severely Handicapped Regulation*, Alta. Reg. 331/79, as am. [hereinafter *AISHA Regulation*]; Alberta, *AISH Policy and Procedures Manual*. Hereinafter, the program is referred to as AISH.

85. Alberta Ministry of Family and Social Services, "The Action Plan on AISH", online: http://www.gov.ab.ca/fss/Programs/initiatives/aish_action_plan.htm (date accessed: 7 April 1999).

86. See *Social Development Act*, R.S.A. 1980 c.S-16, as am.; *Social Allowance Regulation*, Alta. Reg. 213/93, as am.; Alberta, *Supports for Independence Manual*. Hereinafter, the program is referred to as SFI.

87. There is a general manual for the entire BC Benefits program: British Columbia Ministry of Human Resources, *BC Benefits Manual*.

88. R.S.B.C. 1996 (Supp.), c.97, as am. by S.B.C. 1997, c.15, s.5 [hereinafter *DBPA*]. See also *Disability Benefits Program Regulation*, B.C. Reg. 79/97, as am. [hereinafter *DBP Regulation*].

89. R.S.B.C. 1996, c.27, as am. [hereinafter *IAA*]. See also *Income Assistance Regulation*, B.C. Reg. 75/97, as am. [hereinafter *IA Regulation*].

90. *IA Regulation*, *Ibid.*, s.13.1, as enacted by B.C. Reg. 359/97, s.4. This lower level is usually referred to as Disability Benefits Level I. In this article, the higher level benefits under the *DBPA* are referred to as Disability Benefits Level II.

5. *Implementation of the ODSP*

In this section, we will review what is known so far about the actual implementation of ODSP by MCSS. It must be kept in mind that the program is still less than one year old as of the date of writing and that the experience to date may not reflect how things will work when the program is fully implemented. Nevertheless, it is instructive to consider how well the Ministry's implementation plans fit its policy directions.

6. *Evaluation and proposals for reform*

Finally, for each topic, the advantages and disadvantages of how the most important issues have been addressed under ODSP will be discussed. Recommendations for improvements to or reform of the program will also be considered.

D. CATEGORIES OF ELIGIBILITY FOR ONTARIO DISABILITY SUPPORT PROGRAM INCOME SUPPORTS AND THE DEFINITION OF "PERSON WITH A DISABILITY"

1. *ODSP provisions dealing with categorical eligibility and the definition of "person with a disability"*

a. Overview of eligibility for ODSP: The three ways of qualifying

As discussed previously, the issue of who would qualify for ODSP was extremely contentious throughout the development of the program. When ODSP was finally implemented, essentially three different classes of persons qualified for for the program:

- "grandparented" recipients
- recipients in prescribed classes not requiring disability adjudication
- "new" recipients qualifying under the *ODSPA* definition of "person with a disability".

In general, regardless of which class they fall into, all ODSP recipients are entitled to the same income support and benefits and are subject to the same rules. Which class an individual falls under, however, is of critical importance in two respects. First, only "new" recipients require diagnostic and functional assessments and assessments by the Disability Adjudication Unit to qualify. Second, only "new" recipients have health status eligibility review dates.

The next three sections of this article discuss the three classes of eligible ODSP recipients in more detail.

b. "Grandparented" ODSP recipients

"Grandparented" ODSP clients include those who were receiving FB as of May 31, 1998 in the following classes:

- disabled persons
- blind persons

- permanently unemployable persons
- dependent fathers with dependent children⁹¹
- persons over sixty years old, including spouses of an Old Age Security recipient
- dependent spouses of former recipients who have not remarried and are either (a) over sixty years old or (b) have dependent children.⁹²

These classes of FB clients were transferred automatically to the new ODSP program as of June 1, 1998 without requiring a new application.⁹³ As discussed previously, their cases will **not** be reviewed for medical eligibility in the future.⁹⁴ Any ongoing or pending medical eligibility reviews that had been scheduled for these classes of recipients under FB were to be deleted from the new ODSP system.⁹⁵ Persons who had completed their FB applications under any of the above categories by May 31, 1998 were also eligible for grandparenting if their applications were subsequently approved.⁹⁶ Clients receiving a Vocational Rehabilitation Services training allowance under the *FBA* as of May 31, 1998 were not grandparented under ODSP, but will continue to receive their training allowances until the completion of their existing VRS programs.⁹⁷

c. Recipients in prescribed classes not requiring disability adjudication

Applicants in the following classes have been prescribed as eligible for ODSP by the regulations and qualify once their financial eligibility is established, without the need for assessments by health professionals or consideration by the Disability Adjudication Unit:

- persons sixty-five years of age or older who are ineligible for Old Age Security
- Canada Pension Plan disability pensioners
- residents of psychiatric facilities, *Developmental Services Act*⁹⁸ facilities and *Homes for Special Care Act*⁹⁹ facilities.¹⁰⁰

91. A "dependent father" is a father who is disabled, permanently unemployable or blind (*FBA, supra* note 3, s.1).

92. *SARA, supra* note 3, Sch.D, s.6; *Supra* note 69, s.4(1).

93. *SARA, Ibid.*, Sch.D, s.2.

94. This is not stated explicitly in either *SARA's Transitional Provisions, Ibid.*, or the *ODSPA General Regulation, supra* note 69, s.4(1), but can be inferred from the wording of these sections, which provide that members of these classes of FB recipients as of May 31, 1998 are in a prescribed ODSP class and do not provide for any exceptions. The fact that there will be no review dates is stated explicitly in the *ODSPA Policy Directives, supra* note 77, Directive 0201-01, "Intake at ODSP Offices (Self-Referrals)" at 11.

95. *ODSPA Policy Directives, Ibid.*

96. *SARA, supra* note 3, Sch.D, s.7.

97. This is a MCSS policy decision and is not based on the legislation or regulations. See *ODSPA Policy Directives, supra* note 77, Directive 0101-01, "Overview of the ODSP Policy Directives" at 4.

98. R.S.O. 1990, c.D.11, as am.

99. R.S.O. 1990, c.H.12, as am. by S.O. 1997, c.15, s.7.

100. *Supra* note 69, s.4(1).

A person 65 years of age or older qualifies for ODSP only if he or she is not eligible for Old Age Security. This group consists of new immigrants who do not meet Old Age Security's ten-year Canadian residency requirement.

If an ODSP recipient had qualified solely on the basis of being a CPP disability pensioner and the CPP pension is subsequently cancelled, the ODSP benefit is continued for three months.¹⁰¹

ODSP eligibility through residency in a facility is limited to residents of the three kinds of institutions or residences specified. Residents of other institutions, whether licensed or unlicensed, must qualify for ODSP under another class. Those who are eligible for ODSP through these three prescribed institutional/residential classes receive only the personal needs allowance of \$112 per month. They do not receive a shelter allowance.¹⁰²

d. "New" recipients qualifying under the *ODSPA* definition of "person with a disability"

The definition of "disability" was extremely contentious throughout the development of the ODSP. In the final version of *ODSPA*, the definition reads as follows:

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.
- (2) A determination under this section shall be made by a person appointed by the Director.¹⁰³

In adopting this as the final version of "person with a disability", Minister Ecker moved a considerable distance towards meeting the concerns expressed by the community of persons with disabilities throughout the development of the ODSP. In comparison with the October 1996 staff proposals, the qualifier "substantial" had replaced "severe" and a one year test had replaced the two year test. Further, section 4(1)(b) had been amended by the Standing Committee by adding the words "one or more of", to address concerns expressed during the hearings that applicants would be required to show that they had substantial restrictions in all three areas of activities of

101. *Ibid.*, s.4(3).

102. *Ibid.*, s.32.

103. *Supra* note 3.

daily living. After this amendment, the three areas (personal care, functioning in the community and functioning in the workplace) were clearly alternative grounds on which eligibility could be established.

e. Restricted eligibility for substance users

In the first reading version of Bill 142, *ODSPA* contained a provision directed at excluding substance users from eligibility by providing that they would not be considered as “persons with a disability”, subject to certain qualifiers.¹⁰⁴ Many organizations in the addictions and mental health fields appearing before the Standing Committee criticized this exclusion severely as both discriminatory and inconsistent with treatment objectives. The Minister and the Standing Committee reworded this eligibility exclusion in a somewhat confusing manner in the final version of *ODSPA*.¹⁰⁵ The main point in the revised wording was that a substance user who qualified as a “person with a disability” would qualify for ODSP income supports so long as the disability was not attributable to the current or recent use (or cessation) of the substance. Someone with a disability which was related to past use of a substance could qualify.

2. Comparison with FB categorical eligibility and the FB definition of “disability”

Persons with disabilities could qualify for FB under one of three definitions: as persons who were “blind”, “disabled” or “permanently unemployable”. These terms were defined in the *FBA General Regulation*.¹⁰⁶ “Blind person” was defined using a technical definition related to tests used to measure vision impairment.¹⁰⁷ The other terms were defined as follows:

“disabled person” means a person who has a major physical or mental impairment that is likely to continue for a prolonged period of time and who, as a result thereof, is severely limited in activities pertaining to normal living, as verified by objective medical findings accepted by the medical advisory board;

“permanently unemployable person” means a person who is unable to engage in remunerative employment for a prolonged period of time as verified by objective medical findings accepted by the medical advisory board...¹⁰⁸

When FB was originally implemented, “permanently unemployable persons” (or “PUEs” as they were commonly known) were in an intermediate category in the social assistance system. Their benefit levels were higher and the other rules applying to them were more favourable than those for “employables” receiving GWA. However, they received lower rates than those who qualified for FB as “disabled persons” or

104. *Supra* note 49, s.4(2).

105. *Supra* note 2, s.5.

106. *Supra* note 24.

107. *Ibid.*, s.1(5).

108. *Ibid.*

“blind persons”. In the early 1980s, the Ministry raised the rates for PUEs to the same level as the other two categories.

After the rates for PUEs were raised, it did not matter in an individual case whether the person was classified as disabled or PUE. MCSS stopped keeping statistics as to the number of recipients in each category and may not in fact have recorded in many cases which of the two definitions the recipient had qualified under. In practice, however, in most cases Ministry officials, legal and community advocates and the Social Assistance Review Board used the PUE definition. It was the easier of the two definitions to qualify under, particularly because of the inclusion in the “disabled person” definition of the term “severely limited”.

While the difference between the “disabled person” and “permanently unemployable person” definitions had been of limited significance under FB, it was brought to the centre of attention during the process of developing ODSP. First, there was the “inadvertent” repeal of the category under Minister Tsubouchi. Later, there was Minister Ecker’s clear statement that there would be no “permanently unemployable” category under ODSP, which she claimed was in accordance with the views of the community of persons with disabilities. The elimination of the “PUE” concept was the most significant change in moving from the FB disability definition to the ODSP one, and needs to be looked at carefully.

Representatives of the disability community had always been faced with a fundamental dilemma regarding eligibility for income programs centred on the “unemployability” concept. On the one hand, if income programs were based on “unemployability”, a major work disincentive effect was inevitable. Any successful efforts towards employment, including training, education, volunteering, rehabilitation and attempts to work, would carry the risk of demonstrating the person’s “employability”, and therefore ineligibility for the income program. This disincentive effect was especially felt to be harsh and unfair by persons with disabilities who both wanted to and were capable of working (for some, this would require accommodation) and for whom there were enough obstacles to competitive employment already. They and their organizations made the representations to the Government, to which Minister Ecker referred, about removing the “permanently unemployable” concept in the new ODSP system.

On the other hand, there is a natural link between “unemployability” and eligibility for disability income. An important justification for providing income support to some persons with disabilities is that they are unable to obtain employment. As well, considering whether a person is “unemployable” leads to a consideration of the economic and social realities of his or her situation, in a way in which an exclusive focus on “functional limitations” due to disability does not. For many people, their disabilities or health problems are compounded in the labour market by their age, illiteracy, lack of education and a wide range of other economic and social factors. In Ontario, people in these circumstances had qualified for FB as PUE, and legitimate

concerns were expressed during the ODSP development process about their continuing eligibility. The Ministry's decision to grandparent existing FB clients, of course, went a considerable distance towards addressing this concern for that group. However, the issue remains a crucial one for new ODSP applicants.

Under the new definition, an applicant whose primary limitation is in his or her ability to work will have to meet the test set out in section 4(1)(b) of *ODSPA*. At first sight, it may seem easier to qualify under this language than under the *FBA*. Section 4(1)(b) just requires that a "substantial restriction" be shown in the person's ability to "function in a workplace", not that the person be "permanently unemployable". However, as we have seen there was considerable flexibility in the FB PUE definition to look at social and economic factors, whereas the use of the phrase "direct [and cumulative] effect of the impairment" in Section 4(1)(b) seems clearly intended to exclude consideration of such factors.

With respect to activities of daily living other than working, again at first sight the *ODSPA* definition of "person with a disability" seems broader than the FB definition of "disabled person" in that the qualifier "substantial" has replaced "severe". However, there is no precise way of quantifying the distinction between these adjectives.¹⁰⁹

The restrictive provisions in *ODSPA* relating to substance users are new. There were no such provisions under FB.

3. Comparison with AISH and BC Disability Benefits as to categorical eligibility and definitions of "disability"

Ontario, Alberta and British Columbia have adopted significantly different approaches to defining "disability" for purposes of their disability-specific social assistance programs.

Alberta has used unemployability as its primary criterion of eligibility under AISH.¹¹⁰ The Alberta Government's "Action Plan On AISH"¹¹¹ apparently will reinforce this emphasis, as it states that "ability to earn a living" will be a criterion for new applicants that will not be applied to current recipients.¹¹²

By contrast, in developing Disability Benefits Level II, British Columbia has attempted to eliminate the unemployability criterion altogether through defining

109. A point we shall return to in our discussion of the ODSP disability adjudication process in Section E, *infra*.

110. The *AISHA Regulation*, *supra* note 84, s.2, states: "For the purposes of the Act, 'severe handicap' means a condition that in the opinion of the Director, after considering any relevant medical reports, physically or mentally so severely impairs an individual that it substantially limits his ability to earn a livelihood and is likely to continue to affect that individual permanently because no remedial therapy that would materially lessen that impairment is available."

111. *Supra* note 85.

112. *Ibid.* at 3.

eligibility solely in terms of the extra costs associated with disability, together with the need for assistance or supervision.¹¹³

Ontario, in developing ODSP, has adopted somewhat of a middle ground in that restrictions in the ability to function in the workplace are considered, but on an equal basis with personal care activities and activities in the community.

What is difficult to determine is the impact these different approaches will have on who qualifies under each program as "disabled". It may be that the actual administration of the definitions in the three provinces results in less difference in practice as to who qualifies than the wording of the definitions would suggest. Despite the emphasis on unemployability in Alberta, there are AISH recipients who are fully employed. Conversely, ability to work may be taken into account indirectly in British Columbia even though BC Disability Benefits Level II is supposed to be based on a complete elimination of the unemployability criterion. For example, a person who is working may be less likely to be assessed as in need of assistance or supervision. People who were fully employed in Ontario received FB under the former program as "permanently unemployable". It remains to be seen what the impact of the new ODSP definition will be.

All three Provinces have, in their disability-specific social assistance programs, moved away from considering social and economic factors such as age, education, literacy and geographic location in determining eligibility. This is an example of how the similarities in administration and policy may, on a day-to-day basis, have more impact than the differences in wording of the definition.

A significant difference in approach among Alberta, British Columbia and Ontario relates to the number of "intermediate" categories within the general social assistance system for persons who do not qualify for the disability-specific program. Alberta has a wide range of intermediate categories within SFI,¹¹⁴ while Disability Benefits Level I is essentially the sole intermediate category within BC Benefits, and Ontario has no intermediate category at all within Ontario Works. Intermediate categories may provide a way of assisting those whose disabilities are less pronounced or more transitory in nature and who might not otherwise qualify for disability benefits. On the other hand, they may provide a convenient mechanism for governments seeking

113. *DBPA*, *supra* note 88, s.1, states: "In this Act... 'person with disabilities' means a person who at the time this section comes into force was a handicapped person under the *Guaranteed Available Income for Need Act* [R.S.B.C. 1979, c.158, as am., as rep. by *BC Benefits (Income Assistance) Act*, S.B.C. 1996, c.6, s.56(2)] or a person (a) who is 18 years of age or older, (b) who, as a direct result of a severe mental or physical impairment, (i) requires extensive assistance or supervision in order to perform daily living tasks within a reasonable time, or (ii) requires unusual and continuous monthly expenditures for transportation or for special diets or for other unusual but essential and continuous needs, and (c) who has confirmation from a medical practitioner that the impairment referred to in paragraph (b) exists and (i) is likely to continue for at least 2 years, or (ii) is likely to continue for at least one year and is likely to recur."

114. There are approximately a dozen sub-categories of eligibility set out the *Supports for Independence Manual*, *supra* note 86.

to limit the numbers of persons with disabilities eligible for the higher benefit levels and more favourable rules of the disability-specific programs.

The three Provinces differ markedly in the extent to which recipients of the disability-specific social assistance programs are subject to review of their medical or health status. Under AISH, there is always the possibility of review, while BC Disability Benefits Level II is essentially a review-free, permanent designation. Ontario will have review dates for new ODSP recipients, but generally not for grandparented ones. The British Columbia and Ontario programs are too new to permit any conclusions to be drawn about the impact of these policies, although British Columbia's permanent designation should encourage recipients to attempt training, education, rehabilitation and return to work. On the other hand, the British Columbia Government appears to be concerned about the long term financial impact of giving people the "for-life" designation and is moving to restrict eligibility for it, as evidenced by the creation of the "intermediate" Disability Benefits Level I category.

Like Ontario, British Columbia "grandparented" existing recipients when it moved to its new program in 1996. It appears that Alberta may be planning to do the same when it introduces its reforms to AISH later this year.

Unlike Ontario, neither Alberta nor British Columbia have any statutory or regulatory provisions restricting eligibility for substance users, although the Alberta *Supports for Independence Manual* strongly suggests that substance use should be viewed as treatable and the person placed in a category where they are expected to work after treatment.¹¹⁵

4. Major policy decisions regarding categorical eligibility and the definition of "disability" within ODSP

Based on the previous analysis and comparisons, the most important policy decisions made by the Ontario Government regarding eligibility categories and definitions in ODSP were:

- (A) to eliminate the concept of "permanently unemployable" from the new definition;
- (B) to use the qualifier "significant" rather than "severe" in the new definition;
- (C) to use a one year rather than a two year test in the new definition;
- (D) to give restrictions in attending to personal care, functioning in the community and functioning in the workplace equal weight in the new definition;
- (E) to require a significant restriction in only one of the three areas of personal functioning described above;
- (F) to put a specific exclusion relating to substance users in the new program;

115. *Ibid.*

- (G) to “grandparent” FB recipients, whether they had qualified as “blind persons”, “disabled persons” or “permanently unemployable persons” so they would never have to be reviewed as to their health status under the new definition (so long as they remained otherwise eligible or went off ODSP for less than one year due to employment); and
- (H) not to have an “intermediate” disability category within OW.

5. *Implementation of the eligibility categories and definition of “disability” within ODSP*

In general, grandparenting of former FB recipients was implemented by MCSS in accordance with the legislative and policy intent, although there were a number of cases in which persons who should have been grandparented were apparently required to reapply or “reviewed” as to health status eligibility. These cases were generally attributable to one of three factors: lack of understanding of the new program by ODSP and OW staff due to the speed with which it was implemented,¹¹⁶ errors in interpreting the rules related to grandparenting¹¹⁷ or “gaps” in the transitional rules.¹¹⁸ The ODSP Branch of MCSS has intervened in a number of these cases to rectify the specific problems.

The implementation of the “person with a disability” definition will be considered together with the discussion of the disability adjudication process in Section E.

6. *Evaluation and proposals for reform*

In deciding who would be eligible for ODSP and who would not, the Government made a number of difficult policy decisions. For the most part, their choices in this area seem to have been justifiable,¹¹⁹ although improvements could have been made.

116. As noted in Section B, *supra*, ODSP was implemented just two days after the regulations were published in the *Ontario Gazette*, and before the *ODSPA Policy Directives* were generally available to MCSS staff. Ministry offices were left with out of date FB forms and precedent letters which did not reflect the new legislation.

117. The Sudbury Community Legal Clinic represented in hearings before the Social Benefits Tribunal two clients who should have been grandparented, but whom MCSS purported to “review”. In the first case, the Tribunal member held that he was not bound by the evidently clear *ODSPA* regulations and policy directives and upheld the decision denying the former recipient benefits (SBT T-05-02-16 (4 January 1999; Collins))! The ODSP branch of MCSS intervened to restore the individual’s income support and grandparented status despite this decision. The clinic won the second case at the Tribunal before a different Tribunal member (SBT T-06-01-19 (1 March 1999; Marcuccio)).

118. The author was consulted in March 1999 by a community agency about a client who had been part of a “double disabled” FB couple for many years. That is, both the husband and wife were considered disabled by FB, but the cheque for both of them came in the name of the husband. The wife’s husband left her, and the local MCSS office proposed to maintain his ODSP entitlement without interruption (as the ODSP cheque was in his name), while requiring her to make a new ODSP application. The April 10, 1999 *ODSPA General Regulation* amendments now provide that a disabled “former spouse” will be grandparented (*Supra* note 80, s.2(1)). After discussion, the ODSP Branch of MCSS intervened to correct this situation, although this amendment was only proposed and not passed at that time.

119. This comment should be placed in its proper context. It relates to decisions taken subsequent to the

There is no simple solution to the “permanently unemployable” dilemma which we have discussed. Different jurisdictions, both in and outside Canada, have taken a range of approaches in relating limitations in the ability to work to eligibility for disability income programs. Disability advocates and organizations almost universally recognize the problem, but there is definitely no consensus as to the solution.

It must be recognized that people with disabilities differ greatly as to the approach which is fair and reasonable for them. A young college graduate, ready and able to work competitively with accommodation, is in a far different position than a former manual worker in his or her late 50s. It may be that no one definition of “disability” can be created which will be fair to them both and that alternative eligibility definitions should be developed (as in fact there were under FB, although there was a considerable gap between the language of the definitions and how they were applied in practice).

For persons with disabilities who are working or ready to work, in many respects British Columbia’s Disability Benefits Level II appears to be a good model. It recognizes that a person who is able to function effectively at work, in the community and in all aspects of his or her life may still have significant and ongoing disability related costs and needs for supports and should remain eligible on that basis, regardless of how he or she functions. It also provides a guarantee that, once found eligible, a person will not later be found ineligible because of a successful period of employment, although this may become a somewhat illusory gain for persons with disabilities if significant numbers are put on Disability Benefits Level I rather than Level II.

For persons with disabilities who are excluded from the workforce by social and economic factors such as age, illiteracy, lack of education and unavailability of suitable work, a fairer definition should be developed within ODSP to allow these factors to be taken into account. If the word “direct” was removed from section 4(1)(b) of *ODSPA*, arguably economic and social factors could be considered more readily. Otherwise, people in this category may be offered no option other than OW, on the rationale that there are jobs they theoretically could do, but which will never be available to them in the real world. The grandparenting of PUE recipients largely addressed this issue for this group, although they will have to be careful not to ever lose their ODSP entitlement. However, grandparenting creates an unfair situation since future applicants will be required to meet a much stricter standard.

decision to have a separate social assistance program for adult persons with disabilities. There are, of course, a whole range of major policy decisions that were made regarding the development of Ontario Works which the author disagrees with in a very fundamental way: the very low rates (especially for families with children), the introduction of workfare, the exclusionary rules relating to dependent adults and many others. It must be remembered as well that families who have children with disabilities have been subjected to the Government’s 21.6% rate cut, which significantly impacts on their ability to provide appropriate opportunities for their children. That said, these issues, important as they are, concern people who were never intended to be included in ODSP, and are beyond the scope of this article.

As many addiction and mental health groups argued before the Standing Committee, the special exclusionary rule applying to substance users is neither fair nor likely to be productive. If people who already have major personal problems are denied ODSP, it is likely either to force them into more difficult living situations which will compound their problems or to lead them to try and hide their problems rather than seek treatment and other assistance. ODSP should be amended to treat people with substance use problems on the same basis as everyone else.¹²⁰

E. THE ONTARIO DISABILITY SUPPORT PROGRAM APPLICATION PROCESS AND THE ROLE OF THE DISABILITY ADJUDICATION UNIT

1. *ODSP provisions dealing with the application process and the role of the Disability Adjudication Unit*

Under ODSP, the determination of whether an applicant qualifies as a “person with a disability” is made by a centralized office in Toronto, the Disability Adjudication Unit (“DAU”). The *Disability Adjudication Manual* indicates that DAU disability adjudicators are drawn from a range of health professions, including physicians, clinical psychologists, nurse specialists, physiotherapists, occupational therapists and vocational and rehabilitation specialists. There is a Medical Director responsible for the development of adjudication standards and related information.

In this section, we shall consider the process of applying to the DAU. There is only a very general provision in *ODSPA*, namely section 10, which deals with the application process. All of the specific provisions are left to the *ODSPA General Regulation*.

MCSS policy is that an ODSP applicant must qualify financially for the program (or for OW, which would clearly imply ODSP financial eligibility as well since OW’s financial eligibility requirements are stricter than those of ODSP) before their application will be considered by the DAU.¹²¹ Upon establishing financial eligibility, the applicant is given or sent a package of four application forms, to be submitted to the DAU.¹²²

120. There has been some indication that the Ontario Government may be changing its thinking in this area. In its recent announcement of changes to the *ODSPA General Regulation*, *supra* note 80, the Ministry stated that ODSP recipients and beneficiaries will now be allowed to attend a residential substance abuse program for up to three months with no reduction in ODSP income support. This signals a type of constructive support for substance users that was missing in the initial ODSP announcements. The current thinking on the part of the Government is to provide support for substance abusers who are participating in treatment programs. Those who refuse will have great difficulty qualifying for ODSP.

121. *Supra* note 77, Directive 0201-03, “Disability Adjudication Process” at 4.

122. A description of the four forms is given in the *ODSPA Policy Directives*, *Ibid.* at 8–9. Initially, all application form packages had to be sent out by the DAU, but as of April 1, 1999 ODSP and OW offices will be able to provide application forms. This information was provided by ODSP Director Ellen Waxman at a March 4, 1999 meeting with the Steering Committee on Social Assistance, a committee comprised of legal clinic advocates.

The first form is the **Health Status Report**. The purpose of this form (which may also be thought of as the “impairment assessment” or the “medical assessment”) is to verify that a person “has a substantial physical or mental impairment and its likely duration”.¹²³ This form must be completed by a member of the College of Physicians and Surgeons, College of Psychologists of Ontario or College of Optometrists of Ontario.¹²⁴ This form is quite detailed, but it asks the health professional to make a number of judgments which are not clearly related to the legislated eligibility standard of “substantial physical or mental impairment”. An example is that the form asks whether the disability is “mild”, “moderate” or “severe”.

The second form is the **Activities of Daily Living Report**. The purpose of this form (which may also be thought of as the “functional assessment”) is “to verify whether the direct and cumulative effect of an impairment on a person’s ability to attend to his or her personal care, function in the community and function in a workplace results in a substantial reduction in one or more activities of daily living”.¹²⁵ This form may be completed by members of the same Colleges as those which may complete the Health Status Report, and also by a member of the College of Occupational Therapists of Ontario, College of Physiotherapists of Ontario, a nurse practitioner registered with the College of Nurses of Ontario as a Registered Nurse — Extended Class or a member of the College of Chiropractors of Ontario.¹²⁶ It is even more lengthy and detailed than the Health Status Report form and, again, there is a real issue as to how several of the questions asked relate to the statutory test of eligibility.

The third form is the **Consent to Disclose Medical Information**.

The fourth form is the **Self-Assessment Report**. Unlike the other three forms, this form is optional. The applicant is required to sign and return it to the DAU, but is not required to put any information on it.

If the application forms are not completed and returned to the DAU within 90 days, the application is deemed to be withdrawn.¹²⁷ This means that all appeal rights are lost with respect to the application, and the process will have to be started again with a new application. The DAU has a discretion to extend the 90 day period,¹²⁸ but the

123. *Supra* note 69, s.46(1).

124. *Ibid.* A fee of \$50 is paid for completion of the Health Status Report (*Supra* note 77, Directive 0201-03, “Disability Adjudication Process” at 9).

125. *ODSPA General Regulation, Ibid.*, s.46(2).

126. *Ibid.* A fee of \$25 is paid for completion of the Activities of Daily Living Report. This amount is reduced to \$20 if the same health professional completes both the Health Status Report and the Activities of Daily Living Report (*Supra* note 77, Directive 0201-03, “Disability Adjudication Process” at 9)!

127. *Supra* note 69, s.16(5).

128. *Ibid.* The regulatory provision states that the ODSP Director has this discretion, but in practice it has been delegated to the DAU (*Supra* note 77, Directive 0201-03, “Disability Adjudication Process” at 8).

DAU's determination on whether to extend the time limit is not appealable to the Social Benefits Tribunal.¹²⁹

Upon receiving a completed set of application forms, the DAU determines whether the applicant is a "person with a disability". In doing so, it uses the *Disability Adjudication Manual*.¹³⁰ The Manual is based on the American Medical Association's *Guides to the Evaluation of Permanent Impairment*.¹³¹ It contains information about a wide range of disabilities. However, it does **not** contain explicit statements as to criteria to be used to determine whether or not an applicant qualifies as a "person with a disability" under ODSP. It is described as "an *aid* to adjudication and not a substitute for it".¹³²

Like the American Medical Association's *Guides to the evaluation of Permanent Disability*, the *DAU Manual* is based on established and "objective" medical criteria. Accordingly, the DAU will not be inclined to accept "controversial" or "subjective" diagnoses. The Introduction of the *Manual* states as follows:

The manual appeals to generally established medical criteria and that [*sic*] call for medical management consistent with accepted principles and practices. This means that an impairment/disability has a demonstrable anatomic, physiologic and psychological abnormality. Abnormalities that present only as symptoms are outside this scope.¹³³

The Manual follows the AMA *Guides* in basing disability assessment on the concept of "impairment of the whole person". Specific disabilities or impairments are assigned a percentage value and there is a formula to calculate their cumulative impact.¹³⁴ For a number of disabilities and impairments, as with the forms, the *Manual* uses the terms "minimal", "moderate" and "severe" in relation to percentage impairments, but there is no indication of how either these terms or the percentage impairments relate to the *ODSPA* legislative test.

Where the DAU makes a determination that an individual is a "person with a disability" and therefore eligible for ODSP, there is a requirement that an eligibility review date be set, unless the DAU "is satisfied that the person's impairment is not likely to improve."¹³⁵ The decision to set an eligibility review date is not appealable to the SBT.¹³⁶

129. *ODSPA General Regulation, Ibid., s.57.*

130. *Supra* note 79.

131. American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 4th ed. (Chicago: American Medical Association, 1995).

132. *Supra*, note 79 at i.

133. *Ibid.*

134. *Ibid.*

135. *Supra* note 69, s.5(1).

136. *Ibid., s.57.*

A decision by the DAU that an applicant is not a “person with a disability” may be dealt with through the ODSP internal review and appeal process, to be discussed in Section K.

2. Comparison with the FB application process and the role of the Medical Advisory Board under FB

The DAU established under ODSP replaced the former Medical Advisory Board (“MAB”), which had carried out disability adjudications under FB and which continued after June 1, 1998 to deal with applications which were still under FB. The MAB was (and is) a “Board” only in name. It consisted of physicians hired part-time on contract throughout Ontario by MCSS. There was virtually no central administration. Starting in the early 1980s, the position of MAB chair was vacant for over a decade, and there were no real guidelines for disability assessment (other than a standardized list of diagnoses).¹³⁷

The MAB medical adjudicators would review the information provided by the applicant’s own doctor on a very basic form provided under the *FBA General Regulation* which was generally referred to as the “Form 4”.¹³⁸ In theory, the adjudicator would then make a recommendation to MCSS regarding eligibility. In practice, the medical adjudicators’ “recommendations” were always accepted. They were the *de facto* decision-makers with respect to disability applications.

The Disability Determination Task Force, in 1992, found wide variances in approval rates for GAINS-D applications among different MCSS area offices.¹³⁹ At different times, approval rates had varied by as much as 30 to 40% between offices (and may have varied even more among individual adjudicators). This was not unexpected, given the lack of centralization and standardization in the disability determination process.

The development of the DAU was clearly a response by MCSS to the problems identified with the MAB. By centralizing the disability adjudication process, appointing a Medical Director, bringing in a wider range of health professionals and developing the *Disability Determination Manual*, the Ministry’s objective was to ensure a much higher level of consistency in decision-making, with better documentation and analysis. Another implicit objective may well have been to reduce the approval rates, which had risen to over 60% under the MAB.¹⁴⁰ The ODSP application forms and especially the *Disability Adjudication Manual* suggest that a much “tougher” standard will likely be introduced. However, as of the date of writing, no DAU approval rates have been published by MCSS, so no definite comparison is possible.

137. This was discussed by the Disability Determination Project Team, *supra* note 81.

138. *Supra* note 24, Form 4.

139. *Supra* note 81 at 37–38.

140. *Ibid.* at 34.

3. *Comparison with AISH and BC Disability Benefits as to the application process and disability adjudication*

There is a very flexible approach taken to the application process under AISH, with a great deal of discretion given to the AISH Regional Administrator. Once it is determined that the applicant is financially eligible, the Administrator provides him or her with a package of forms, but there is considerable room for judgment as to which forms are provided and how much information is requested. The Administrator may decide that the applicant is eligible without requesting a specific medical report or may decide to request additional information, including a detailed medical report and a detailed functional assessment (including a vocational or a psychological assessment). There is no adjudication manual and no designated adjudication unit or body. The Administrator may retain medical advisors on contract to review certain applications, but there is no requirement that this be done in every case.¹⁴¹

There is a very clear contrast between AISH and ODSP in this respect, with Alberta having a very flexible and informal system, involving a great deal of discretion, and Ontario having a much more structured system, directed at standardization and consistency.

The application process for BC Disability Benefits Level II is based on the two components of the definition of "person with disabilities".¹⁴² Once the applicant is determined to be financially eligible, he or she is given an application form. The applicant must complete a basic self-assessment part and then obtain two professional assessments relating to the "persons with disabilities" definition. First, a physician must certify on the form that there is a "severe mental or physical impairment". Second, there must be a report by an "assessor" on the form documenting either "extensive assistance or supervision" with activities of daily living or "unusual and continuous" disability-related costs. The "assessor" may be the physician who certifies the impairment, but is more usually an occupational therapist, social worker, teacher, training consultant or other professional who knows the person well. The assessor must be "impartial" — he or she cannot be a friend, neighbour, relative or advocate, even one with professional qualifications. The form, with all three parts completed, is submitted for assessment to the Health Services Branch of the Ministry of Human Resources.¹⁴³

The British Columbia application process is similar to the Ontario one, but there are some differences. B.C. requires the applicant to answer self-assessment questions, but Ontario does not. The B.C. professional assessment forms are much shorter and

141. For an overview of the AISH application process, see *AISH Policy and Procedures Manual*, *supra* note 84, Directive AISH-02-01-01, "Application Process".

142. *Supra*, note 113.

143. For details of the application and disability assessment process, see British Columbia Ministry of Human Resources, *BC Benefits Manual*, Directive 14.13, "Health Services: Disability Benefits Program"; British Columbia Ministry of Human Resources, *Application Form and Guide: Disability Benefits Program*.

simpler than the ODSP forms. Unlike Ontario, B.C. restricts completion of the impairment assessment component of the form to physicians. However, B.C. has a more expansive list than Ontario of professionals who can complete the functional assessment component. No disability adjudication manual is available to the public in B.C.

4. *Major policy decisions regarding the disability adjudication process within ODSP*

Based on the previous analysis and comparisons, the most important policy decisions made by the Ontario Government regarding disability adjudication within ODSP were:

- (A) to centralize and standardize the disability adjudication process;
- (B) to develop and eventually publish the *Disability Adjudication Manual*;
- (C) to base their *Manual* on the American Medical Association's *Guides to the Evaluation of Permanent Impairment*, with its emphasis on verifiable medical conditions and on "impairment of the whole person";
- (D) to require both an impairment assessment (Health Status Report) and a functional assessment (Activities of Daily Living Report) in every case; and
- (E) to extend completion of the Reports mentioned above to a wider class of health professionals than just physicians.

5. *Implementation of the disability adjudication process within ODSP*

The DAU was set up in a timely manner to deal with the ODSP applications that began to be made after June 1, 1998. Unfortunately, it was significantly understaffed in relation to the tasks required of it, and the result has been very significant delays in meeting its responsibilities. These delays have occurred at all stages of the application process: including the initial mailing of the forms to applicants, adjudication of the applications, responding to inquiries from applicants, advocates and health professionals and fulfilling the DAU's responsibilities in the internal review and SBT appeals process.¹⁴⁴ The resulting delays (although not entirely unexpected due to the previous backlog in the FB system and the rapid manner in which ODSP was implemented) were very unfair to applicants, who were often forced to depend on OW for several months while waiting for their applications to be processed. Fortunately, the Ministry has recently indicated that there are plans to increase the DAU's resources.¹⁴⁵

The other significant weakness in implementing the disability adjudication process related to the general failure of the DAU and the Ministry to inform and consult with

144. For details, see: Steering Committee on Social Assistance, Letter to Hon. J. Ecker (26 February 1999).

145. This statement was made by ODSP Director Ellen Waxman at the March 4, 1999 meeting with the Steering Committee on Social Assistance, *supra*, note 122.

the disability community and with health professionals regarding the criteria for adjudication. As discussed above, both the forms and the *Disability Adjudication Manual* are lengthier and more complex than they need to be. More significantly, there are major grounds for concern as to whether they (a) reflect the legislated *ODSPA* definition of “person with a disability” and (b) reflect the range of current knowledge and opinion about disabilities (rather than just the *AMA Guide* perspective). The Ministry has recently indicated plans to consult and consider revisions of the forms.¹⁴⁶

6. Evaluation and proposals for reform

The modernization, centralization and standardization of the disability determination process through the creation of the DAU was a necessary step which the Ministry had to take. It was clearly unfair to applicants to have completely different eligibility criteria applied, as happened with the MAB, depending on where they lived and on which adjudicator’s desk their application happened to land.

A fundamental on-going issue will be the content of the *Disability Adjudication Manual*, which should be revised and updated in consultation with representatives of the disability community and health professionals, to ensure that it reflects the best current knowledge about disabilities and impairments, as well as accurately reflecting the *ODSPA* legislated definition of “person with a disability”. The “impairment of the whole person” approach, with its emphasis on percentage assessment of disabilities, needs to be re-examined carefully in this process. The cumulative effect of impairments on an individual’s ability to function is often much different than the estimate provided by the *AMA Guide*’s mathematical formula. The Ministry’s planned revision of the forms should be part of this reconsideration, taking the same factors into account.

It is an essential part of fairness to persons with disabilities that their applications be processed in a timely manner, and it is to be hoped that the Ministry will follow through on its plans to allocate additional resources to the DAU to ensure that this occurs.

F. FINANCIAL ELIGIBILITY FOR THE ONTARIO DISABILITY SUPPORT PROGRAM: IMPROVEMENTS IN ASSET AND INCOME RULES

1. ODSP provisions regarding financial eligibility, assets and income

ODSPA does not contain any specific provisions regarding financial eligibility, assets and income. Rather, it leaves all of the rules in this area to be made by regulation.¹⁴⁷ Part IV of the *ODSPA General Regulation*¹⁴⁸ deals with the asset rules, while Part V¹⁴⁹ deals with the calculation of income support, including the income rules. Discussion of all of these rules in detail is beyond the scope of this article. As our focus is on the

146. *Ibid.*

147. *Supra* note 69, s.55(1)3.

148. *Ibid.*, ss.27–28.

149. *Ibid.*, ss.29–43, esp. s.43.

policy directions taken under ODSP, we will emphasize only the **changes** with respect to the financial eligibility rules made in moving from the FB system to ODSP.

2. Comparison with FB financial eligibility, asset and income rules

a. Overview

As was discussed above, from the beginning of the development of the ODSP, the Government emphasized the improvements it was making in the asset and income rules over the existing FB system. In her speech introducing the new program, Minister Ecker emphasized that the asset rules would be made more favourable to recognize “that disabilities may require life-long, as opposed to temporary, assistance”.¹⁵⁰ She also stressed that the asset and income rules would be changed to make it easier for parents (and other relatives and friends) to provide “extra support” to their adult sons and daughters, within the parents’ lifetimes as well as through inheritances.¹⁵¹

As the proposed changes to the existing FB rules relating to financial testing were all improvements which would help applicants and recipients, they generated relatively little controversy during the public debate over SARA. During this period, moreover, the only information available regarding the ODSP asset and income rules was in statements by the Ministry. The *ODSPA* component of Bill 142 provided no details regarding ODSP financial eligibility. This was left to be determined by regulation.

When the *ODSPA General Regulation* appeared, it contained all the improvements previously referred to by the Minister. There were no significant changes over what had been presented during the consultation process. In fact, there were some additional improvements, particularly with respect to exempt assets.

b. Improvements in the ODSP asset rules over FB

While the *FBA General Regulation*¹⁵² had referred to “liquid assets”, and provided a complex definition of that term, the *ODSP General Regulation* referred simply to “assets” and left this term undefined. As yet, it is not known whether this change in terminology will have any effect in practice.

The basic level of allowed assets for a single person was raised from the FB level of \$3,000 (the level at which it had remained since 1980) to \$5,000. The additional amount for a spouse remained at the FB level of \$2,500, as did the additional amount for other dependants of \$500.¹⁵³

The long-standing exemption under FB for a principal residence was maintained.¹⁵⁴ And the possibility of also exempting a second residence on a discretionary basis was

150. *Supra* note 4 at 10.

151. *Ibid.*

152. *Supra* note 24.

153. *FBA General Regulation, Ibid.*, ss.3(2), 3(3); *ODSPA General Regulation, supra* note 69, s.37(1).

154. *FBA General Regulation, Ibid.*, s.1(1)(f)(ii); *ODSPA General Regulation, Ibid.*, s.28(1)1.

added, where it could be shown to be “necessary for the health or well-being of one or more members of the benefit unit”.¹⁵⁵

Under FB, a primary motor vehicle considered to be a necessity and valued up to \$10,000 (or not considered a necessity and valued up to \$5,000) had been permitted.¹⁵⁶ Under ODSP, a primary motor vehicle of any value owned by any member of the benefit unit is exempt.¹⁵⁷ In addition, while under FB a second vehicle was only permitted with a value up to \$5,000 and if considered a necessity,¹⁵⁸ under ODSP a second vehicle with a net value of up to \$15,000 is allowed if it is “required to permit a dependant to maintain employment outside the home”.¹⁵⁹

For ODSP recipients operating a business, the level of exempt business assets has been raised to \$20,000 from the FB level of \$10,000.¹⁶⁰

Under FB, prepaid funerals were considered an exempt asset up to \$5,000. Under ODSP, all prepaid funerals are now considered exempt assets, regardless of their value.¹⁶¹

Personal injury and related awards for “pain and suffering” (or for the death of a member of the benefit unit) and for actual expenses relating to the injury were made exempt up to a \$100,000 limit, with the Director also given a discretion to increase this amount where the “actual expenses” component exceeded \$100,000. This was a significant increase over the FB limit of \$25,000.¹⁶²

A cumulative limit of \$100,000 was introduced in ODSP for each benefit unit with respect to the following types of funds:

- trusts derived from an inheritance;
- trusts derived from life insurance policy proceeds; and
- the cash surrender value of life insurance policies.¹⁶³

Under FB, the cumulative limit for trusts derived from inheritances or life insurance policy proceeds was \$65,000,¹⁶⁴ while the cash surrender value of life insurance

155. *ODSPA General Regulation, Ibid.*, s.28(1)3.

156. Ontario Ministry of Community and Social Services, *FBA Policy and Procedural Guidelines*, Directive 0304-02, “Assets: Motor Vehicle”.

157. *Supra* note 69, s.28(1)6.

158. *Supra* note 24.

159. *Supra* note 69, s.28(1)7.

160. *FBA-General Regulation, supra* note 24, s.1(1)(l); *ODSPA General Regulation, Ibid.*, s.28(1)9.

161. *Supra* note 156, Directive 0302-02, “Assets: Definition of Assets” at 4; *ODSPA General Regulation, Ibid.*, s.28(1)13.

162. *FBA General Regulation, supra* note 24, s.1(1)(h); *ODSPA General Regulation, Ibid.*, ss.28(1)14, 28(2).

163. *ODSPA General Regulation, Ibid.*, ss.28(1)19, 20, 28(3).

164. *Supra* note 24, s.1(1)(i).

policies had no special rule and was therefore included in the general “liquid asset” limit of \$3,000 for a single person.¹⁶⁵

A final important ODSP asset exemption, not contained in the FB rules, is “the amount of a loan taken against a life insurance policy if that amount is or will be used for disability related expenses approved by the Director”.¹⁶⁶

In other respects, the FB “liquid asset” rules were essentially maintained. No assets were subjected to more restrictive rules or lower limits under ODSP.

c. Improvements in the ODSP income rules over FB

As with the asset rules, the ODSP income rules in some cases represent significant improvements over the FB rules, and otherwise remain the same.

A major new rule under ODSP provides that payments that are applied to “disability-related items or services” as well as to “education and training expenses” are totally exempt from inclusion in income.¹⁶⁷ Under FB, a regulation to this effect had been established for trusts derived from inheritances and life insurance proceeds.¹⁶⁸ Under ODSP, however, this rule has been extended to include all payments for these purposes.¹⁶⁹

The *ODSP Policy Directives* set out a reasonably comprehensive list of expenses which would qualify as “disability-related” or as “education and training” for purposes of this exemption. Some of the items included are the following:

- assistive devices
- support services
- prescription drugs not available under a drug plan
- home renovations for accessibility
- disability-related educational supports
- sign language and lip reading training.¹⁷⁰

165. *Supra* note 156, Directive 0302-02, “Assets: Definition of Assets” at 6–9.

166. *Supra* note 69, s.28(1)21.

167. *Ibid.*, s.43(1)9.

168. *Supra* note 24, s.13(2)49.

169. The wording in the *ODSPA General Regulation*, *supra* note 69, s.43(1)9, refers to payments “that are applied to [emphasis added]” these types of expenses. This seems to imply a direct link between the payments and the expenses, as where the expenses are paid directly by a family member. It is open to interpretation whether this provision can also be used to cover a situation in which the ODSP recipient personally receives payments from a relative or friend, and then uses some or all of these payments for disability-related expenses or education and training expenses. The *ODSPA Policy Directives* do not address this point directly, although they do say that payments received from employment are not exempt even when used to pay disability-related expenses (*Supra* note 77, Directive 0302-08, “Treatment of Disability-Related Items and Services” at 4). We shall return to this point later.

170. *Supra* note 77, Directive 0302-08, “Treatment of Disability-Related Items and Services”.

However, this exemption does not cover general living expenses such as:

- rent, mortgage payments, property taxes and utilities
- non-adapted clothing
- entertainment and travel, except for disability-related component costs
- insurance premiums
- home renovations not required because of a disability, unless required for health and safety reasons.¹⁷¹

Another significant ODSP improvement is to exempt “payments from a trust or life insurance policy or gifts or other voluntary payments up to a maximum of \$4,000 for any twelve month period.”¹⁷² There was no parallel exemption under FB (except to a very limited extent for “casual gifts of small value” and “casual payments of small value”).¹⁷³ What this means is that family or friends of an ODSP recipient or a trust or life insurance policy can make payments to the ODSP recipient of up to \$4,000 for any purpose within any twelve month period, in addition to any exempt payments for “disability-related items and services” and “education and training” expenses.¹⁷⁴

Under FB, loans were treated as income except if applied to the operation of a business,¹⁷⁵ but under ODSP loans are exempt if for an approved purpose, including the operation of a business, “medically necessary health related reasons” where no government funding is available and disability-related items or services.¹⁷⁶ The recent amendments to the *ODSPA General Regulation* provide that loans for certain additional purposes will be exempt under ODSP, both as assets and income. These include loans to purchase exempt assets such as principal residences and motor vehicles and loans for payment of first and last month’s rent and loans for the purchase of necessary household goods.¹⁷⁷

Life insurance interest or dividends were income under FB,¹⁷⁸ but are exempted under ODSP if reinvested in the policy, used to pay premiums or used to pay disability-related expenses or education and training expenses.¹⁷⁹

171. *Ibid.*

172. *ODSPA General Regulation, Ibid.*, s.43(1)13.

173. *Supra* note 24, ss.13(2)27, 13(2)28.

174. Care must be taken given the language used in this regulatory provision. Payments, at least from individuals, must be **voluntary**. Support payments ordered by a court would not qualify. As well, the \$4,000 limit applies to any consecutive 12-month period, not just to a calendar year.

175. *Supra* note 24, s.13(2)16.2.

176. *Supra* note 69, s.43(1)1.

177. *Supra* note 80, ss.4(1), 9(1).

178. *Supra* note 24, ss.13(2)6, 13(2)16.1.

179. *Supra* note 69, s.43(1)11.

The FB initial net earnings exemption for a single person of \$160 per month was retained in ODSP, but the net earnings exemption for a family of more than one person was raised from \$185 per month to \$235 per month. For both singles and families with earnings, “net” basically means “after required deductions are made from the paycheque”. For both singles and families, there is an additional exemption of 25% of net earnings over the initial exemption limit and child care expenses as well as disability-related work expenses can be taken into account in the calculation. Under FB, there was a three-month waiting period before the earnings exemption applied, but this was removed under ODSP. This is a significant change for some applicants, who can now have the earnings exemption rules applied to the initial determination of their financial eligibility for the program.¹⁸⁰

3. Comparison with AISH and BC Benefits financial eligibility, asset and income rules

a. Comparison with AISH

A unique feature of AISH among social assistance programs for persons with disabilities has always been that it is a purely income-tested system, with no asset test at all. Income derived from assets has been taken into account, but there has been no asset definition or limit.¹⁸¹ However, the Alberta Government’s announced changes to AISH¹⁸² include the introduction of a \$100,000 asset limit. In addition to the \$100,000, a principal residence, a car or truck, and a vehicle adapted for a disability will be allowed. While Ontario’s ODSP permits a \$100,000 fund from certain specific sources or combinations of sources, such as inheritances, life insurance and personal injury awards, AISH will still permit a \$100,000 asset limit from any source, which is a much broader exemption.

For purposes of AISH, income is divided into totally exempt, not exempt and partially exempt income.¹⁸³ Totally exempt income includes items such as the federal Children’s Benefit, GST credit, provincial home renovations grants, student loans and the portion of awards or damage settlements which do not replace lost income. Income which is not exempt is deducted dollar-for-dollar. This includes Canada Pension Plan, Employment Insurance, Workers’ Compensation, insurance benefits, support payments for immigrants from their sponsors, maintenance payments from a spouse and inheritance income. These rules are very similar to those under ODSP with the exception of inheritance income which has significant special exemption rules under ODSP.

180. For the earnings exemption rules in each program, see *FBA General Regulation*, *supra* note 24, s.13(2)1; *ODSPA General Regulation*, *ibid.*, s.38.

181. *AISHA*, *supra* note 84, s.4(2), sets out the eligibility criteria for AISH and refers to an income test, but not to an asset test.

182. *Supra* note 85.

183. *AISHA Regulation*, *supra* note 84, s.3 & Sch.1.

AISH has a \$200 monthly exemption for all income received on behalf of a dependent child (apparently from any source, including child support). There is no corresponding provision in ODSP.

While ODSP allows \$4,000 every 12 months to be paid by families, trusts and others as voluntary payments to a recipient, AISH only allows \$600 as “gifts to mark social occasions”.

The AISH category of partially exempt income includes employment income, but several other kinds of income as well. This is another unique feature of AISH. The following are some of the kinds of income included together with employment income in the partial exemption test:

- interest and investment income
- awards or settlements for loss of income
- lottery winnings
- room and board income
- rental income from principal residence
- farm and business income
- scholarships, bursaries, training allowances and other student grants
- payments received from life insurance policies on terminally ill persons
- income tax refunds other than fully exempt tax credits.

For employment and self-employment, net earnings (after statutory and mandatory deductions) are considered.

The amount of the partial exemption varies based on the AISH recipient’s family composition. For single recipients who have no dependent children, the first \$165 per month is totally exempt and 25% of any additional income is exempt. For recipients who have dependent children or who have a dependent spouse who does not qualify for AISH herself or himself, the first \$775 per month is totally exempt and 25% of any additional income is exempt. If both spouses qualify for AISH, each spouse will get the \$165 per month total exemption plus a 25% exemption for any additional income. If both spouses qualify for AISH and have dependent children, however, both spouses will not get the \$775 initial exemption. In that case, only one will get the \$775 initial exemption and the other will get an initial exemption of \$165.

This \$775 total initial exemption for clients with dependants is much higher than in other programs and is another unique feature of AISH. However, this must be balanced against the fact that AISH only provides an allowance to **individuals** with disabilities who qualify. There is currently no additional amount provided for spouses or dependent children, although this is under consideration by the Alberta Government.¹⁸⁴

184. *Supra* note 85.

Thus, the \$775 exemption under AISH does not necessarily reflect a system in which these families can have a significantly higher income than in other programs.

The same partial exemption levels have been applied under AISH to employment earnings as to the other kinds of partially exempt income listed above. In its recent AISH announcement, however, the Alberta Government has stated that it will raise the earnings exemption for single individuals to \$200 per month.¹⁸⁵ However, the earnings exemption for families will remain the same.

There is no simple comparison here with ODSP in that some of the (non-employment) payments which are partially exempt under AISH would be totally exempt under ODSP,¹⁸⁶ some would be partially exempt¹⁸⁷ and some would not be exempt at all.¹⁸⁸ For employment earnings, the AISH and ODSP rules are very similar in that both have an initial monthly earnings exemption with a 25% exemption for additional earnings, based on net income. Once Alberta increases the AISH earnings exemption for singles to \$200, it will be higher than Ontario's monthly exemption of \$160. It is not really possible to compare what the two programs provide by way of earnings exemptions for families, because the two programs are structured so differently in this area.

b. Comparison with BC Disability Benefits

BC Disability Benefits Level II is both asset-tested and income-tested. Although it has somewhat similar exemptions to those under AISH and ODSP, they are generally less extensive. As well, the rates under BC Disability Benefits are lower than those under the other two programs.

The general asset exemption under BC Disability Benefits is \$3,000 for a single person, \$5,000 for a person with one dependant, and \$500 for each additional dependant. These asset limits are very similar to the FB levels and are lower than the ODSP levels.¹⁸⁹

The principal residence is exempt¹⁹⁰ as is "one motor vehicle generally used for day-to-day transportation needs",¹⁹¹ the same as in Ontario and Alberta. BC Disability Benefits treats an applicant or recipient's life insurance policy as an asset if it has a cash surrender value of more than \$1,500.¹⁹² This has a similar effect to Ontario's old FB rule, which was changed under ODSP. There is provision under BC Disability Benefits for a "special needs trust" of up to \$100,000,¹⁹³ similar to that under ODSP.

185. *Ibid.*

186. Examples are certain funds received by post secondary students and interest earned on exempt assets.

187. An example is room and board income.

188. Examples are income tax refunds other than fully exempt tax credits.

189. *DBP Regulation, supra* note 88, ss.6(1)(a), 6(1)(b).

190. *Ibid.*, s.6(1)(c).

191. *Ibid.*, s.6(1)(b).

192. *Ibid.*, s.6(1)(h).

193. *Ibid.*, s.7. The amount held in the trust can be higher if it is a discretionary trust or if the trust is

In comparison with AISH and ODSP, the income exemptions under BC Disability Benefits are quite narrow and specific.¹⁹⁴ Recipients are permitted an earnings exemption of \$200 per month plus 25% of additional earnings. Unlike AISH and ODSP, the earnings exemption rules are the same for a family as for an individual. The BC earnings exemption for a single person is higher than Ontario's and the same as that proposed in Alberta. For families, it is lower than under AISH and ODSP, however it must be remembered that BC Disability Benefits has lower monthly benefit rates than AISH or ODSP to begin with.

For family support payments, BC Disability Benefits allows a \$50 per month exemption for someone without dependent children, and \$100 per month for someone with dependent children. This is lower than AISH permits for someone with dependent children, however AISH allows no exemption for a person without dependent children. ODSP has no exemption for support payments at all.

4. *Major policy decisions regarding financial testing, assets and income within ODSP*

Based on the previous analysis and comparisons, the most important policy decisions made by the Ontario Government regarding financial testing, assets and income within ODSP are as follows:

- (A) to significantly increase permitted assets and income which would assist persons with disabilities in seeking and maintaining independence;
- (B) to significantly increase permitted assets from particular sources such as inheritances, life insurance and personal injury awards;
- (C) to make only a modest improvement in the general level of permitted assets;
- (D) to greatly increase the opportunities for family members (and others) to provide voluntary support to the ODSP recipient without affecting his or her allowance; and
- (E) to make no improvement in the earnings exemption for individual recipients and only a modest improvement for families.

5. *Implementation of the ODSP financial testing, asset and income rules*

Issues have arisen regarding the stringency with which the asset and income rules are being enforced. These issues will be discussed below in Section I.

6. *Evaluation and proposals for reform*

The ODSP financial eligibility rules are designed primarily to assist ODSP recipients who have families who are both willing and able to help them. This was an explicit objective of Minister Ecker's ODSP strategy, to emphasize the Ministry's "Partnership with Families". If families have the resources, they can provide an ODSP recipient

approved by the Director.

194. The income rules are set out in Schedule 2 of the *DBP Regulation, Ibid.*

with an accessible cottage or apartment in addition to a home and with a vehicle (such as an accessible van) of any value. They can pay for post-secondary education or for a wide range of disability-related items and services. They can provide up to \$4,000 every twelve months for any purpose whatsoever. And they can establish a testamentary trust to continue to make these types of expenditures after their deaths.

There are other “winners” under the ODSP financial eligibility rules, such as recipients with large personal injury awards, those who are operating a business and those who have invested in life insurance policies. Subject to the rules, these ODSP recipients may be able to keep significant assets and receive significant “extra” income without any adverse effect on their allowances.

But those without these resources don’t fare so well under ODSP. The basic exemption for assets is still only \$5,000 for an individual and \$7,500 for a couple, with \$500 added for each dependent child. Persons with disabilities who don’t have “special funds” under the ODSP asset rules and who don’t have families or friends who can and will provide “extra support” are limited to these low levels of savings.

The detailed nature of the asset and income rules leads as well to arbitrary and inequitable distinctions. Why, for example, is there a \$100,000 exemption for a personal injury award, but no special provision at all for a former spouse with a disability who obtains a family law award? The former spouse may be totally ineligible for ODSP until her or his savings are reduced to \$5,000 (or \$6,500 if there are three children, for example). In practice, this type of situation is often addressed by having the former spouse purchase a principal residence or a vehicle, but this is not an appropriate solution in every case.

While the \$100,000 general asset exemption proposed in Alberta (which has had no asset test for two decades) is likely unaffordable in the short term in Ontario, strong consideration should be given to increasing the general exemption level under ODSP in the short-term. One possibility would be to double the current levels, so that the asset exemption would be \$10,000 for a single person, \$15,000 for a couple or a single person with a dependent child and \$1,000 for each additional dependant.

Perhaps the most surprising shortcoming of the ODSP financial eligibility rules is how little was done for persons with disabilities who are working, despite employment being characterized as a key objective of ODSP. Although there were some improvements in the earnings exemption, particularly the elimination of the three-month waiting period, the initial earnings exemption for a single person was not raised at all. Nor was any provision made to increase the subsequent 25% earnings exemption, nor to introduce higher exemption levels for families of more than two. The result is that ODSP recipients are better off receiving voluntary payments from others than they would be earning an equivalent amount themselves!

It would make sense to improve the ODSP earnings exemption in the short term, perhaps by moving to the \$200 level adopted by Alberta and British Columbia for a

single person and adding \$50 for each additional dependant. The 25% exemption for earnings over the original exemption could be increased to 30%.

Many persons with disabilities are not "winners" under the improved financial eligibility rules under ODSP. But even the "winners" may have cause for concern. Family members with resources, or individuals with substantial life insurance policies now will be increasingly able to utilize these resources to supplement ODSP. However, government, social and health agencies may come to expect that these resources be used for co-payments, user fees or the private purchase of services. Families and individuals with "special funds" may increasingly find that governments and service providers will demand that they use private resources to supplement publicly-funded services or replace them altogether.

G. OTHER BENEFITS UNDER THE ONTARIO DISABILITY SUPPORT PROGRAM: HEALTH BENEFITS, DISABILITY-RELATED NEEDS, EMPLOYMENT-RELATED BENEFITS, ACCOMMODATION-RELATED BENEFITS, AND CHILD-CARE RELATED BENEFITS

1. *ODSP provisions regarding other benefits*

Recipients of income support under ODSP may be eligible for a wide range of additional benefits: these include health benefits, disability-related needs, employment-related benefits, accommodation-related benefits and child-care related benefits. The rules regarding these benefits are not found in *ODSPA* but are left to be made by regulation.¹⁹⁵ Many of these benefits are found in Part VI of the *ODSPA General Regulation*.¹⁹⁶ Discussion of the details of all of these benefits is beyond the scope of this article. We will discuss the particulars of some changes to health benefits made in moving from FB to ODSP.

The ODSP "other benefits" are:¹⁹⁷

Health Benefits

- Ontario Drug Benefit coverage
- a basic dental plan administered by the Ontario Dental Association
- hearing aids
- assistive devices coverage
- vision care benefits
- special diets
- mandatory special necessities

195. *ODSPA*, *supra* note 2, s.55.

196. *Supra* note 69, ss.44-45.

197. These benefits are set out in *Ibid.*, s.44, unless otherwise indicated.

- “extended health benefit” rules.

Disability-Related Needs

- guide dog allowance.

*Employment-Related Benefits*¹⁹⁸

- employment or training start-up benefit
- child care deductions from employment or training earnings¹⁹⁹
- maintenance of a second residence while attending a training program.

Accommodation-Related Benefits

- utilities allowance²⁰⁰
- heating costs²⁰¹
- home repairs
- community start-up benefit.

Child-Care Related Benefits

- back-to-school allowance
- winter clothing allowance
- the Assistance for Children with Severe Disabilities Program.²⁰²

2. Comparison with FB “Other Benefits”

With the exception of health benefits, the ODSP “other benefits” package is essentially the same as under FB.

For persons with disabilities receiving FB, the “health benefits package” had always been a major component of the program. In response to positions put forward by individuals, families and organizations representing the disability community, successive Ontario governments had developed a range of health benefits entitlements that went together with FB eligibility. Some of these entitlements, but not all, extended to other categories of FB and GWA recipients as well.

During the consultation process and in Minister Ecker’s announcements regarding the ODSP, the major improvement to the “health benefits package” that was put forward

198. The ODSP employment supports program is discussed in Section J, *infra*.

199. The child care deduction is part of the earnings exemption rules (*Ibid.*, s.38).

200. The utilities allowance is part of the shelter allowance rules (*Ibid.*, s.31(1)8(ii)).

201. Heating costs are part of the shelter allowance rules (*Ibid.*, s.31(1)10).

202. The ACSD, an income-tested special needs program, is under *ODSPA*. However, it is really separate from the ODSP income support program and is available to any moderate and low income families who have children with exceptional special needs. ACSD was called the “Handicapped Children’s Benefit” under FB. Essentially the same rules were adopted to ACSD as for HCB. For details regarding ACSD, see *ODSPA*, *supra* note 2, s.49; *ODSPA ACSD Regulation*, *supra* note 71; *ODSPA Policy Directives*, *supra* note 77, Directive 1101-01, “Assistance for Children with Severe Disabilities, Formerly the Handicapped Children’s Benefit”.

related to the Ministry of Health's Assistive Devices Program ("ADP").²⁰³ ADP pays for a range of equipment and supplies required by persons with disabilities (and others). The basic ADP payment is 75% of the **approved** cost of the equipment and supplies, which leaves the consumer to find another way to pay the remaining 25% or more. While ADP is reasonably comprehensive, there are also significant concerns in the disability community about items which are not covered as well as "caps" and other restrictions applied to funding in many equipment and supplies categories. Because of these "caps" and other restrictive rules, the approved ADP cost is often lower than the actual cost to the consumer, and as a result ADP often pays much less than 75% of the "real cost" in practice.

What the Ministry proposed and brought into effect under the ODSP initiative was 100% ADP coverage for ODSP recipients.²⁰⁴ What this means is that 100% of the ADP **approved** cost of equipment and supplies will be covered, rather than 100% of the **actual** cost. Nevertheless, this was widely viewed as a positive step by disability organizations, as their clients and members receiving social assistance often had significant problems in affording 25% of the cost of equipment and supplies once they had received ADP approval for 75% of the cost. Supplementary Aid under GW²⁰⁵ was available for this purpose, but typically only in larger urban centres and only on a discretionary basis. Consumers often had to turn to hard-pressed disability organizations, to service clubs or to their families in order to pay the required 25% (or more) of essential items. The new changes also authorize payment for ADP assessments (required for eligibility) for ODSP recipients where no other source of funding is available. Another problem persons with disabilities typically have with ADP-funded equipment is that ADP does not cover repairs, replacement parts and batteries. The recent amendments to the *ODSPA General Regulation* address this problem with respect to mobility devices used by ODSP recipients.²⁰⁶

Two other improvements made to the "health benefits package" under ODSP were important to some recipients.

The first related to special diets. Under the FBA "aggregate" rule, only clients with very high special diet costs could receive any special diet allowance at all and, even then, the entitlement was reduced by the "special needs amount" of \$194.²⁰⁷ Under *ODSPA*, the "aggregate" rule has been eliminated and recipients are now eligible for a special diet prescribed by a physician to a maximum of \$250 per month.²⁰⁸

203. The description of ADP which follows is taken from *ODSPA Policy Directives, Ibid.*, Directive 0605-03, "Assistive Devices".

204. *Supra* note 69, s.44(1)v.

205. *GWAA, supra* note 2, s.7.

206. *Supra* note 80, s.10.

207. *Supra* note 24, ss.12(5)6, 12(5)12.

208. *Supra* note 69, s.44(1)4. A small number of persons who had qualified for special diet allowances higher than \$250 per month under FB were subsequently "grandparented" and allowed to retain their higher special diet allowances.

The second improvement related to mandatory special necessities, which include diabetic supplies, surgical supplies and required travel and transportation for medical purposes. These were formerly provided by municipalities under GWA, but have now been transferred to ODSP.²⁰⁹ In theory, this makes no difference to consumers with disabilities, but in practice it makes mandatory special necessities easier to access, especially in smaller municipalities. As mentioned above, mandatory special necessities now include repairs and batteries for wheelchairs and other mobility devices.²¹⁰

There was also a small cutback in eligibility for the “extended health benefit”. The FB “extended health benefit” rules permitted persons with disabilities whose income (from employment or otherwise) was too high for FB eligibility, but who had health costs which would make them eligible if taken into account as “budgetary requirements”, to remain on FB as recipients of the “health benefits package” only.²¹¹ Such persons were required to meet all FB requirements other than the income rules, such as the rules relating to liquid assets. The basic FB rule was carried over into ODSP.²¹² This “extended health benefit” rule now requires the calculation of the cost of the health benefits on a month-by-month basis in every case, although the cost of one-time larger items can be allocated over a year.²¹³ However, formerly under FB there was an “automatic buffer zone” which meant that persons could continue to qualify for the health benefits package if they were over-income by \$50 for singles and \$100 for persons with dependants even after adding their health costs to their budgetary requirements. This buffer zone has been abolished under ODSP which will make it practically more difficult to qualify for the “extended health benefit”. That said, however, only a small number of FB recipients actually qualified for the “automatic buffer zone”.

3. Comparison with “Other Benefits” in AISH and BC Disability Benefits

As in ODSP, under AISH and BC Disability Benefits a significant package of “other benefits” is available to recipients of the disability-specific social assistance program, with a more restricted package available to general social assistance recipients. A detailed discussion of these benefits is beyond the scope of this article. However, we shall examine briefly an issue of great importance to the disability community: namely, continued entitlement to “other benefits”, especially health and disability-related benefits for those who become employed.

209. *Ibid.*, s.44(1)(iii).

210. *Supra* note 80, s.10.

211. *FBA General Regulation*, *supra* note 24, s.15(6); *FBA Policy and Procedural Guidelines*, *supra* note 156, Directive 0407-02, “Minimum Cheque Amount: Extended Health Benefits”.

212. *Supra* note 69, s.45(1).

213. *Supra* note 77, Directive 0605-08, “Extended Health Benefit” at 5.

British Columbia has introduced rules to enable those who leave the program because of employment to retain their health benefits package. Thus, in that province, Disability Benefits Level II recipients (and their dependants) keep their health coverage with no time limit if they gain financial independence through employment.²¹⁴ This is a significant step by the B.C. Government to address the work disincentive issue.

In its announced reforms of AISH,²¹⁵ the Alberta Government has also announced plans to allow recipients to retain their health benefits if they become employed, however the details of this program have not yet been described.

The ODSP earnings exemption and extended health benefits rules also, in theory, extend health benefits coverage very significantly to those who become employed. However, these rules do not always work so well for recipients in practice. They require a detailed month-by-month calculation of earnings and health-related costs, which is difficult for both recipients and ODSP officials to keep up with. Sometimes this leads to overpayments. In other cases, the extended health benefits are never obtained, simply due to the administrative complexity created by the detailed nature of the rules.

4. Major policy decisions regarding "Other Benefits" within ODSP

Based on the previous analysis and comparisons, the most important policy decisions made by the Ontario Government regarding "other benefits" within ODSP are the following:

- (A) to continue all of the health benefits, disability-related needs, employment-related benefits, accommodation-related benefits and child care-related benefits provided under FB;
- (B) to make improvements in health benefits directed at meeting the most essential needs of recipients; and
- (C) not to make improvements in benefits other than health benefits.

5. Implementation of "Other Benefits" within ODSP

Very little information is available about the implementation of "other benefits" within ODSP. Recipients are often unaware of these benefits, and more could be done to provide information about them. The transfer of "mandatory special necessities" from municipalities to ODSP has proven especially confusing to consumers.

6. Evaluation and proposals for reform

The Government's improvements in this area, as in many other aspects of ODSP, were targeted specifically at recipients with identifiable special needs. The extension of ADP coverage, special diets and mandatory special necessities all were directed at

214. *DBPA*, *supra* note 88, s.32(1). Health benefits coverage is also extended to persons who leave the program because they turn 65 and their dependants.

215. *Supra* note 85.

those who have identifiable costs of this type. For individuals with these needs, the improvements made in the “health benefits package” under ODSP were important.

Ontario should consider adopting the British Columbia’s approach to continuing health benefits coverage (and perhaps other benefits as well, such as the guide dog allowance) for ODSP recipients who become employed. Rather than maintain the very complex earnings exemption and extended health benefits calculation required under ODSP, it makes sense simply to provide that the health benefits would be continued for a recipient who becomes employed. This could be subject to a “high-income limit” or other restrictions if necessary to limit eligibility, but it should be kept in mind that the health benefits covered are really essential needs for most persons with disabilities.

H. TRUSTEESHIP AND THIRD-PARTY PAYMENTS

1. *ODSP provisions regarding trusteeship and third-party payments*²¹⁶

Under *ODSPA*,²¹⁷ a person may be appointed to “act for” a recipient who is using or is likely to use the income support provided in a way that is “not for the benefit of a member of the benefit unit”: that is, not for the benefit of the person himself or herself or not for the benefit of his or her dependants. If the person already has a guardian of property or a trustee, however, that person acts instead of a person appointed by the Ministry. The person appointed as a recipient’s “informal trustee” under *ODSPA* is not entitled to fees or compensation, subject to some exceptions prescribed by regulation and described below.

As discussed above, during the Standing Committee hearings a number of organizations expressed concerns about “informal trusteeship”. Some recommended additional safeguards, while others argued that it was inappropriate to have any provisions whatsoever in *ODSPA* to deprive recipients of the management of their property.

In response to these criticisms, the Government made some changes to *ODSPA* (and to *OWA*). First, an additional ground for appointing an “informal trustee” that was in Bill 142 originally was removed. This ground, contained in section 12(1)(b) of the first reading version of Bill 142, was that “the recipient is incapacitated or is incapable of handling his or her affairs”. The reason for removing this provision may well have been a realization that ODSP officials should not make what is essentially a legal determination about a person’s capacity.²¹⁸ However, the practical effect of this amendment is uncertain, as the “use of assistance not for the benefit of a member of the benefit unit” test which remains is very broad.

216. The provisions regarding trusteeship and third-party payments discussed in this section apply to OW as well.

217. *Supra* note 2, s.12.

218. The *ODSPA Policy Directives*, *supra* note 77, Directive 0701-01, “Trustees and Persons Appointed by the Director to Act for a Recipient” at 4, state that, “A determination of whether an applicant/recipient is capable of handling funds does not mean a determination of the applicant/recipient’s mental capacity”.

The second change was to add a provision that the person appointed must “report and account in accordance with the regulations.”²¹⁹

The third amendment was to delete section 21(2), paragraph 4, which was in the first reading version of Bill 142. That provision stated that a decision to appoint a person to act on behalf of a recipient was not appealable. Thus, the decision to appoint a person is now appealable to the Social Benefits Tribunal.

The *ODSPA General Regulation*²²⁰ and the *ODSPA Policy Directives* introduced some additional rules regarding “informal trusteeship”. Trustees are to be free from conflicts of interest: ODSP staff and landlords, for example, cannot be appointed. The Office of the Public Guardian and Trustee or an organization or agency under contract to the Ministry may be appointed to “act for” a recipient. Either of these bodies may receive compensation for acting, but this compensation is not to be recovered from the income support paid to the recipient. This leaves open the possibility that these bodies may receive compensation from the recipient’s assets if there are any. Persons, including the organizations just mentioned, appointed to act for a recipient must prepare an annual report and may be required to provide information to the Ministry on a more frequent basis by the ODSP Director. The Ministry shall obtain the consent of the recipient to the appointment of someone to act for him or her “if feasible” and shall give the recipient an opportunity to say why an appointment should not be made at all, discontinued if already made or why someone else should be appointed. The Ministry is required to make periodic reviews of the need to continue appointments of “informal trustees”. The Ministry’s policy is to conduct an automatic review every six months at a minimum. Finally, the Ministry has authority, in cases of misuse of funds by the person appointed, to pay the recipient a maximum of one month’s additional income support, but only in cases where the benefit unit could not provide for its basic needs and shelter without such a payment.

The *ODSPA* provisions regarding payments to third parties were also criticized during the Standing Committee hearings, but were not changed by the Government. The legislation provides that third parties who are owed money by members of the benefit unit may be paid directly by ODSP, where the costs relate to basic needs or shelter as defined in the regulations. The *ODSPA General Regulation*²²¹ limits direct payments to third parties to cases where the Ministry is satisfied that the amounts really are or will be owing to the third party (e.g. a landlord). Ministry policy is not to enter into direct payments to third parties unless the rent or utilities are at least two months in arrears. Where the Director is satisfied that there is a “reasonable dispute” as to whether the amount is owing (for e.g., there is a landlord/tenant issue), there is provision to pay the money into Court or to a “neutral third party” at the request of

219. *Supra* note 2, s.12(4).

220. *Supra* note 69, s.49.

221. *Ibid.*, s.50.

the recipient. Unlike “informal trusteeship”, a decision by the Ministry to make a direct payment to a third-party creditor is not appealable to the Social Benefits Tribunal.²²²

2. Comparison with FB policies regarding trusteeship and third-party payments

“Informal trusteeship” was provided for under FB.²²³ While the Ministry policy guidelines indicated that the rights of recipients should be protected in the process of appointing someone to act for them, the legislation contained no real safeguards. By introducing a duty on the part of the Ministry to consult with recipients, a duty on the part of “informal trustees” to submit an annual report and an appeal to the Social Benefits Tribunal, ODSP has brought a number of additional safeguards (and, with them, additional administrative and procedural requirements) into the “informal trusteeship” process.

Unlike ODSP, the FB system did not provide for direct payment to third party creditors with the exception of the direct payment of rent on behalf of recipients who were tenants of public housing authorities.²²⁴

3. Comparison with trusteeship and third-party payments in AISH and BC Disability Benefits

A “private trustee” may be appointed for an AISH recipient “unable to conduct his own affairs”.²²⁵ The trustee is not automatically required to submit reports, but may be required to do so by AISH officials.²²⁶ The client’s consent to the appointment is sought “where feasible”.²²⁷ As an alternative to a “private trustee”, the client may appoint an “authorized representative” on a voluntary basis.²²⁸ Abuse of a recipient’s funds by a trustee is investigated, but the only remedies are criminal or civil actions for fraud.²²⁹ AISH does not have a provision for direct payment to third party creditors.

The BC Disability Benefits program does not have any legislative provision at all for trusteeship or payment to third party creditors. However, “third party administration” is allowed by Ministry of Human Resources policy.²³⁰ These arrangements are

222. *ODSPA*, *supra* note 2, s.21(2)3.

223. *FBA*, *supra* note 3, ss. 10(2), 10(3); *FBA General Regulation*, *supra* note 24, s.18(4)(d); *FBA Policy and Procedural Guidelines*, *supra* note 156, Directive 0202-08, “Applications and Eligibility Criteria: Appointment of Trustee”.

224. *FBA*, *ibid.*, s.5(2); *FBA General Regulation*, *ibid.*, s.37.

225. *AISHA*, *supra* note 84, s.10(1).

226. *Ibid.*, s.10(2).

227. *AISH Policy and Procedures Manual*, *supra* note 84, Directive 04-03-01, “Trusteeship: Private Trustee” at 1.

228. *Ibid.* at 2.

229. *Ibid.* at 3.

230. *BC Benefits Manual*, *supra* note 143, Directive 7.11, “Eligibility for Welfare to Work, Youth Works & Disability Benefits: Payment of Benefits” at 4.

described as being set up by “agreement” by the recipient with the third party, and those wishing to assist a recipient in this way are to be advised to consult a lawyer. It therefore appears that, under BC Disability Benefits, incapacity issues are generally directed towards the legal system and the Public Trustee. “Third party administrators” are not to be appointed if they may have a conflict of interest or if they are Ministry employees. Where no one else is available to act, a fee-for-service arrangement can be made, with a maximum fee of \$25 monthly for each recipient.

In comparison with Alberta and British Columbia, Ontario has taken some important steps towards recognizing “informal trusteeship” under ODSP and in introducing safeguards through a reporting requirement and the availability of an appeal to the Social Benefits Tribunal.

4. *Major policy decisions regarding trusteeship and third-party payments within ODSP*

Based on the previous analysis and comparisons, the most important policy decisions made by the Ontario Government regarding trusteeship and third-party payments are the following:

- (A) to continue to recognize the need for “informal trusteeship” within the program;
- (B) to introduce a reporting requirement, an appeal and other safeguards into the “informal trusteeship” process; and
- (C) to introduce a third-party payment to creditors with respect to shelter and other basic needs.

5. *Implementation of trusteeship and third-party payments within ODSP*

As of the date of writing, very little information is available about implementation in this area of ODSP. It appears that “informal trusteeship”, thus far, has changed very little from the FB system and that the Ministry is ordering third-party payments to creditors in only a very limited number of cases.

6. *Evaluation and proposals for reform*

In the area of trusteeship, the Government was forced to perform a difficult balancing act. On the one hand, it was important to place controls on “informal trusteeship” to protect ODSP recipients against having management of their money taken away arbitrarily and from being exploited by trustees. On the other hand, family members and friends who are assuming the responsibilities of an “informal trusteeship” without compensation may find the reporting and record-keeping requirements to be a burden. Minister Ecker certainly heard both viewpoints strongly expressed during the process of developing ODSP, and appears to have moved towards a final position which is a reasonable compromise among all the interests involved.

There are certainly problems with direct third-party payment to creditors, but there is justification for it so long as its use is confined to emergency situations where an eviction or loss of a basic service, such as an utility, is imminent.

The Government and community advocates should monitor this aspect of ODSP carefully, but thus far no trend has developed which would lead to a strong argument for major change.

I. ADMINISTRATION AND ENFORCEMENT OF THE ODSP

1. *ODSP provisions relating to administration and enforcement*

As discussed above, little or no mention was made of administration and enforcement procedures during the consultation period leading up to the ODSP, and in Minister Ecker's announcement of the program. When Bill 142 was tabled in the Legislature, however, *ODSPA* had the same provisions in this area as *OWA*. Many community groups criticized these provisions during the Standing Committee process. The Government responded by introducing some limitations and safeguards into the enforcement powers, but did not fundamentally change the strict approach it was taking to the administration of the new programs.

Here we will just summarize the main *ODSPA* administration and enforcement powers and requirements without discussing each in detail.²³¹

Application Process

In the ODSP application process, the onus is on the applicant and his or her dependants to provide and verify all necessary financial, personal and other prescribed information to establish eligibility.²³² A detailed list of the information that may be requested is provided by regulation.²³³ It includes such items as: Social Insurance Number, proof of the person's identity and birth date, information with respect to income and assets and information with respect to the person's status in Canada. A consent to disclose and verify information must be signed by the applicant, his or her spouse and another dependant at the Ministry's request.²³⁴ As well, a "Rights and Responsibilities" form must be signed.²³⁵

Home Visits

ODSP applicants and recipients are subject to random home visits by Ministry officials.²³⁶ Refusal to allow a home visit without a valid reason is grounds for refusal or suspension of ODSP income support. These visits are not supposed to be "investigations", given that Ministry officials "shall not look at things that cannot be seen in plain view."²³⁷

231. Ian Morrison has presented a more comprehensive analysis of these powers in the *OWA* context (*Supra*, note 11 at 28–36).

232. *ODSPA*, *supra* note 2, s.5(1).

233. *Supra* note 69, s.14(2).

234. *Ibid.*, s.15.

235. *Supra* note 77, Directive 0201-01, "Intake at ODSP Office (Self-Referrals)" at 4.

236. *Supra* note 69, s.10.

237. *Ibid.*, s.10(3).

"Spousal" Status Investigations

Where an ODSP applicant or recipient lives in the same dwelling place as a person of the opposite sex, he or she may be required to respond to a detailed questionnaire administered by Ministry officials titled "Determination of Spousal Status Questionnaire".²³⁸ The purpose of the questionnaire is to determine whether or not the co-resident is a "spouse",²³⁹ and therefore whether the alleged spouse's assets and income must be taken into account in applying the financial eligibility test. There is some respect for privacy in that sexual factors are not inquired into.²⁴⁰ Some persons with disabilities live with members of the opposite sex who are caregivers rather than partners, however the Ministry policies and the questionnaire do not really take this possibility into account.

Asset Disposal Investigations

There is authority under *ODSPA* to find an applicant or recipient ineligible if he or she has disposed of assets for less than adequate consideration within the past year.²⁴¹ The Ministry also has the discretion to go back three years in looking at disposal of assets.²⁴²

Liens

As discussed above, when *ODSPA* was introduced in Bill 142 it contained a general provision allowing liens to be placed against property. This raised great concern within the community of persons with disabilities, especially with respect to the possibility that liens might be placed against homes. In response to these submissions to the Standing Committee, this provision was amended. In the final version of *ODSPA*, it is stated clearly that liens may not be placed against a principal residence.²⁴³ In fact, the regulations provide that liens are not to be placed against non-exempt property at all during the first six months of ODSP eligibility,²⁴⁴ and provide for a six-month "grace period" during which ownership of non-exempt property does not affect eligibility which can be extended if the recipient is making reasonable efforts to sell the property and has consented to a lien being placed on it.²⁴⁵

Overpayments

Under ODSP, any payment to which the recipient was not entitled is considered an overpayment and is subject to recovery,²⁴⁶ even if the overpayment was caused by an

238. *Supra* note 77, Directive 0202-03, "Co-residency v. co-habitation" at 3-8.

239. *Supra* note 69, s.1(1).

240. *Ibid.*, s.1(2).

241. *Ibid.*, s.22.

242. *Ibid.*, s.22(3).

243. *Supra* note 2, s.7(3).

244. *Supra* note 69, s.55(1).

245. *Ibid.*, s.28(1)17.

246. *ODSPA*, *supra* note 2, s.14(1); *ODSPA Policy Directives*, *supra* note 77, Directive 0801-01, "Recovery of Overpayments" at 4.

administrative error.²⁴⁷ Where overpayments are recovered from ODSP income support, the usual rate of recovery is 5%. However, there is authority in the regulations to increase the rate of recovery to 10%. It also may be reduced below 5% where a higher collection rate will cause undue hardship.²⁴⁸

If interim assistance is paid while the person is awaiting a hearing by the Social Benefits Tribunal and the person's entitlement is eventually found by the Tribunal (or, on appeal or judicial review, by Divisional Court) to be less than the interim assistance paid, then the excess interim payment is considered an overpayment recoverable by the Ministry.²⁴⁹

Information Sharing

Very extensive authority is given under *ODSPA* for the Ministry to share information, including database information, with other governments, including all levels of government in Canada, the United States, other countries and "other prescribed bodies".²⁵⁰ Some new provisions were added to *ODSPA* after the Standing Committee hearings in relation to this authority, but the real impact of these "safeguards" is minimal.

Biometric Information

There is also a wide authority provided under *ODSPA* for the Ministry to use biometric information, such as fingerscanning or eyescanning, in administering and enforcing the legislation.²⁵¹ As with information sharing generally, some new "safeguard" provisions were added after the Standing Committee hearings, but the authority to implement the use of biometric information on a widespread basis remains.

Investigative Authority of Ministry Staff

ODSPA creates a fraud control unit and the position of eligibility review officer. Both are given wide investigatory powers under the legislation.²⁵²

Provincial Offence and Resulting Disqualification period

Under the *ODSPA* legislation a provincial fraud offence has been created.²⁵³ In addition to the punishment for the offence, someone convicted of it is subject to a three-month cancellation of ODSP income support for a first offence, and a six-month cancellation for subsequent offences.²⁵⁴

247. *ODSPA Policy Directives, Ibid.* at 7.

248. For ODSP rate of recovery of overpayments, see *ODSPA, supra* note 2, s.15(1); *ODSPA General Regulation, supra* note 69, s.51(1); *ODSPA Policy Directives, Ibid.* at 5.

249. *ODSPA, Ibid.*, s.27.

250. *Ibid.*, s.53(1). Presumably, in the future, "other prescribed bodies" could include private organizations, such as insurers.

251. *Ibid.*, ss.54(1), 54(2).

252. *Ibid.*, ss.45, 46.

253. *Ibid.*, s.56.

254. *ODSPA, supra*, s.54(6); *ODSPA General Regulation, supra* note 69, s.25.

2. Comparison with FB policies regarding administration and enforcement

While many of the administration and enforcement provisions just reviewed were started under FB, a number were new under ODSP. The major changes are: recovering overpayments regardless of administrative error; recovering interim assistance in some cases as an overpayment; the extensive authorization of information sharing, including sharing of information between electronic databases; the introduction of the authority to collect biometric information; the wider investigative authority given to Ministry staff; and the new provincial fraud offence. The Ministry clearly has much wider investigation and enforcement powers under ODSP than under FB.

3. Comparison with AISH and BC Disability Benefits policies regarding administration and enforcement

Like Ontario, Alberta has taken a very strict and rigorous approach to administration and enforcement of AISH (and an even more strict and rigorous approach for SFI). For example, all overpayments are fully recoverable.²⁵⁵ Failure to notify the Ministry of Family and Social Services of a material change in disability status or income is a provincial offence.²⁵⁶ The AISH Director may discontinue, suspend or vary an AISH allowance on a range of grounds: including failure “to seek or accept reasonable employment for reasonable wages”; resigning from a job that the recipient “might reasonably have held”; failure to collect income to which the recipient is entitled; refusal or neglect to avail oneself “of appropriate training or rehabilitation measures”; and providing inaccurate information or refusing to provide information.²⁵⁷

British Columbia has also introduced a number of measures similar to Ontario. Under BC Disability Benefits, overpayments are generally recoverable.²⁵⁸ Benefits paid pending an appeal are subject to a repayment agreement.²⁵⁹ And there is a three-month disqualification for a provincial fraud offence.²⁶⁰

4. Major policy decisions regarding administration and enforcement within ODSP

Based on the previous analysis and comparisons, the most important policy decisions made by the Ontario Government regarding administration and enforcement were:

- (A) to continue the administration and enforcement provisions that existed under FB; and
- (B) to strengthen the administration and enforcement provisions by adding several new restrictions and Ministry powers.

255. *AISHA*, *supra* note 84, s.9(1).

256. *Ibid.*, s.6(1).

257. *Ibid.*, s.6(2).

258. *DBPA*, *supra* note 88, s.7.

259. *BC Benefits Manual*, *supra* note 143, Directive 9.1, “Recovery of Overpayments” at 4.

260. *DBP Regulation*, *supra* note 88, s.16(2).

5. *Implementation of administration and enforcement provisions within ODSP*

While some of the administration and enforcement provisions discussed above have already been fully implemented for ODSP applicants and recipients, others have not. For example, the Ministry has proceeded to enter into information sharing agreements with other governments in Canada, but has not proceeded with a biometric information collection system.

Although as noted above the administration and enforcement powers are essentially the same in *ODSPA* and *OWA*, in general there has been much more rigorous enforcement within *OW*. The Ministry's new "consolidated verification" process, which basically involves requiring applicants and recipients to produce a great deal of information in order to maintain eligibility, has been applied throughout Ontario to sole support parents moving from the former *FB* program to *OW*, but has not yet been applied (at least on any large scale basis) within *ODSP*.

As with other important components of *ODSP*, as of the date of writing, little information is available about the actual impact of the administration and enforcement provisions.

6. *Evaluation and proposals for reform*

There is little doubt that many of the *ODSP* administration and enforcement provisions will have a very harsh and unfair impact on persons with disabilities, especially if co-ordinated in a "consolidated verification" initiative. Many *ODSP* applicants and recipients, especially those with cognitive disabilities, will have extreme difficulty in collecting the detailed documentation that may be required. They will not be able to repay overpayments which occur due to administrative error, nor will they be able to repay overpayments incurred from collecting interim assistance prior to an unsuccessful appeal. Many, especially those with mental health problems, would find fingerscanning stigmatizing, if not frightening. Applicants or recipients may be penalized because of mistakes made by their "informal trustees".

The punitive aspects of *ODSP* will impact on many persons with disabilities in Ontario. The results will be onerous, not only for *ODSP* applicants, recipients and their dependants, but also for their families and service providers. The Government should review the administration and enforcement provisions in *ODSP* from this perspective.

J. EMPLOYMENT SUPPORTS

1. *ODSP Employment Supports provisions*

The development of a new Employment Supports program is one of the most important components of *ODSP*. It will not be possible to review all aspects of Employment Supports within this article. Rather, an outline will be given, emphasizing the key policy decisions which the Government made in this area.

Eligibility for Employment Supports

The eligibility criteria for Employment Supports are set out in sections 32 and 33 of *ODSPA*:

32. (1) The prescribed employment supports may be provided to a person described in subsection (2) in order to remove barriers to the person's competitive employment and assist the person in attaining his or her competitive employment goal.
- (2) Employment supports may be provided to a person if the person is eligible for income support under Part I or if,
- (a) the person has a physical or mental impairment that is continuous or recurrent and expected to last one year or more and that presents a substantial barrier to competitive employment; and
 - (b) the fact that clause (a) applies to the person has been verified by a person with the prescribed qualifications.
33. No person is eligible for employment supports under this Act unless he or she is qualified for them under section 32 and,
- (a) the person is resident in Ontario;
 - (b) the person intends to, and is able to prepare for, accept or maintain competitive employment;
 - (c) the person is not a member of a class of persons prescribed to be ineligible for employment supports; and
 - (d) the person enters into a funding agreement with a service coordinator based on a competitive employment plan.²⁶¹

The test provided in Section 32(2)(a) is broader than the definition of "person with a disability" discussed earlier in this paper. To be eligible for Employment Supports, the person just needs to have "a physical or mental impairment" that is expected to last one year or more. The impairment does not have to be "substantial", so long as it leads to "a substantial barrier to competitive employment". Accordingly, many persons with disabilities would be eligible for Employment Supports who would not qualify for ODSP income support. Those who do qualify for ODSP income support are automatically considered to meet the section 32(2)(a) test and are not required to verify their impairment or disability.²⁶²

A key component of the eligibility test is found in section 33(b). Employment Supports are only available to persons with disabilities who have a competitive employment goal, which they are considered to be capable of attaining. The Ministry's policy is that "competitive employment" means at least minimum wage.²⁶³

261. *Supra* note 2.

262. *Supra* note 78, Directive 102-02, "Eligibility and Application Process" at 5.

263. *Ibid.* Directive 103-01, "Employment Planning" at 7.

In determining eligibility, reference must also be made to the regulatory exclusions pursuant to section 33(d).²⁶⁴ Under section 2(1) of the *Employment Supports Regulation*, the following classes of persons are not eligible for Employment Supports:

- persons receiving assistance under OW
- persons under 16 years of age
- persons entitled to receive rehabilitation services under the *Canada Pension Plan*²⁶⁵
- persons eligible to receive Employment Insurance benefits²⁶⁶
- persons entitled to Workers' Compensation or Workplace Safety and Insurance payments²⁶⁷
- persons entitled to motor vehicle no-fault statutory accident benefits under the *Insurance Act*²⁶⁸
- persons entitled to rehabilitation benefits under an insurance policy, such as long-term disability insurance²⁶⁹
- persons entitled to receive services under the Ontario Ministry of Health's Drug and Alcohol Recovery Program or some other substance abuse program of the Ministry of Health.

ODSPA income support recipients must exhaust all of the sources listed above before being eligible for ODSPA Employment Supports.²⁷⁰

Applicants for Employment Supports receive a package of forms which include: a program outline/brochure; the Application Form; a Verification of Disability/Impairment Form (not required of ODSP income support recipients); a Consent to Release Information Form; and an employment planning document.²⁷¹ The Verification of Disability/Impairment Form must be completed by one of the following health professionals:²⁷²

264. *Supra* note 70, s.2(1).

265. *Supra* note 19. This excludes participants in Canada Pension Plan's Disability Vocational Rehabilitation Program. The original *Employment Supports Regulation* excluded all CPP disability pensioners, but the April 10, 1999 amendments make it clear that only those entitled to CPP rehabilitation services are excluded (*Supra* note 80, s.1).

266. *Insurance Act*, R.S.O. 1990, c.I.8, as am. These persons presumably must make use of Human Resources Development Canada's programs.

267. These persons presumably must apply to the Workplace Safety and Insurance Board for employment supports.

268. These persons presumably must apply to the responsible insurer.

269. These persons presumably must apply to the responsible insurer.

270. *Supra* note 70, s.2(2).

271. *Supra* note 78, Directive 102-02, "Eligibility and Application Process" at 3-4.

272. *Supra* note 70, s.3.

- An audiologist who is a member of the College of Audiologists and Speech-Language Pathologists of Ontario
- A member of the College of Chiropractors of Ontario
- A registered nurse who is a member of the College of Nurses of Ontario
- A member of the College of Occupational Therapists of Ontario
- A member of the College of Optometrists of Ontario
- A member of the College of Physicians and Surgeons of Ontario
- A member of the College of Physiotherapists of Ontario
- A member of the College of Psychologists of Ontario.

This is a somewhat longer list of health professionals than for disability assessment for income support purposes, but it still includes only health professionals and not social workers or vocational counsellors.

The application is considered by an ODSP Employment Supports Specialist. It does not go to the DAU. The Employment Supports Specialist has a discretion to accept an earlier verification of disability or impairment made by a health professional listed above, rather than requiring a new form in order to “streamline” the process. It is in fact expected that most applicants will have previous verification, and that requiring a new professional assessment will be the exception rather than the rule.²⁷³

Eligible Goods and Services

Section 4 of the *ODSPA Employment Supports Regulation* sets out in some detail which goods and services may and may not be provided under Employment Supports. The following may be provided:

- employment consultation and planning
- employment preparation and training
- job placement services
- the cost of transportation required to participate in the first three listed activities
- job coaching
- tools and equipment necessary for a person’s employment preparation and training
- services of an interpreter, reader or note-taker
- mobility devices
- prosthetic devices and vision aids.

273. *Supra* note 78, Directive 102-02, “Eligibility and Application Process” at 6.

This list has a strong orientation towards competitive employment. Items and services which are not provided as employment supports are:

- educational programs for which Ontario Student Assistance Program support is available
- educational programs under the *Education Act*²⁷⁴
- goods and services available under the Ministry of Health's Long-Term Care Program, such as attendant care
- that portion of the cost of equipment and supplies covered by the Ministry of Health's Assistive Devices Program
- medical, dental and nursing treatment and procedures, including prescription drugs
- goods and services that the person's employer is required to provide under the *Human Rights Code*²⁷⁵
- structural modifications to a person's place of employment
- purchase or modification of a home
- purchase or modification of a vehicle.

Most of these goods and services are excluded on the basis that they will be provided from another source when required, such as another Ontario Government program or an employer.

The Provision of Employment Supports

Employment Supports are designed around the expectation that participants are capable of meeting competitive employment goals, and are capable of planning and using job-finding strategies towards those goals. Accordingly, the program is based on a "brokerage" model, in which Employment Support Specialists assist clients in accessing goods and services which the clients have already identified. It is recognized that some clients may require assistance in this process, but the expectation is that most clients will be self-directed.²⁷⁶

Section 33(d) of *ODSPA* requires the development of a competitive employment plan and a "funding agreement" based on that plan, as a condition of receiving Employment Supports. Approval of the employment plan is accordingly a necessary first step.²⁷⁷ Once the employment plan is approved, the client and the Employment Supports

274. *Education Act*, R.S.O. 1990, c.E.2, as am.

275. *Human Rights Code*, R.S.O. 1990, c.H.19, as am.

276. *Supra* note 78, Directive 101-01, "Introduction to the ODSP Employment Supports Directives" at 3 & 6. The Directive states that, "Clients are responsible for directing to the greatest degree possible their own strategies towards competitive employment (at 6)."

277. For details of what is required to be in employment plans and the criteria for their approval, see *Ibid.* Directive 103-01, "Employment Planning".

Specialist negotiate an Employment Supports Funding Agreement (“ESFA”), which covers the goods and services the client requires to meet his or her competitive employment goal, the costs of these goods and services and the payment method.²⁷⁸ A client whose individual or family income (including the income of the client’s parent(s) if he or she lives with them) exceeds \$51,000 annually (net of payroll deductions) must make a 30% co-payment to the cost of the goods and services unless there are “extenuating circumstances”. The co-payment, if any, is included in the ESFA.²⁷⁹

Once the ESFA is in place and goods and services are provided to the client, the Employment Supports Specialist monitors the clients’ progress. There are a number of reasons for which employment supports may be suspended or cancelled, such as:

- the person ceases to be eligible for the supports
- the person fails to use the supports
- the person fails to make satisfactory progress towards competitive employment
- the person fails to provide information necessary to determine continuing eligibility
- the person fails to purchase the supports
- the person fails to comply with the ESFA in purchasing the supports.²⁸⁰

Prior to the suspension or cancellation of employment supports, the person is entitled to notice of the intention to do so, and to use the “dispute resolution process” established on a local level by the Ministry.²⁸¹ The relevant Policy Directive states that a Dispute Resolution committee or committees will be established by the Area Office, in accordance with recommendations from the Local Planning and Advisory Group. The Local Planning and Advisory Group is drawn from key stakeholders, with at least half being persons with disabilities.²⁸²

278. Such an agreement is required by *ODSPA, supra* note 2, s.35(2). For details of the ESFA, see *Employment Supports Policy Directives, Ibid.* Directive 104-03, “Employment Supports Funding Agreement”.

279. *ODSPA, supra* note 2, s.35(1)(b); *ODSPA Employment Supports Regulation, supra* note 70, s.6; *ODSPA Employment Supports Policy Directive, Ibid.* Directive 104-02, “Client Contribution Requirements”.

280. *ODSPA, Ibid.*, ss.36(1), 36(2); *ODSPA Employment Supports Regulation, Ibid.*, s.7; *ODSPA Employment Supports Policy Directives, Ibid.* Directive 103-03, “Client Progress”.

281. *ODSPA, Ibid.*, ss.36(2), 36(3); *ODSPA Employment Supports Policy Directives*, Directive 106-01, “Dispute Resolution”. A decision by an Employment Supports Specialist not to approve an employment plan is not a suspension or cancellation of Employment Supports, and the client cannot use the dispute resolution process at that stage (*Employment Supports Policy Directives, Ibid.* Directive 103-01, “Employment Planning” at 9).

282. See *ODSPA Employment Supports Policy Directives, Ibid.* Directive 106-02, “Local Planning and Coordination Group”.

It should be noted that decisions regarding Employment Supports are **not** appealable to the Social Benefits Tribunal.²⁸³ A number of disability organizations appearing before the Standing Committee argued that there should be an independent appeal to the tribunal for Employment Supports, but they were unsuccessful in convincing the Government to change its position on this issue.

2. Comparison with Vocational Rehabilitation Services

The main difference between Employment Supports and the former VRS program is the new focus on competitive employment. The mandate of VRS was very broad. It included an emphasis on assessment and counselling, support for post-secondary education, support for homemaking, home and vehicle modifications and a range of other supports not found in Employment Supports. On the other hand, Employment Supports is designed to move quickly to assist clients who have good employment-related skills and are capable of self-directed planning (or who have other sources of assistance in developing and carrying out an employment plan).

VRS did not have any provision for client co-payment, while a co-payment has been introduced within Employment Supports.

Under VRS, there was an appeal to the Social Assistance Review Board, while under Employment Supports the appeal to the independent Social Benefits Tribunal has been replaced by a local dispute resolution process.

3. Comparison with Alberta and British Columbia employment supports programs

Review of the Alberta and British Columbia employment support programs is beyond the scope of this article. However, in broad terms both Provinces (and other provinces and territories, as well), like Ontario, are moving towards a sharper focus on competitive employment, due to the impact of the Employability Assistance for People with Disabilities ("EAPD") federal-provincial cost-sharing initiative. Under EAPD, which replaced the former program under the *Vocational Rehabilitation of Disabled Persons Act*²⁸⁴ in 1997, the focus is on individualized supports directed towards competitive employment. The provinces and territories, including Alberta, British Columbia and Ontario, are reorienting their employment supports programs to meet the EAPD criteria and qualify for the 50-50 federal cost-sharing (EAPD is the sole remaining conditional cost-sharing program).²⁸⁵ The exception is Quebec which is negotiating with the federal government, separate from the EAPD negotiations.

283. *ODSPA*, *supra* note 2, s.21(3).

284. R.S.C. 1985, c.V-3, as am.

285. See Human Resources Development Canada, "Multilateral Framework on Employability Assistance for People with Disabilities", online: Human Resources Development Canada <http://www.hrdc-drhc.gc.ca/dept/disab/0619/shtml> (date accessed: 11 April 1999).

4. Major policy decisions regarding Employment Supports within ODSP

Based on the previous analysis and comparisons, the most important policy decisions made by the Ontario Government regarding Employment Supports are the following:

- (A) to develop the program with a strong competitive employment focus;
- (B) to emphasize a “brokerage” model based on self-direction by participants;
- (C) to specify in detail the goods and services that would and would not be provided;
and
- (D) to have a local dispute resolution process rather than an appeal to an independent tribunal.

5. Implementation of Employment Supports within ODSP

Implementation of Employment Supports within ODSP only began in January 1999. Accordingly, very little information is available about the implementation process as of the date of writing.

In Minister Ecker’s ODSP announcement, it was emphasized that Employment Supports would have funding of \$35 million annually, almost double the \$18 million allocated under VRS.²⁸⁶ While this increase is welcome, it is still a very modest budget given the ambitious objectives of the program and the size of the Province.

6. Evaluation and proposals for reform

Given the very recent implementation of ODSP Employment Supports, it is much too early for any meaningful evaluation. What would be significant is a study of the Program’s impact on competitive employment of participants over a five or ten year period.

The Government’s decision to focus Employment Supports on competitive employment would appear to be a positive step (even aside from the requirement to qualify for EAPD cost-sharing). VRS was trying to do too many different things and, as a result, immediate, practical assistance to help persons with disabilities obtain and keep employment was often unavailable.

Of course, the supports formerly provided under VRS now have to be provided elsewhere. In one respect, the Government has not lived up to its commitments in this area as yet: namely, the home and vehicle modification programs promised by Minister Ecker have not materialized. There have been concerns expressed as well that funding for post-secondary supports was “lost” in the transition from VRS to support through the special needs offices of Ontario’s colleges and universities.

The Employment Supports consumer co-payment appears to be an unnecessary additional barrier for persons with disabilities. It seems especially unfair to apply it

286. *Supra* note 4.

in cases where adults with disabilities are living with their parents, thereby taking the parents' income into account.

The loss of an appeal to an independent tribunal takes an important safeguard away from the Employment Supports program. It remains to be seen how well the local Dispute Resolutions Committees will function.

An overriding issue is the adequacy of funding for the Employment Supports program. VRS was traditionally a very poorly funded program, with resulting delays and frustrations. A significant increase in funding to Employment Supports will likely be required if the new program is to escape a similar fate.

K. INTERNAL REVIEWS AND APPEALS

1. *ODSP provisions relating to internal reviews and appeals*

A complete review of the ODSP internal reviews and appeals process is beyond the scope of this article. Only a few main points will be highlighted.

Internal Reviews

A decision of ODSP may not be appealed to the Social Benefits Tribunal unless an internal review has been requested.²⁸⁷ On the other hand, a decision that cannot be appealed to the Tribunal may still be internally reviewed.²⁸⁸

An internal review is conducted by Ministry officials. There is no hearing, and the *Statutory Powers Procedure Act*²⁸⁹ does not apply.²⁹⁰ There is a 10 day time limit for requesting an internal review of an adverse decision,²⁹¹ such as a finding of ineligibility by the DAU or the ODSP local office. There is a discretion on the part of the Ministry to grant extensions of time.²⁹² However, a refusal to grant an extension is not itself appealable.²⁹³ The request for an internal review must be in writing.²⁹⁴ Once the request for an internal review is received by the Ministry, it must be completed within 10 days.²⁹⁵

Appeals to the Social Benefits Tribunal

There are a number of decisions under ODSP which cannot be appealed to the Tribunal:

287. *ODSPA*, *supra* note 2, s.22(1).

288. *ODSPA Policy Directives*, *supra* note 77, Directive 1001-01, "Notice of Decision and Internal Review Process" at 3.

289. R.S.O. 1990, c.S.22, as am.

290. *ODSPA*, *supra* note 2, s.22(4).

291. *ODSPA*, *Ibid.*, s.22(2); *ODSPA General Regulation*, *supra* note 69, s.58(1).

292. *ODSPA General Regulation*, *Ibid.*, s.58(3).

293. *Ibid.*, s.57.

294. *Ibid.*, s.58(2).

295. *Ibid.*, s.59(1).

- a decision regarding “discretionary income support” (however, as yet there is no category of “discretionary income support” within ODSP);
- a decision regarding extraordinary support through Order-in-Council;
- a decision to make direct payment to a third-party creditor
- a decision resulting from a change in *ODSPA* or the regulations
- a decision regarding Employment Supports
- a decision not to extend the time for filing an internal review beyond the ten-day limit
- a decision to refuse, cancel or suspend income support because of the death of a member of the benefit unit
- a determination that an application to the DAU has been deemed to be withdrawn because of failure to comply with the ninety-day time limit
- a decision by the DAU to set a review date for someone found to be a “person with a disability”.²⁹⁶

There are extensive rules within *ODSPA* governing appeals.²⁹⁷ The structure and function of the Social Benefits Tribunal are governed by the *OWA*.²⁹⁸ The Tribunal does not have authority to consider the constitutional validity of legislation, nor whether a regulation is consistent with the governing statute.²⁹⁹

2. *Comparison with appeals under the FB/VRS/GWA system*

The major change with respect to appeals, in moving from the FB/VRS/GWA system to the ODSP/OW system, is the formalized requirement that there be internal reviews. There were reviews conducted informally under the previous system, but there was no standardized system for them.

As already discussed, there is no appeal from Employment Supports decisions under ODSP, whereas there was an appeal to the Social Assistance Review Board from VRS decisions. Conversely, ODSP has an appeal to the Social Benefits Tribunal from the decision to appoint an “informal trustee”, whereas no such appeal existed under FB.

The jurisdiction of the Tribunal has been narrowed in the new system, to exclude its making *Charter* decisions in particular.³⁰⁰

296. *ODSPA*, *supra* note 2, ss.21(2), 21(3); *ODSPA General Regulation*, *Ibid.*, s.57.

297. *ODSPA*, *Ibid.*, ss.23–31.

298. *OWA*, *supra* note 2, ss.60–67.

299. *Ibid.*, s.67.

300. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11.

3. *Comparison with appeals under AISH and BC Disability Benefits*

In broad terms, the appeals systems in Alberta, British Columbia and Ontario are similar in that there is an independent tribunal in each Province and a mandatory internal review which must be completed before the case can go to the tribunal.

4. *Major policy decisions regarding internal reviews and appeals within ODSP*

Based on the previous analysis and comparisons, the most important policy decisions made by the Ontario Government with respect to internal reviews and appeals are the following:

- (A) to implement a mandatory internal review process;
- (B) to make certain decisions non-appealable to the Tribunal; and
- (C) to limit the constitutional and administrative law jurisdiction of the Tribunal.

5. *Implementation of internal reviews and appeals within ODSP*

Because of the short time frame within which ODSP was implemented and probably because of lack of resources as well, there have been problems in implementing the internal review process in local Ministry offices and, in particular, in the DAU. Initially, internal reviews, which are mandated by the legislation, were not always conducted. It remains to be seen what the longer-term experience will be with the new system.

6. *Evaluation and proposals for reform*

The introduction of a mandatory internal review process has both benefits and drawbacks. On the one hand, it means that issues may be resolved in a more timely and informal manner in many cases. On the other hand, there is a significant risk of compromising the rights of applicants or recipients in a review process without procedural safeguards. On balance, mandatory internal review is probably a justifiable initiative by the Ministry.

Consideration should be given to making Employment Supports and third-party creditor payments appealable to the Social Benefits Tribunal.

L. CONCLUSION

In some respects, the ODSP represents a significant advance for persons with disabilities over the former FB/VRS system. The asset rules have been significantly improved. Voluntary gifts of \$4,000 every twelve months from family and friends have been allowed. There is 100% rather than 75% coverage of Assistive Devices Program equipment and supplies. There are more safeguards around "informal trusteeship".

However, not everyone is in a position to benefit from these changes. There has been no basic rate increase for several years, so people who have ODSP and nothing more

have had a gradual erosion of their support due to inflation. Earnings exemptions have not been increased for individuals, and in practice it is still difficult for persons who are working full time to get extended health benefits.

The issue of who is “disabled enough” to qualify for ODSP will be contentious for some time. It remains to be seen how the Disability Adjudication Unit will develop its criteria and practices. Those who do not qualify will apparently be relegated to an inadequate and punitive Ontario Works system for years to come.