

A Principled Approach:

**Considering Eligibility Criteria for Disability-Related Support
Programs through a Rights-Outcome Lens**

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I. INTRODUCTION

In Ontario, persons with disabilities may have access to a number of different disability-related support programs that provide different types of benefits and services to those who qualify. Programs are offered by private insurers and different levels of government, with a spectrum of purposes, including income replacement, compensation for injury and disability-related devices and service subsidies. Who has access to each program is determined by eligibility criteria that define and categorize persons with disabilities. Each program makes choices about scope and target recipient group and, in so doing, draws conclusions about who is eligible to receive a particular benefit or service.

Decisions that broaden or narrow eligibility are often based upon assumptions about disability and the characteristics that we impute to persons with disabilities. These decisions have a tremendous impact on the lives of persons with disabilities, providing or eliminating access to income supports, transportation services, education programs, employment measures, assistive devices, medical and drug benefits and other disability-related supports. While establishing a single set of eligibility criteria may not be possible¹, establishing a principle-based mechanism to guide policy and program decisions will aid in ensuring that eligibility criteria are consistent with governing laws, national policy commitments and evidence-based scholarly research.

In this paper, we develop and present a principle-based evaluation tool called a “Rights-Outcome Lens” that can be used to assess eligibility criteria for disability-related support programs and specifically income support programs. In approaching this task, we take

on the six principles adopted by the Law Commission of Ontario (“LCO”) in its background research on the law as it affects persons with disabilities (“principles”).² The principles situate this work within a context that considers disability in a particular way and that identifies persons with disabilities as rights-holders. Working from that starting point, we consider the laws, policies and scholarly research that inform those principles and identify a number of outcome measures to evaluate eligibility criteria. To illustrate how the Rights-Outcome Lens may work in practice, we have applied it to the eligibility criteria of one income support program, the Ontario Disability Support Program (“ODSP”).³ ODSP is Ontario’s targeted social assistance program for persons with disabilities. The application of the Rights-Outcome Lens to ODSP suggests more detailed markers that could be used to complete an evaluation of other disability-related support programs.

While the Rights-Outcome Lens could have application to disability-related programs in general, it was developed in the context of income support programs and ODSP in particular. Given that context, our outcome measures may not adequately address other types of disability-related support programs and specific issues relevant to those programs. This paper is intended as a starting point for a thorough analysis of disability policy in Ontario. The proposed Rights-Outcome Lens provides a basis from which additional research and development may proceed. Additional outcome measures or variances of those described in this paper may be addressed in future research.

II. METHODOLOGY

The principle-based evaluation tool, or “Rights-Outcome Lens,” was developed using a three-step process. As our starting point, we adopted the LCO principles.⁴ Although our process began with the adoption of the LCO principles, we next took a step back in order to consider the context or the theoretical framework from which the principles were derived. To that extent, the theoretical framework precedes the establishment of the principles. While the LCO outlined a broad theoretical framework upon which we largely rely, there are a number of nuances that we have further developed to address the particular issues respecting eligibility criteria for disability-related support programs. Based on a literature review of legal, policy, academic and community writing, we unpacked the context in which the principles were developed, with a particular focus on income support programs. A full discussion of our theoretical framework begins in Section III.

In step three, our analysis of the principles, together with the theoretical framework, identified a number of outcome measures that flow from the principles and form the basis of the Rights-Outcome Lens. Literature about ODSP, key informant interviews and focus groups provided additional information about income support programs that also influenced the development of outcome measures. These outcome measures provide a structure against which policy makers can evaluate eligibility criteria for disability-related support programs from a principled perspective.

To illustrate the Rights-Outcome Lens, we use it to analyze three aspects of ODSP income support eligibility criteria: 1. eligibility based on disability status; 2. eligibility based on financial status; and 3. the process and administrative factors that influence access to the program. It is important to note that ODSP legislation provides for services beyond income support, including employment supports and assistive devices benefits; however, to qualify for access to those services, an applicant would first have to establish general eligibility for income support. For the purposes of this paper, we limited our scope to consider only the primary eligibility criteria.

This paper is not, nor can it be, a comprehensive review of the ODSP program, nor can it fully assess ODSP in the context of national, provincial, municipal and private disability-related support programs, poverty reduction programs and disability policy.

The application of the Rights-Outcome Lens to ODSP is helpful in assessing the degree to which its specific eligibility criteria are consistent with principled-based analyses. The Rights-Outcome Lens can also provide a starting point to the development of a comprehensive evaluation tool to assess eligibility criteria for disability-related support programs.

III. THEORETICAL FRAMEWORK & PRINCIPLES

In this section, we develop the theoretical framework that forms the basis of the principles and the outcome measures used for the Rights-Outcome Lens. This theoretical framework includes both new approaches to the conceptualization of disability and legal and policy sources.

A. Conceptualizations of Disability

The last fifty years have witnessed a significant shift in the way that “disability” is understood and conceptualized.⁵ This shift can be seen both within disability scholarship⁶ as well as, to a degree, in the approaches to disability adopted by governments and policy-makers. It is beyond the scope of this paper to do more than briefly review the major changes in conceptualization.

Conceptualizations situating disability as the problem of an individual or individual “pathology”⁷ have dominated the last century. These conceptualizations have generally been divided into two subgroups: the bio-medical approach and the functional limitations approach.

The bio-medical approach assumes that disability is caused primarily by an impairment, that is, a disease, disorder, physical or mental condition that is aberrant or abnormal. It is because of this impairment that people are excluded from participation in society. Under the bio-medical model, medical practitioners are considered to be the experts regarding the nature, causes and appropriate responses to disability. Income supports

or other benefits are provided on the basis of charity, with persons with disabilities being considered the 'deserving poor'.⁸

While still identifying disability as an individual problem, the functional limitations model does not focus on the particular biomedical impairment but rather the impact that the impairment has on the individual's ability to participate in social roles such as employment. Under this approach, it is possible to have an impairment without a disability if that impairment does not impede a person's ability to function. Here, the range of expertise regarding disability is extended to include physiotherapists, occupational therapists and other professionals.⁹

Beginning in the 1960's, disability activists and theorists began to develop new conceptions of disability, noting that by focusing only on the biological or functional condition of the individual, existing models failed to recognize the role played by society in limiting and enabling people. Rather than seeing disability as inherent in an individual, these new approaches see disability resulting from attitudes and conditions within society. Under the social model, disability is caused by socially constructed barriers, including both societal attitudes and physical and policy structures that serve to exclude or "disable" individuals. Various commentators have chosen to categorize and describe subgroups under the social model differently. Marcia Rioux, for example, distinguishes between 'environmental' and 'human rights' models.¹⁰ The former model focuses on disability as the result of individuals reacting with social, political and economic barriers in their environments and on identifying and removing barriers to participation and inclusion. The environmental model has been criticized as being not sufficient on its

own since it does not adequately consider impairment and does not give weight to the embodied experience of persons with disabilities.¹¹ Rioux's human rights model looks beyond particular environments to examine broad systemic factors that keep some people from participating as equals in society including: income and social status, social support networks, social environments, physical environments and impairment. This model emphasizes the role that social attitudes and systems that appear neutral on their face play in creating and perpetuating disadvantage. Under this approach, impairment is recognized to the extent necessary to design accommodations to permit persons with disabilities to achieve substantive equality.

Joan Gilmour is another scholar who adopts a combined approach that begins with the social model recognizing the political causes of disability within society and social organizations but still taking into account the embodied experience of a condition or impairment as lived.¹²

The social model of disability is now accepted by many scholars. This conception of disability is also included in the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD)¹³ which Canada ratified on March 11, 2010, becoming legally bound by its terms. In paragraph (e) of its Preamble, the CRPD states:

Recognizing that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.¹⁴

The CRPD thus recognizes both the reality of impairment as well as the social approach's emphasis on the environmental, social and attitudinal barriers that serve to cause disability. It is this conceptualization of disability that we have adopted as part of the framework for the Rights-Outcome Lens.

B. Legislative and Policy Context

Our framework also includes legislative and policy sources.

In Ontario, the rights of persons with disabilities are protected by both the Canadian Charter of Rights and Freedoms ("the Charter")¹⁵ and the Ontario *Human Rights Code*.¹⁶ Section 15(1) of the Charter establishes equality before and under the law, without discrimination on the basis of a number of enumerated grounds including mental and physical disability. Section 15(2) of the Charter protects laws, programs and activities that aim to improve the conditions of disadvantaged groups or individuals, including people with mental or physical disabilities.

The Ontario *Human Rights Code* ("Code") prohibits discrimination on the basis of disability in the provision of services, goods and facilities; employment, housing and accommodation; contracts and memberships in professional associations and unions. The Preamble of the Code clearly recognizes "the inherent dignity, worth and equal rights of all; the creation of a climate of mutual respect and understanding and the ability to contribute and participate in the community."¹⁷

The federal, provincial and territorial governments of Canada have developed a number of policy documents related to disability. In 1998, they adopted a common

document stating their policy goals with respect to disability issues called *In Unison: A Canadian Approach to Disability Issues*.¹⁸ *In Unison* outlines the following vision of persons with disabilities in Canada based on the principles of equality, accommodation of difference, inclusion and independence:

Persons with disabilities participate as full citizens in all aspects of Canadian society. The full participation of persons with disabilities requires the commitment of all segments of society. The realization of the vision will allow persons with disabilities to maximize their independence and enhance their well-being through access to required supports and the elimination of barriers that prevent their full participation.¹⁹

The UN *Convention on the Rights of Persons with Disabilities* also includes a key provision establishing a number of cross-cutting general principles in Article 3 which states:²⁰

The principles of the present Convention shall be:

- (a) Respect for inherent dignity, individual autonomy including the freedom to make one's own choices, and independence of persons;
- (b) Non-discrimination;
- (c) Full and effective participation and inclusion in society;
- (d) Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity;
- (e) Equality of opportunity;
- (f) Accessibility;
- (g) Equality between men and women;
- (h) Respect for the evolving capacities of children with disabilities and respect for the right of children with disabilities to preserve their identities.

C. Core Principles

Drawing from the Charter, the Ontario *Human Rights Code*, case law, policy documents and the CRPD, the Law Commission of Ontario preliminarily adopted the following six principles as the focus of its examination of the Law as it Affects Persons with Disabilities:²¹

1. Respect for the dignity and worth of persons with disabilities,
2. Autonomy and independence,
3. Inclusion and participation,
4. Equality and non-discrimination,
5. Recognition that humans vary infinitely along a spectrum of abilities and that society must accommodate these variances into its mainstream, and
6. Respect for the diversity among persons with disabilities in the experience of disability.

We have adopted these principles as the core principles of the Rights-Outcome Lens.

IV. DERIVING PRINCIPLE-BASED OUTCOMES FOR THE RIGHTS-OUTCOME LENS:

Having outlined the theoretical framework and principles, we take that framework and use it to further interpret the principles to derive outcome measures. In this way, the theoretical framework begins the process by suggesting principles and then operates to contextualize and interpret the principles. For the purposes of this paper, we considered this analysis within the context of eligibility criteria for income support programs. In so doing, we have identified a number of outcome measures. A discussion of each of the principles, along with the corresponding outcome measures follows.

A. Respect for the Dignity and Worth of Persons with Disabilities

In *R. v Kapp*, McLachlin C.J.C. and Abella J. note:

There can be no doubt that human dignity is an essential value underlying the s. 15 equality guarantee. In fact, the protection of all of the rights guaranteed by the *Charter* has as its lodestar the promotion of human dignity.²²

In *Eldridge v. British Columbia (Attorney General)*, La Forest J. recognizes that s.15 (1) of the Charter “expresses a commitment -- deeply ingrained in our social, political and legal culture -- to the equal worth and human dignity of all persons.”²³ While dignity is often stated as a key aspect of disability laws and policies, it is a difficult quality to understand in practice. How does a disability-related support program incorporate dignity? In *Andrews v. Law Society of British Columbia*,²⁴ McIntyre J. states that Charter, s.15(1) “entails the promotion of a society in which all are secure in the knowledge that they are recognized at law as human beings equally deserving of

concern, respect and consideration.” McIntyre J.’s description, although not speaking directly of dignity, incorporates that idea within the context of equality and inclusion. Indeed, the principles often inform one another and their co-existence provides additional considerations for analysis.

When considering future disability policy in Canada, Michael Prince notes that disability-related supports are a fundamental mechanism for ensuring that persons with disabilities enjoy the same rights and freedoms as others:

Disability supports is an issue of employment – indeed, that has been the prime focus of much programming of late. Disability supports is also an issue of mobility and human rights; of independent living, learning and community participation; of personal and social development; of supporting families and caregivers; and, in a definitive way, an issue of inclusion, citizenship and dignity.²⁵

Seen in this light, accessible, adequate and effective disability-related supports are directly related to dignity:

A critical need exists for improved and enhanced supports and services. Today, services and supports are fragmented, often unavailable or unaffordable, not portable across life transitions or place, and all too often disempowering or stigmatizing to those seeking a modicum of assistance to live in dignity and to be active citizens.²⁶

Since disability-related support programs play an essential role in the lives of persons with disabilities, impacting their ability to participate on equal terms with others in the community, the principle of dignity is a concept that must underlie the development of those programs. In addition, dignity impacts how programs are administered; how individuals gain access to the programs; and how people maintain services and benefits over time.

In general, the provision of income support in Canada has shifted over a number of decades. This shift has been consistent with changes occurring in the broader international context and has been influenced by complex narratives of economic structuring, understanding of disability and frameworks of social responsibility to those who are disadvantaged.²⁷ The theme of fiscal restraint has driven social assistance policy for more than thirty years and choices to narrow eligibility criteria and reduce benefits have disproportionately impacted persons with disabilities as they are more likely to require low-income programs than others.²⁸ Prince argues that national disability policy has begun to embrace the recognition of persons with disabilities as citizens rather than charity recipients, in large part due to Charter jurisprudence and international laws including the CRPD.²⁹ While disability policy has been evolving to recognize the inherent citizenship of persons with disabilities and the socially constructed nature of exclusion, governments have simultaneously taken steps to reduce their own financial responsibility for low-income supports.³⁰

If we view persons with disabilities as full citizens, with entitlement to the rights and responsibilities of citizens, as reflected by the above jurisprudence, national policy and the CRPD, disability-related income supports must reflect that approach rather than adopting a charity perspective and must acknowledge dignity as a core value.

Outcome Measures:

As such, respect for the dignity and worth of persons with disabilities lead to the following outcome measures:

- Income Allowances that Promote Acceptable Living Standards
- Asset Allowances that Promote Acceptable Living Standards
- Accessible and Respectful Administrative Processes for Eligibility Determination

B. Autonomy and Independence

Autonomy and independence are about the freedom of an individual to be in charge of his or her own life. Autonomy focuses on the opportunity to choose for oneself while independence refers to doing for oneself, with adequate support where required.

Eligibility criteria for disability-related income support programs must be designed and implemented in a manner that gives persons with disabilities the option to choose and do for themselves. For example, the way in which eligibility criteria impact relationship dynamics must be considered. In *Falkiner v Ontario*, the Ontario Court of Appeal found that single mothers receiving social assistance and living with men who were not the biological fathers of their children but with whom they had some arrangements for sharing household expenses, were not required to rely on these men for support. Social assistance payments could not be reduced or eliminated simply because these relationships existed. The Court found:

Beyond purely financial concerns, more fundamental dignity interests of the [applicants] have been affected. Being reclassified as a spouse forces the [applicants] and other single mothers in similar circumstances to give up either their financial independence or their relationship ... Forcing them to become financially dependent on men with whom they have, at best, try-on relationships strikes at the core of their human dignity.³¹

When considering eligibility for disability-related income support programs, the principles of autonomy and independence require that eligibility criteria take into consideration the importance of persons with disabilities determining and securing their own financial independence. How the program defines the benefit unit has a considerable impact on whether individuals meet the financial eligibility criteria for such programs. Rules restricting the acquisition of assets and earning of income often limit one's eligibility for disability-related income supports. The principles of autonomy and independence must be considered when developing and enforcing such rules.

For example, a review of provincial disability-related income support programs across Canada demonstrates that most programs exempt inheritances if the program recipients are restricted from making decisions regarding the inherited proceeds. A relationship of dependency between a trustee and the recipient as beneficiary of a trust is created to ensure that the inherited proceeds do not make the recipient ineligible for benefits under the program. As a result, the decision-making rights of recipients are compromised and the possibility of future financial independence is also diminished. .

Outcome Measures:

As such, the principles of autonomy and independence lead to the following outcome measures:

- Definition of the Benefit Unit that Empowers the Individual
- Income Allowances that Promote Acceptable Living Standards
- Asset Allowances that Promote Acceptable Living Standards

C. Inclusion and Participation

Inclusion and participation mean that society is organized – both in its public and private dimensions – to enable all people to engage fully. Full inclusion requires that persons with disabilities be recognized and valued as equal participants whose needs are considered essential to society and not “special”. Prince notes that “people with disabilities and their families experience undue hardship and are restricted from full and active participation in economic, educational and social life”³² because of a failure to develop programs and systems that promote inclusion:

Canadians with disabilities have long been disadvantaged, marginalized and stigmatized. While some important advances have occurred over the last 20 years – including some program reforms recently introduced at both the federal and provincial/territorial levels - there also have been many setbacks and erosions in supports, as well as continued challenges in everyday living and barriers to participation in schools, work, community activities, public services and facilities. Research and experience show that both generic and disability specific community services are inadequate in meeting existing needs.³³

The Supreme Court described the impact of policies and laws that exclude in *Eaton v. Brant County Board of Education*:³⁴

Exclusion from the mainstream of society results from the construction of a society based solely on “mainstream” attributes to which disabled persons will never be able to gain access. Whether it is the impossibility of success at a written test for a blind person, or the need for ramp access to a library, the discrimination does not lie in the attribution of untrue characteristics to the disabled individual. The blind person cannot see and the person in a wheelchair needs a ramp. Rather, it is the failure to make reasonable accommodation, to fine-tune society so that its structures and assumptions do not result in the relegation and banishment of disabled persons from participation, which results in discrimination against them.

Despite the reality of on-going exclusion, national policies have embraced the concept of inclusion and full participation, endorsing a position that:

...strongly affirms the fundamental entitlement to equal citizenship of people with disabilities, and includes commitments to facilitate inclusion and

participation as full citizens in all aspects of Canadian society, with provision of supports needed to achieve this goal.³⁵

Further evidence of the government's commitment to the principles of inclusion and participation was evidenced by Canada's March 11, 2010 ratification of the CRPD which adopts these principles.

Some disability-related support programs have embraced the idea of "inclusion and full participation" by emphasizing strategies to increase the employability of persons with disabilities. Other programs have been based on the premise that work integration should play an increased role in disability-related support programs as opposed to "passive cash transfers."³⁶ Indeed, ensuring that persons with disabilities can fully participate in employment is an important aspect of inclusion and independence.

Employment provides economic, social and psychological benefits as acknowledged by the Supreme Court:

Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.³⁷

Nonetheless it must be acknowledged that full work integration cannot exist where there continue to be environmental, social and attitudinal barriers that prevent access to employment.³⁸ Further, regardless of accommodations, some persons with disabilities will never be able to participate in the workforce, or will be able to do so only intermittently, based on their own embodied experience of impairment. Workplace integration is one aspect of developing disability policy but it cannot redress social

exclusions alone. Policies promoting work integration alone cannot fulfill the government's obligation to promote inclusion and full participation.

Outcome Measures:

As such, the principles of inclusion and participation lead to the following outcome measures:

- Definition of the Benefit Unit that Empowers the Individual
- Income Allowances that Promote Acceptable Living Standards

D. Equality and Non-Discrimination

Equality means creating social conditions that respect difference, address disadvantages and ensure that all women, men, girls and boys participate fully on equal terms. In the context of disability, equality requires creating societal conditions that allow for difference while addressing disadvantage, in order to guarantee the equal participation and inclusion of people with disabilities in all aspects of society. Since its decision in *Andrews*, the Supreme Court of Canada has held that section 15 of the Charter guarantees substantive, and not just formal, equality.³⁹ The Supreme Court has recognized that the principle of equality does not necessarily require identical treatment since a "like treatment" model of discrimination may, in fact, produce inequality.⁴⁰ In *Eldridge v. British Columbia (Attorney General)*, the Supreme Court held that discrimination can result from the failure to take positive steps to ensure that disadvantaged groups benefit equally from services offered to the general public, subject to the principle of reasonable accommodation.⁴¹ In *Eldridge*, this meant

requiring the provision of sign language interpretation services to ensure that deaf persons can communicate effectively with their health care providers.⁴² Rioux further elaborates stating that “well-being” should be the outcome:

The weakness of the formal and equal opportunity models of equality for disability could be overcome by a model of equality based on well-being as an outcome. This concept of equality incorporates the premise that all humans -- in spite of their differences -- are entitled to be considered and respected as equals, and have the right to participate in the social and economic life of society. Unlike the other models of equality it would take into account the fact that the conditions and means of participation may vary for each individual, entailing special accommodation to make participation possible. While the outcome -- equality of well-being -- would be universal, the programs or means to ensure equality could justifiably be targeted to enable those least able to achieve well-being to be supported on a temporary or long-term basis. Difference would both be acknowledged and be accommodated in ensuring the outcome.⁴³

Based on this interpretation of equality, the determination of disability status for income support programs must take into account differences in the effect of various impairments in the context of each individual’s own circumstances.⁴⁴

Equality of well-being also speaks to ensuring that such programs strive to reduce inequalities in income between persons with disabilities and others. In 2006, the poverty rate for persons with disabilities in Canada was 14.4%, encompassing approximately 600,000 people.⁴⁵ Gilmour argues that the socio-economic environment is a key determinant of health; therefore, reducing income inequalities is a critical factor in improving the general health and well-being of persons with disabilities.⁴⁶ Although evaluating social assistance levels is beyond the scope of this paper, these inequalities should be taken into consideration when setting the rules governing income and asset limits for disability-related income support programs.

The principle of non-discrimination means that all rights are guaranteed to everyone, without distinction, exclusion or restriction based on disability, race, sex, language, religion, political or other opinion, national or social origin, property, birth, age, or any other status. Discrimination means any distinction, exclusion or restriction which has the purpose or effect of denying the recognition, enjoyment or exercise by persons with disabilities, on an equal basis with others, of all human rights and basic freedoms. Persons with disabilities might also experience multiple forms of discrimination, for example, a woman with disabilities might experience discrimination on the basis of sex as well as disability.

The issue of what and what is not considered discriminatory with respect to the provision of benefits has been addressed by the Supreme Court. In *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, the Court stated:

...Where stereotyping of persons belonging to a group is at issue, assessing whether a statutory definition that excludes a group is discriminatory, as opposed to being the legitimate exercise of legislative power in defining a benefit, involves consideration of the purpose of the legislative scheme which confers the benefit and the overall needs it seeks to meet. If a benefit program excludes a particular group in a way that undercuts the overall purpose of the program, then it is likely to be discriminatory; it amounts to an arbitrary exclusion of a particular group. If, on the other hand, the exclusion is consistent with the overarching purpose and scheme of the legislation, it is unlikely to be discriminatory. Thus, the question is whether the excluded benefit is one that falls within the general scheme of benefits and needs which the legislative scheme is intended to address.⁴⁷

This suggests that the operational objectives of any benefit program must be consistent with its purpose. Eligibility criteria for income support programs must therefore ensure

that individuals are not discriminated against by underinclusive legislation and jurisprudence.

Outcome Measures:

The following outcome measures for equality and non-discrimination are suggested:

- Definition of Disability that Recognizes Individual Experience
- Recognition of Disability as both an Embodied Experience and a Social Construct
- Income allowances that promote acceptable living standards
- Asset allowances that promote acceptable living standards

E. Recognition that humans vary infinitely along a spectrum of abilities and that society must accommodate these variances into its mainstream

This principle encompasses two key ideas. First it recognizes that differences among individuals are inherent to the human condition. Second, it addresses the need to 'mainstream' disability policy within general services and programs offered by the government. While the general topic of mainstreaming is outside the scope of this paper since we are focusing on the provision of disability-specific programs, the failure to mainstream access will be briefly mentioned below, in the application of the Rights-Outcome Lens to ODSP.

The other aspect of this principle calls for the normalization of all human experiences, including the experience of living with a disability. Respect for differences in abilities involves acceptance of all people, including persons with disabilities, as part of human diversity and humanity. Despite some visible or apparent differences, all people have the same rights and dignity. Each person will experience disability differently. Different types of impairments will have different implications for health and individual capacity as

will different types of attitudinal and structural barriers. The responsibility to change falls not on the individual but on the State and civil society which must accept diversity and respond to the difference that disability represents by ensuring that there is a place for all within the mainstream. In *Andrews v. Law Society of British Columbia*,⁴⁸ McIntyre J. noted that the “accommodation of differences . . . is the essence of true equality”, recognizing that the purpose of Charter, s. 15(1) is not only to prevent discrimination by the attributing stereotypes to individuals, but also to improve the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society.

Considering only the physical aspects of disability ignores the fact that it “is a far more complex phenomenon” which includes a vast array of conditions and categories of illness “the symptoms of which are not verifiable in a urine sample, blood test or x-ray.”⁴⁹ Adopting a broad conceptualization of disability, the Supreme Court has said that the concept of disability cannot be one that lacks flexibility and should encompass a multi-dimensional approach that considers socio-political dimensions including prejudice and stereotypes.⁵⁰

This is consistent with both the World Health Organization (WHO) definition and the inclusive definition espoused by the CRPD. WHO refers both to the social and individual causes of disability:

Disabilities is an umbrella term, covering impairments, activity limitations, and participation restrictions. An impairment is a problem in body function or structure; an activity limitation is a difficulty encountered by an individual in executing a task or action; while a participation restriction is a problem experienced by an individual in involvement in life situations. Thus disability is a complex

phenomenon, *reflecting an interaction between features of a person's body and features of the society in which he or she lives.* [emphasis added].⁵¹

Yet, as noted in the above section, a “disability” may exist regardless of barriers. In the theoretical framework that we have adopted, it is recognized that personal experiences of symptoms may be, in and of themselves, disabling, and may limit activities regardless of the existence of barriers.

In order to meet this principle, eligibility criteria for disability-related support programs must acknowledge a broad range of individual experiences that may lead to impairment, including the environmental, social and attitudinal barriers that exclude individuals.

Similarly, assessment and verification of disability may be, in part, a medical process; however, medical assessment will provide only one perspective of disability.

Recognizing that medical professionals cannot fully verify a disability that may have non-medical origins is an important element in any eligibility criteria. As such, verification measures must encompass a broad understanding of the cause of disability, not only medical assessments.

Outcome Measures:

Recognition that humans vary infinitely along a spectrum of abilities and that society must accommodate these variances into its mainstream suggests the following outcome measures:

- Definition of Disability that Recognizes Individual Experience
- Recognition of Disability as both an Embodied Experience and a Social Construct
- Definition of Disability that Reduces Medicalization

F. Respect for Diversity and the Experience of Disability

Among persons with disabilities, there are more disparities than similarities. As such, the ability to shift social values toward substantive equality (as discussed above) is challenging:

Persons with disabilities form a very diverse group, with very different life circumstances, types and severity of disability, and face a range of different barriers. A teenager with an invisible disability, such as a learning disability, finds herself confronted not only with the difficulties associated with a disability, but also with the lack of understanding and recognition of that disability by other people. Consequently, a range of interventions is required. In particular, personalized approaches, with services adapted to the particular needs of each individual, are most likely to be successful.⁵²

Even where individuals may have the same category of condition, their own experience with that condition may be different:

But the presence of a disability does not affect everyone the same way and to the same extent. "Disabilities run the range from relatively mild to profound. Their consequences may be very different. Some disabilities affect physical functioning, stamina, cognition, memory; many affect the person in a combination of these and other ways. Some disabilities can be accommodated easily in the workplace, home and elsewhere, while others cannot. The effect of a disability on an individual's life, and that of his or her family, often includes many intangible social and psychological obstacles which are not easily capturable in an inventory of the person's functional limitations."⁵³

This approach was affirmed by the Supreme Court in a human rights decision:

A disability, unlike, for example, race or colour, may entail pertinent functional limitations. . . . An individual may suffer severe impairments that do not prevent him or her from earning a living. Beethoven was deaf when he composed some of his most enduring works. Franklin Delano Roosevelt, limited to a wheelchair as a result of polio, was the only President of the United States to be elected four times. Terry Fox, who lost a leg to cancer, inspired Canadians in his effort to complete a coast-to-coast marathon even as he raised millions of dollars for cancer research. Professor Stephen Hawking, struck by amyotrophic lateral sclerosis and unable to communicate without assistance, has nevertheless worked with well-known brilliance as a theoretical physicist. (Indeed, with perhaps bitter irony, Professor Hawking is reported to have said that his disabilities give

him more time to think.) The fact they have steady work does not, of course, mean that these individuals are necessarily free of discrimination in the workplace. Nor would anyone suggest that, measured against a yardstick other than employment (access to medical care for example), they are not persons with daunting disabilities.

The concept of disability must therefore accommodate a multiplicity of impairments, both physical and mental, overlaid on a range of functional limitations, real or perceived, interwoven with recognition that in many important aspects of life the so-called “disabled” individual may not be impaired or limited in any way at all.⁵⁴

Economic status, particularly the impact of poverty, also creates a distinction among persons with disabilities. Where an individual has access to resources that can ameliorate limitations or can overcome social barriers, their experience of disability (or the absence of disability from their difference) will be distinct from a person who does not have similar resources. Other social factors, including age and education will also impact the way in which impairments are experienced.

Gender, race, cultural background and sexual orientation influence how individuals will experience or express disability. For example, some disabilities are more prominent among certain cultural groups or are more often experienced by a particular gender. Jongbloed notes that multiple sclerosis affects women at a rate double that of men and its symptoms are often invisible, difficult to document and predict.⁵⁵ As a consequence, eligibility requirements that fail to encompass the experiences inherent to multiple sclerosis will have a differential impact on women. Similarly, cultural differences influence the degree to which mental illness may be acknowledged or treatment sought.⁵⁶ Given that some individuals will not approach their doctor or report particular symptoms and limitations, preferring to downplay their experience due to internalized or

cultural stigma and discrimination, eligibility criteria must also acknowledge these types of cultural differences to avoid unintentional or systemic discrimination.

Outcome Measures:

Respect for diversity and the experience of disability suggests the following outcome measures:

- Definition of Disability that Recognizes Diversity among Persons with Disabilities
- Recognition of Disability as both an Embodied Experience and a Social Construct

This section has reviewed the six principles and identified the outcome measures that flow from each. The next section addresses the resulting evaluative tool, or Rights-Outcome Lens, in more detail.

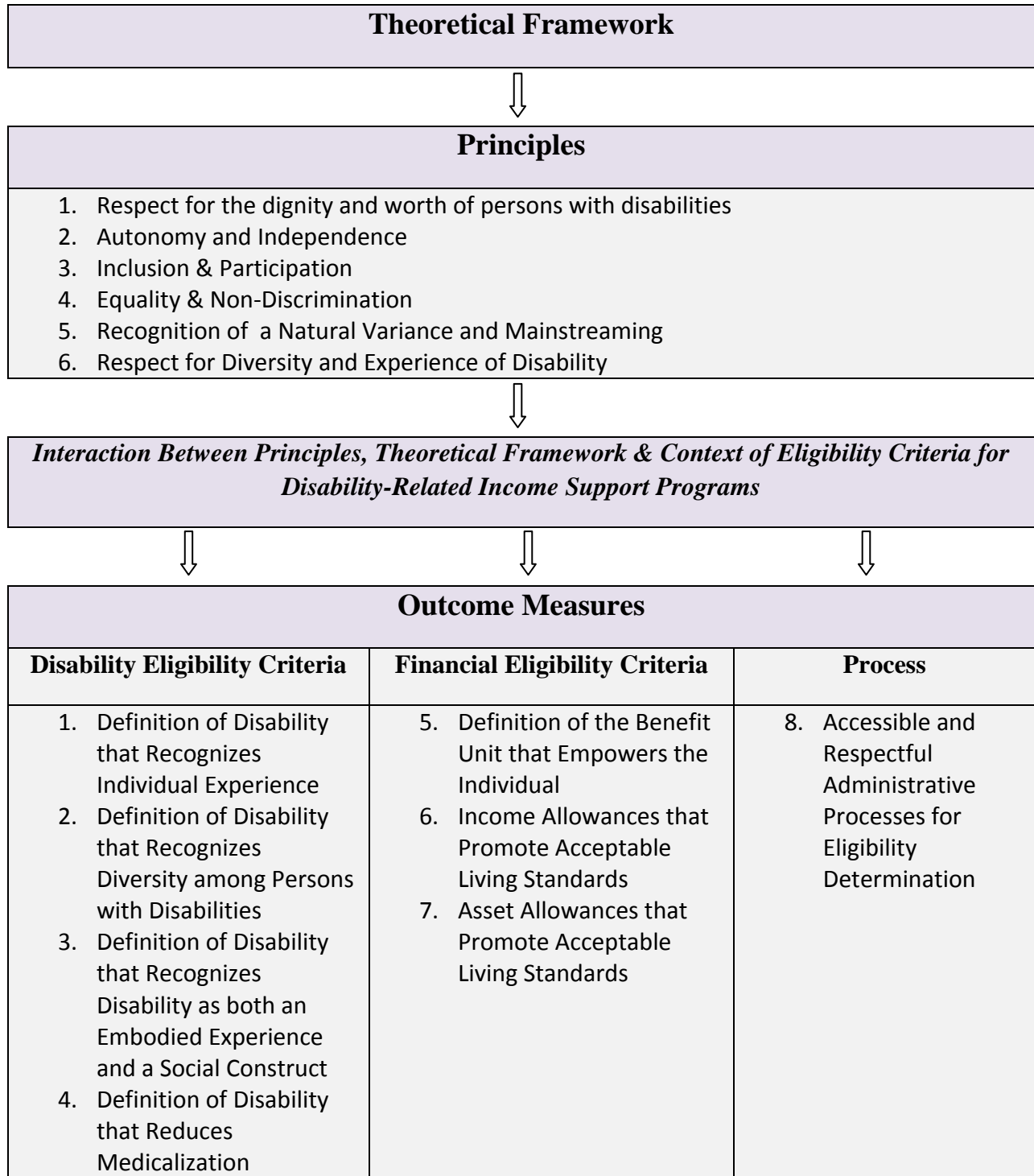
V. THE RIGHTS-OUTCOME LENS

Taking outcome measures drawn from the principles, we have developed an evaluation tool or Rights-Outcome Lens that can be used by policy makers and legislative drafters to ensure that a principled approach has been applied in the design and implementation of eligibility criteria for disability-related support programs. The Rights-Outcome Lens will provide a means of determining the appropriate eligibility criteria in the context of such programs. In particular, the outcome measures will be applied in the following three broad areas:

- A. Eligibility Based on Disability Status
- B. Eligibility Based on Financial Status
- C. Process & Administrative Factors that Influence Access to ODSP

Figure 1 below provides an illustration of the Rights-Outcome Lens.

Rights-Outcome Lens (Figure 1)



The Rights-Outcome Lens is meant to be a generic instrument that can be applied to any income support program for persons with disabilities and also, potentially, other disability-related support programs with minor modifications. Note, however, that the version of the Rights-Outcome Lens illustrated in Figure 1 represents the initial stages of an evaluation mechanism. For a complete tool, additional research is necessary to define specific criteria to consider under each outcome measure, within the context of the type of disability-related support program and its purpose. In the next section of the paper, the Rights-Outcome Lens will be discussed in the context of ODSP. That analysis provides some suggestions about the specific criteria that may be applied in an evaluation tool derived from the Lens.

VI. APPLICATION OF THE RIGHTS-OUTCOME LENS: ONTARIO DISABILITY SUPPORT PROGRAM EXAMPLE

In this section, the Rights-Outcome Lens is applied to ODSP to illustrate how it may be used in practice. For this discussion, we begin with a general overview of ODSP, including contextual background. We then analyze the eligibility criteria: those that determine disability status and financial eligibility. . Finally, we address the process and administrative factors that influence access to ODSP. We conclude with our observations of ODSP's eligibility criteria in light of the Rights-Outcome Lens.

A. Overview of the Legislation

ODSP is a social assistance program targeted to those with a significant financial need. It is, as such, directed to those with a disability and who have little available income or assets.⁵⁷ This disability-related benefit does not stand alone, but instead operates within a system including other benefits that are available to persons with disabilities from private and public sources. Other income support programs include private disability insurance, federal disability pension under the Canada Pension Program, Employment Insurance and Ontario's Workplace Safety and Insurance compensation. Access to these programs depends on when and how the impairment or injury was acquired and whether or not an individual had been part of the paid workforce prior to injury. When a disability exists from an early age, preventing participation in work, or where other factors have led to non-paid employment, part-time or precarious employment, an individual is left to provincial social assistance programs such as ODSP for income support.

Ontario, like most Canadian jurisdictions, divides income support between a general welfare program (Ontario Works) and a disability program (ODSP). As the federal government has reduced its commitment to shared funding of these programs, more responsibility has fallen on the provinces and, in the case of general welfare programs, to municipalities.⁵⁸ When the Ontario government announced the creation of ODSP in 1998, it indicated that the new program was intended to provide a different level of support and marked “the start of a new era of fair treatment and opportunity for people with disabilities in Ontario.”⁵⁹ Increased benefit payments, employment supports, medical supports and exemption from participation in workfare, distinguished ODSP from Ontario Works, implying that persons with disabilities were “more deserving” poor. The Supreme Court has acknowledged this distinction between programs:

It is clear that the ODSPA and the OWA are meant to serve very different goals. The former statute is meant to ensure support for disabled applicants, recognizing that the government shares in the responsibility of providing such support (ODSPA, s.1). The latter statute, on the other hand, seeks to provide only temporary assistance premised on the concept of individual responsibility (OWA, s.1). The divergent purposes of these two statutes was alluded to by the Honourable Janet Ecker, the Ontario Minister of Community and Social Services, on the day after the ODSPA was proclaimed:

This new program removes people with disabilities from the welfare system, where they should never have been in the first place, and it creates for them an entirely separate system of income support....
(Legislative Assembly of Ontario, *Official Report of Debates*, No. 19A, June 2, 1998 at p. 971)⁶⁰

However, despite the acknowledged difference in purpose between ODSP and Ontario Works, ODSP maintained many of the same individual obligations and enforcement mechanisms as the general welfare system, situating ODSP firmly within the charity model.⁶¹

To qualify for ODSP, initial determinations of income and assets are made. Often, this is done through municipal welfare programs, administered under Ontario Works. Once the financial criteria have been established, a disability determination package is completed by the applicant. Some portions are completed by physicians or other health care practitioners while the “self-report” is completed by the applicant themselves. This process focuses on determining whether an individual is unable to support themselves financially due to a medical condition. The application is reviewed by the Disability Adjudication Unit (DAU). If the DAU refuses an application, an individual may apply to for an “internal review” whereby the application is reconsidered by a panel of three adjudicators. If a negative decision is made at this level, the applicant has the opportunity to have the decision considered by the Social Benefits Tribunal (SBT), an independent tribunal. The SBT can confirm, set aside or amend the decision of the DAU.

B. Eligibility based on Disability Status

Determining who is considered “disabled enough” to qualify for benefits depends upon how “disability” is defined. Given that all persons fall within a natural spectrum of ability, it becomes necessary when targeting disability-related support programs to make a distinction among individuals in order to best focus resources on the intended recipients. However, as described by the Ontario Human Rights Commission, while “the government has the right to “draw the line” to accommodate resource availability... there must be a tenable justification for the resultant differential treatment.”⁶² In other words, applying outdated stereotypes or negative beliefs about persons with disabilities

would not be an appropriate or principled mechanism to guide disability-related benefit eligibility. To guide decision-making, it is necessary to identify whether choices are made based on principled values. We apply the outcome measures to the disability status eligibility criteria to evaluate the extent to which a principled approach is achieved. While the legislative test and its judicial interpretation largely meet the criteria from the Rights-Outcome Lens, substantial weaknesses were noted in the administrative application of disability adjudication.

The explicit definition of “a person with a disability” in ODSP is addressed in section 4 of the *Ontario Disability Support Program Act* which states:⁶³

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.

A number of outcome measures directly impact the determination of disability status: : recognition of the individual experience of disability, recognition of the diversity of persons with disabilities, recognition of disability as both a lived experience and a social construct, and accessible and respectful processes.

1. *Definition of Disability that Recognizes Individual Experience*

As outlined above, the experience of disability is not uniform, nor does it easily fit within specific categories of impairments or disease. Eligibility criteria that identify “a person with a disability” must be alive to the diverse and changing understanding of disability as well as the individual experiences of disability.

On a plain reading of section 4, the ODSP definitional criteria provide for an expansive understanding of disability. First, paragraph (a) requires an impairment that is substantial. The use of the word substantial is a shift from previous legislation which required a serious impairment, a change that the courts have interpreted as a lower threshold. For example, the Ontario Court of Appeal in *Gray* held that this definition is “much more generous” since the provision “was intended to encompass a broader segment of society.”⁶⁴ The use of the word “substantial” is different from other provincial regimes in Canada and the federal Canadian Pension Plan disability eligibility requirements.⁶⁵ Similarly, ODSP requires that an impairment be “continuous or recurrent”, allowing for the possibility of fluctuating illnesses. The impairment need only be “expected to last for one year or more” and does not have to be “permanent” as is required in other jurisdictions.⁶⁶ In this way, the legislation normalizes the experience of disability as part of the human condition.⁶⁷

Inclusion of “recurrent” conditions is particularly important in the context of particular conditions, for example, conditions related to mental health.⁶⁸ This inclusion acknowledges that conditions are not necessarily fixed and that a short term “snap shot”

of an individual's situation does not adequately represent the experience of the condition. Nonetheless, the condition may be an impairment that can substantially restrict the individual's participation in one or more of the enumerated areas of daily life.

The definition of disability also requires an examination of the "cumulative" impact of multiple impairments on the person and, as a result, the cumulative restrictions:

The assessment as to whether a person has a substantial physical or mental impairment must consider the various conditions individually and cumulatively. It is not necessary to break down the analysis to every part of the mind and body affected and find at least one disorder is substantial. Such artificiality would detract from the person centered and remedial purposes of the ODSPA. To analyze each physical or mental disorder separately and require that each separately result in a 'substantial restriction' would deprive 'cumulative' of any meaning in s. 4(1)(b).⁶⁹

The Ontario Court of Appeal in *Gray* found that the whole of the individual's circumstances must be taken into account when considering whether or not they were substantially restricted:

An impairment of an important bodily function which is serious to one person may not necessarily be a serious one for someone else. The task of the court in each case will be to decide whether the impairment is serious to the particular injured person who is before the court. In performing that task the question will always be the detrimental effect which the impairment has upon the life of the particular injured person. It is impossible for this court to lay down general guidelines of the concept of seriousness in all cases. Each case must be decided upon its own facts.⁷⁰

An impairment must be verified by a medical practitioner; however, the degree of verification required is rather minimal. In *Sandiford*, the Ontario Divisional Court held that "where the verification indicates an arguable basis for the impairment, its duration and the restriction alleged, the Tribunal must then evaluate the whole of the evidence to assess whether the statutory test is met."⁷¹ In other words, it is the symptoms

experienced by the individual that are relevant to the consideration and not the medical category.⁷² The role of medical professionals in determining disability status is discussed further below.

Once a substantial impairment is determined that is expected to last for one year or more, the analysis shifts to identify the degree to which the impairment restricts the activities of the individual. Recognizing that impairments affect individuals differently, an impairment is considered within the individual's own circumstances and their ability to participate in the community. Unlike other regimes that focus on the employability of the individual, ODSP considers the varying roles that individuals may play in society. The "direct and cumulative effect of the impairment" is considered in relation to "the person's ability to attend to his or her personal care, function in the community and function in a workplace." Courts have interpreted "substantial restrictions" within the context of the whole person, in a similar manner to the determination of "substantial impairment"; courts have also considered social factors within this analysis.⁷³

The one aspect of the legislative definition of disability that is highly problematic in terms of this outcome measure is the specific exclusion in section 5(2) of persons whose impairments and primary restrictions result from addiction to drugs or alcohol.⁷⁴ This exclusion was made despite extensive evidence that established substance abuse as a mental disorder which is often experienced together with other aspects of mental illness.⁷⁵ In *Ontario Disability Support Program v. Tranchemontagne*, the Ontario Superior Court noted that making distinctions about eligibility based on "assumed or unjustly attributed characteristics" resulted in the denial of "essential human worth":

The provincial social assistance scheme must, understandably, provide different benefits according to the different purposes of each of the two programs. Indeed, differentiation in eligibility is a feature of most benefit schemes. Such schemes have been found to be non-discriminatory on the basis that they must assign benefits according to certain eligibility criteria in order to be financially viable, and are, by their very nature, specifically designed to provide assistance commensurate with eligibility: *Gibbs*. However, as the Supreme Court stated at para. 33 of *Gibbs*, comparing the benefits allocated to individuals or groups according to the different purposes those benefits are intended to serve “is not helpful in determining discrimination – it is understandable that insurance benefits designed for disparate purposes will differ. If, however, benefits are allocated pursuant to the same purpose, yet benefits differ as the result of characteristics that are not relevant to this purpose, discrimination may well exist” [emphasis in the original].⁷⁶

In 2009, after lengthy litigation, the Superior Court upheld a determination by the SBT that the section 5(2) exclusion violates the Ontario *Human Rights Code*, which considers substance abuse disorders a form of disability.⁷⁷

It is important to note that the judicial interpretation of the ODSP disability definition, as explained above, is applied differently by the administrative decision-makers at the DAU and by the quasi-tribunal decision-makers at the SBT. When reviewing the variance between decisions reached by these two bodies, a Ministry consultant found that separate tests were being applied to adjudicate the question of “disability”:

Generally, but not in all cases, the DAU does not apply the case law directives of looking at conditions as “cumulative” and viewing the applicant “in their own context” as widely or as often as the SBT. On the other hand, the SBT is straying from the “medical disability” definition more into “social disability” involving language and educational deficiencies as well as medical conditions to a much greater degree than the DAU...**It appears that the DAU has not moved to accept the direction of the *Gray* decision** in broadening and liberalizing the definition of “a person with a disability” to the same extent as the SBT.⁷⁸
[emphasis in the original]

The different tests being applied point to a fundamental difference in the approach taken to disability-related income support. While the judicial and SBT interpretation of “a

person with a disability” more clearly encompasses the broad experiences of disability inherent in any population, the DAU or day-to-day interpretation is much more restrictive. Whereas the judicial interpretation largely conforms to this outcome measure, the administrative application of the definitional criteria is more problematic.

Episodic illnesses, including mental health conditions, diabetes, rheumatoid conditions and HIV, is one category of the individual experience of disability that often falls outside of eligibility for ODSP in the administrative application of the definition.⁷⁹ The shifting symptomatology, uncertain course of the condition and difficulty in diagnosing and/or prognosing conditions create circumstances whereby “functional restrictions become exceedingly problematic to corroborate as consistently substantial and stably recurrent” despite disabling impacts. In *Denial by Design*, the Income Security Advocacy Centre noted that the DAU’s definition of “a person with a disability” tends not to include persons with less understood medical conditions:

The DAU has also tended to hold to its own conservative views about less understood medical conditions such as fibromyalgia, chronic pain syndrome, and environmental sensitivity, to name a few. While there is apparently no official policy of refusing to recognize these disorders, advocates have found that the DAU rarely grants ODSP benefits in these cases. In fact, as recently as 2001, the DAU has held the position that fibromyalgia could not be considered a substantial impairment because “this debatable condition is benign, non-deforming and [does not progress] into total disability.”⁸⁰

Persons with mental health conditions currently make up more than fifty percent of ODSP recipients, a number that continues to trend upward.⁸¹ Despite increasing identification of mental health impacts on disability, mental health is poorly framed and understood in policy materials, leading to substantial difficulty

in understanding how it fits within eligibility criteria.⁸² It is not surprising then that ODSP also has difficulty fitting mental health “impairments” and “restrictions” within the disability definition.

In a study conducted by the Income Security Advocacy Centre, DAU adjudication summaries were reviewed to better understand why some forms of disability were seen to be consistently refused at that level of application and adjudication.⁸³ In their review, DAU adjudicators were found to give the following reasons to deny applications for ODSP:

- The applicant had not been hospitalized for their condition
- The applicant was not taking psychiatric medications
- The applicant had not been referred to a psychiatrist
- The applicant was not suicidal, homicidal, psychotic or in crisis
- The applicant provided no objective evidence of restrictions
- The applicant indicated “severe restrictions disproportionate to expected impairment

The report notes that many of these reasons for denial are outside of the legislative test. While the report was limited in its review to a “snapshot” of DAU decisions over a short period of time, the data indicate that the disability definition eligibility criterion when applied to mental illnesses is highly problematic.⁸⁴

The Income Security Advocacy Centre review also indicated that applications for ODSP that were primarily related to musculoskeletal conditions and chronic pain were also denied more often than applications related to other conditions.⁸⁵ Many of the reasons for denial were identical although the DAU seemingly also drew negative conclusions based on indications of conservative treatment, a lack of assistive devices and a failure to access non-OHIP funded therapies such as massage, chiropractic or physiotherapy.

Some of the difficulties in establishing disability status faced by people with these conditions are under-recognition of symptoms such as fatigue, pain, dizziness, reduced stamina and anxiety as resulting in serious impairment.⁸⁶ Further discussion of medical professionals' involvement in categorizing and verifying impairments is found below.

The individual experience of disability, including the differential impact of impairments on individuals given their social characteristics, the existence of fluctuating and recurring conditions and the recognition that an impairment need not be tied to a medical diagnosis, is generally well reflected in the legislation and supported by judicial interpretation. However, to the extent that the administrative application of the definition varies from the judicial considerations, the actual operation of ODSP fails to recognize the ways in which people experience disability. In order to more effectively meet this outcome measure, a flexible and more individualized approach to assessing disability is required to sufficiently capture the varied personal experiences of different impairments and conditions.

2. Definition of Disability that Recognizes Diversity among Persons with Disabilities

Diversity of persons with disabilities is closely linked with the outcome measure

individual experience of disability discussed above. Both are derived from the principle of respect for the diversity and the experience of disability. As noted above, the individual experience of disability can be influenced by a number of social factors. Some examples of these include age, employment experience, social roles and the ability to communicate in English or French. These factors impact both criteria of “substantial impairment” and “substantial restriction.” While the courts have

acknowledged that social factors play a role in considering the “whole of the person” within the context of his or her own situation,⁸⁷ these issues do not receive the same treatment at the administrative level, negatively impacting the degree to which ODSP meets this outcome measure.

In some respects, the principle of equality and non-discrimination also informs this outcome measure. Gender, race, cultural background and sexual orientation influence how individuals will experience or express disability. For example, some disabilities are more prominent among certain cultural groups or are more often experienced by a particular gender. Jongbloed notes that multiple sclerosis is experienced differently by each individual and its symptoms are invisible, difficult to document and predict.⁸⁸

Jongbloed notes that fatigue, for example, is one symptom that is particularly difficult to quantify in terms of restrictions. She further notes that multiple sclerosis affects women at a rate double that of men.⁸⁹ Similarly, racial background may present differences in the types or severity of different forms of impairment or in how those impairments may be perceived. For example, cultural differences influence the degree to which mental illness may be acknowledged or treatment sought.⁹⁰ Given that some individuals will not approach their doctor or report particular symptoms and limitations, preferring to downplay their experience due to internalized or cultural stigma and discrimination.

A full discussion of the varying ways in which diversity impacts experience of disability is beyond the scope of this assessment. However, it is necessary, in meeting this outcome measure, that diversity be addressed with respect to both “impairment” and “restriction” criteria. While the legislative definition is broad and inclusive, the

administrative application of that definition fails to accommodate differences. A full discussion of the process and administration difficulties is found below.

3. Recognition of Disability as both an Embodied Experience and a Social Construct

The social constructionist approach to disability identifies social pathology as the sole cause of disability. As identified above, we have adopted a theoretical framework that defines disability as the combination of an individual's experience of an impairment and the individual's interaction with his or her environment. In applying this outcome measure to ODSP, we have determined that the government's role in addressing disability is multi-faceted. That role includes acknowledging the role of both social barriers and the individual experience of impairment in reducing persons with disabilities' ability to fully participate in the community.

One aspect of the government's role is the identification and removal of socially constructed barriers to ameliorate disadvantage. Unlike previous Ontario legislation which provided income assistance to persons who were "permanently unemployable" and who were "severely limited in activities pertaining to normal living,"⁹¹ ODSP requires that the person have "substantial restrictions" in one or more of the following realms: personal care, community or work activities. While the new definition acknowledges the different roles that individuals play in society, it also clearly places "disability" within the person:

This definition locates both the impairments and any limitations on the person's ability to attend to the activities of daily living squarely within the individual. In that, its adherence to a medical model of disability is clear—it is premised on the assumption that the person cannot participate because he or she is too impaired to do so.⁹²

Even the “social definition” of disability as applied by the SBT and the courts, one that takes into account age, education and language, are all aspects of individual limitations.⁹³ There is no recognition that an impairment or the cumulative effect of impairments may be overcome by removing socially constructed barriers that prevent access to employment.⁹⁴

Despite its negative connotations, the previous definition of disability which took into account “permanent employability,” was a broader eligibility criterion that acknowledged society’s role in excluding persons with disabilities from work. The new definition restricts those who can access income assistance.⁹⁵ This narrowing of the definition reflects a movement away from supporting recognition of the variations in experience of disability. Placing the whole of the impairment and restriction on the individual indicates that “disability” within ODSP remains strongly entrenched in the medical model, inconsistent with this outcome measure.

In Ontario, social barriers continue to operate to exclude individuals from full participation in the community and the workplace in a myriad of ways, regardless of the individual’s abilities. For example, while an individual may be fully capable of performing the functions of a particular job, inaccessible transportation options may prevent them from attending the workplace. Similarly, on-going attitudinal barriers limit the ability of individuals from obtaining and retaining jobs as discrimination continues to exclude some.⁹⁶

A number of legislative requirements are making improvements to the environment for persons with disabilities. The Ontario *Human Rights Code* requires “reasonable accommodation” in employment and recognizes that indirect and systemic discrimination continue to marginalize and exclude.⁹⁷ The *Accessibility for Ontarians with Disabilities Act (AODA)* seeks to proactively identify and eliminate barriers to participation, particularly in the built environment.⁹⁸

Despite legislative and societal changes, barriers continue to exist and may be the primary reason that an individual cannot compete openly in the labour market.⁹⁹ As the Caledon Institute points out, increasing employability is an important goal for persons with disabilities but cannot be an alternative to income:

employability expectations must bear in mind the profound barriers to employment: lack of work-related aids and devices, lack of personal supports, negative attitudes and high unemployment. Income support must always be assured in order to provide a secure base.¹⁰⁰

There is an obvious tension between the principles in this example as moving towards fuller participation has been used to limit access to income supports with an increased focus on creating incentives to return to work; however, the principles need not conflict as continuously improving accessibility can occur alongside maintaining economic security.

4. Definition of Disability that Reduces Medicalization

ODSP eligibility requirements specifically require medical verification for “the impairment and its likely duration and the restriction in the person’s activities of daily living.”¹⁰¹

Courts have interpreted the degree of medical verification necessary to be relatively low, requiring only an “arguable basis” for the existence of an impairment.¹⁰²

Nonetheless, placement of “disability” within the medical model, both in the legislative and judicial interpretations and, in particular, the degree to which medical proof is required at the administrative stage of eligibility determination, reinforces inequitable power relationships between applicants/ recipients and their health care providers.¹⁰³

Frazer, Gilmour & Mykitiuk, in analyzing women and disabilities in the context of ODSP, argue that the power inequity pervades each level of interaction with health professionals: the gaze, the dialogue and the judgment. As the medical professional frames each aspect of the interaction, it is their perceptions that matter, minimizing the role of the woman with a disability.¹⁰⁴ The emphasis on the medical practitioner’s perception is particularly problematic given that in ODSP applications, the process is not for the health care benefit of the individual and is influenced by the implied obligation under ODSP for medical practitioners to separate feigned disabilities from those that are legitimate. The patient’s relationship of trust with their medical practitioner is changed by the very task of verifying disability.¹⁰⁵ Further, as medical professionals rarely understand the experience of disability and the impact of impairments on the lives of their patients, any reporting of restrictions is based on the information received from the individual, prescribed and interpreted, and more “objective” because it is translated by

the medical professional.¹⁰⁶ To the extent that medical professionals are simply restating symptoms and limitations that have been described by a patient, the medical lens adds little to the question of qualification.

The inability of many medical professionals to understand the lives of persons with disabilities is further explored in the context of chronic illnesses. Certain conditions are characterized by invisible symptoms, including chronic pain and multiple sclerosis. Medical professionals have difficulty quantifying the impact of symptoms “that they cannot see” leading to problematic reporting and higher rejection rates.¹⁰⁷ Also problematic is the fact that most medical professionals understanding of disability is framed within the medical model and does not extend to social factors that create disability.¹⁰⁸

Practical difficulties also impact the reliance on medical professionals to “prove” disability. This issue is explored below in a discussion regarding the processes of disability determination.

Over emphasis on the role of medical professionals will limit access to ODSP, even where an individual’s impairments and restrictions are otherwise substantial. Again, the legislative test requires minimal verification by a medical professional, acknowledging that medical assessments can only play a small role in determining eligibility as “a person with a disability” given the confluence of factors that impact “disability.” Medical assessment will continue to be necessary to a degree; however, as the courts have recognized, such assessments should only provide an arguable basis from which to

evaluate qualification. Equally important is an assessment of social factors that alter an individual's experience of an impairment and the individual experiences of social barriers. Consequently, new mechanisms of verification may be explored, including the expansion of the types of individuals who may provide evidence of disability and greater reliance on self-reporting and lay evidence, in order to better meet this outcome measure.

Conclusion: Eligibility based on Disability Status

In applying the outcome measures to the definitional criteria of disability in ODSP, a number of concerns become apparent. While the legislation itself, with the exception of exclusions for addictions, is generally inclusive, the administrative application of the criteria fails to recognize the individual and diverse experiences of disability. A harmonization of the application of the legislative and administrative definition that more adequately meets the outcome measures described in the Rights-Outcome Lens will provide a more principled basis on which to assess eligibility for ODSP.

C. Eligibility Based on Financial Status

Many income support programs for persons with disabilities require a financial screening process prior to disability determination. For persons who are found to be financially eligible and ultimately approved for benefits, ongoing compliance with financial rules is imposed. Most social assistance programs in Canada are defined as needs-tested, meaning that income requirements are compared with available assets and income in order to determine need. This is illustrated in the purpose section of

ODSP insofar as it emphasizes accountability to taxpayers, the shared responsibility of “government, communities, families and individuals,” and the conservation of resources.¹⁰⁹ Gilmour argues that the statement of shared responsibility permits the government to reduce its role in ensuring financial security for persons with disabilities.¹¹⁰ The explicit focus on taxpayer accountability is an unusual statement in legislation. While there is an implicit understanding that government programs must be generally accountable, ODSP makes that statement explicit.¹¹¹ In this way, ODSP fails to recognize state assistance and full citizenship as a “right”; instead, the legislation implies that persons with disabilities are only “deserving” of state assistance or full citizenship “to the extent that they demonstrate that they have taken individual moral and political responsibility for their own economic fates.”¹¹²

A person’s ability to earn income and acquire assets beyond certain amounts is limited when seeking to qualify for, or maintain, ODSP benefits. Moreover, many income support programs define the benefit unit to include more than just the individual recipient based on family status, causing persons with disabilities to be dependent on others in their benefit unit with higher incomes.¹¹³ These restrictions on income, assets and family size are generally inconsistent with the LCO principles and our derived outcome measures.

Although asset and income exemptions in the ODSP are an improvement from those found in the predecessor Family Benefits Act system,¹¹⁴ some of the restrictions currently in place continue to negatively affect eligibility for individuals who would

otherwise qualify for benefits based their disability. Using the Rights-Outcome Lens, this section provides a detailed discussion and analysis of such rules.

1. Definition of the Benefit Unit that Empowers the Individual

Prior to discussing outcomes that relate to income and asset provisions, income support programs for persons with disabilities must ensure that the definition of the benefit unit empowers the individual recipient. Any restrictions placed on social assistance recipients should not impede one's ability to be financially independent or autonomous. ODSP stipulates that a spouse of an applicant is considered to be a dependant in the benefit unit and that the budgetary requirements, income and assets of dependants are to be included in determining financial eligibility. Therefore the combined income, assets and expenses of a couple would be taken into account to determine financial eligibility and the amount of income support available for the recipient.¹¹⁵ This requirement does not promote an outcome of individual empowerment. Instead, by accounting for the person's spouse in the determination process, a situation of dependency is created whereby persons with disabilities are forced to access the financial resources of their spouses prior to being eligible for benefits under the program. Not only is the individual's ability to be financially independent affected, but this broad definition of benefit unit is a breach of one's dignity. As discussed above, the *Falkiner* decision did make some progress this area; however, its application is currently limited in scope to single parents.¹¹⁶

2. Income Allowances that Promote Acceptable Living Standard

This outcome measure is grounded in the interaction of three principles, as outlined above in Section IV. Since persons with disabilities face multiple barriers to accessing economic security, ODSP provides an alternate mechanism of support, compensating for the exclusions that are created because of social organization and attitudes. This aspect speaks to the principles of equality and non-discrimination. The adequacy of a benefit impacts the degree to which a person with a disability can participate fully in the community, allowing for social inclusion through access to community activities, volunteerism, recreation, etc. Similarly, the adequacy of the benefit impacts the degree to which a person with a disability can live independently and choose his or her own lifestyle.

Several Canadian publications have discussed the importance of ensuring that income support programs adequately meet the needs of its recipients.¹¹⁷ Sufficient income is accepted as a prerequisite to full participation and inclusion in society.¹¹⁸ Despite these assertions, programs for persons with disabilities rarely provide for adequate living standards. For example, the maximum available amount of income support for a single individual living in Ontario is \$1,042 (monthly).¹¹⁹ This amount is supposed to cover all of an individual's basic needs (i.e. food, clothing transportation) and shelter requirements (i.e. rent, mortgage, insurance etc.), yet the after-tax low-income cut off (LICO) for communities with populations of more than 500,000 was \$17,570 in 2006.¹²⁰ Not only does this present a significant gap between provincial income supports available for people with disabilities and the amount of income required to meet their

daily necessities, but it also limits one's ability to fully participate and be included in society. Moreover, individuals with income in excess of their entitlement under ODSP would ultimately be ineligible for income support benefits under the program.¹²¹

Given the gap between ODSP entitlements and the amount of income required to promote acceptable living standards, ODSP recipients must find ways to supplement their income in order to survive. For those who are able to work and find gainful employment, ODSP does include certain allowances for employment earnings.

Individuals are able to retain 50% of their net employment earnings in any given month after allowances for child-care deductions¹²² and disability-related work expenses.¹²³

Therefore, recipients only become ineligible for ODSP if the employment income they are able to retain after the claw-back is higher than the maximum income support available to them under the program.

Some members of our focus groups appreciated this "incentive" to earn employment income while still being able to maintain eligibility for income support. They viewed such employment income as a "top-up" to their benefits under ODSP, even after the 50% clawback had been applied. Other members of the group classified the clawback of employment earnings as a "disincentive" to work. The feeling conveyed was that for some individuals with disabilities, much effort is made to seek out and maintain employment. In many cases, individuals must overcome significant barriers to accessibility in the workplace and are limited to low-paying positions. Thus, a 50% clawback of their net earnings as a requisite to maintaining eligibility for the benefits was viewed as unreasonable.

Individuals who are unable to work or find employment are often forced to rely on other sources of income in order to supplement their income support benefits. ODSP regulations include a number of exempt sources of income. Of particular note are the following two provisions:

43. (1) The following shall not be included in income: ...

9. Payments from a trust or from a life insurance policy, gifts or other voluntary payments, that are applied to,

i. expenses for disability related items or services for a member of the benefit unit that are approved by the Director and that are not and will not be otherwise reimbursed, ...

13. Payments in addition to a payment under paragraphs 1 to 12 that are payments from a trust or life insurance policy or gifts or other voluntary payments up to a maximum of \$6,000 for any 12-month period. ¹²⁴

First, the legislation allows for support from any source where the income will be used for expenses for disability related items or services. For example, an ODSP recipient may want to access funds from a parent in order to pay for personal assistance services or occupational therapy, neither or which is reimbursed from any other plan or program. This is a good example of a provision that allows ODSP recipients the flexibility to fulfill their everyday needs without affecting eligibility requirements for the program.

On the other hand, section 43(1)(13) of the ODSP Regulation allows for voluntary payments and or gifts from any source. However, in order for such payments to not trigger an overpayment or affect eligibility for the program, ODSP imposes a \$6,000 limit from such sources in any 12-month period per member of the benefit unit. For example, a sibling may support her brother with funds for groceries, rent and other living

expenses; however, exceeding \$6,000 in support over any 12-month period would likely jeopardize the recipients ODSP benefits. The maximum benefit available for a single individual on ODSP is \$1,042 per month.¹²⁵ While benefit levels should be increased to be truly consistent with our desired framework, a \$6,000 allowance in the form of voluntary payments does not even allow individuals to meet the LICO in communities with population of more than 500,000. At current entitlement levels, ODSP must allow for unlimited amounts of voluntary payments and gifts in order for recipients to achieve the outcomes identified in Figure 1.

Some ODSP recipients may also be eligible for income from other government sources. While some of this income is considered exempt for the purposes of determining eligibility, other sources are not. For example, the following government income is considered exempt:¹²⁶

- Payments of Assistance for Children with Severe Disabilities;
- Some payments received under the *Child and Family Services Act*;
- Payments received under the *Developmental Services Act*;
- A payment or refund under the *Income Tax Act*;
- A death benefit payment under the *Canada Pension Plan*;
- Some payments received under the *Indian Act*;
- A Canada Education Savings Grant;
- Payments of Universal Child Care benefits; and
- Payments from Registered Disability Savings Plans (RDSPs).

These exemptions are commendable as income from these programs is essential to narrowing the gap between ODSP entitlements and full achievement of the identified

outcomes. There is, however, one significant source of income that is not considered exempt by ODSP. Although receipt of Canada Pension Plan Disability (CPPD) payments does not affect eligibility for ODSP, such payments are taxable and deducted dollar-for-dollar by ODSP. Keeping in mind that CPPD is paid to individuals who are unable to work, a full clawback of CPPD income leaves few options for those individuals to supplement their ODSP benefits. The full claw back is inconsistent with the manner in which employment income is treated under the program. Given that CPPD benefits are meant to replace employment income, perhaps deductions, if any, should mirror those allowances governing employment earnings.

3. Asset Allowances that Promote Acceptable Living Standards

Needs-based income support programs also consider the assets of the benefit unit when determining eligibility for benefits. Like the overly restrictive rules relating to income discussed above, limitations on the accumulation of assets often restrict persons with disabilities from having acceptable living standards. With ODSP entitlements well below the LICO, a principled approach to income supports for persons with disabilities should encourage the acquisition and growth of one's asset base to allow for future financial security. Without such opportunity, many persons with disabilities who rely on income support programs to subsidize their budgetary requirements will perpetually live in poverty. In addition, excluding persons with disabilities with assets in excess of legislated limits forces these individuals to convert and spend such assets before accessing income supports. Focus group participants noted that this requirement has a significant impact on persons who acquire a disability

later in life, forcing these individuals to exhaust all the savings they have accumulated through years in the workforce before they are eligible to access supports. Again, this often results in a living well below acceptable standards and forms multiple barriers to achieving financial independence and autonomy. The prescribed asset limit for a benefit unit applying for, or in receipt of, ODSP is \$5,000 for an individual and \$7,500 for a couple.¹²⁷ This means that a single recipient cannot exceed \$5,000 in non-exempt assets without being suspended from receipt of future ODSP income. A new applicant with more than \$5,000 in assets would not even proceed to the disability status determination phase of the applicant process.

ODSP does allow recipients to own certain assets that are exempt from the prescribed limits. For example, an individual is allowed to own his or her own primary residence and motor vehicle.¹²⁸ While such exemptions may look good on paper, in practice, the combination of low entitlement levels and restrictions on saving money makes it almost impossible for anyone to be in a position to acquire such assets.

Overly restrictive limits on assets often affect recipients' ability to save for future personal needs. As a means of advancing savings opportunities for persons with disabilities, the federal government introduced the Registered Disability Savings Plan (RDSP) in the 2007 federal budget. The RDSP, much like a Registered Retirement Saving Plan (RRSP), allows persons with disabilities to invest funds in a tax-deferred registered account that can attract up to \$4,500 in federal contributions per year.¹²⁹ In order for the RDSP to be an effective tool in the financial planning process, it is imperative that provincial income support programs exempt assets in RDSPs when

determining eligibility. The Ontario government has amended ODSP legislation for exactly this purpose by allowing Ontarians in receipt of ODSP to save through RDSPs without penalty.¹³⁰

For friends and family members who wish to name ODSP recipients as beneficiaries of their estates or life insurance proceeds, careful planning must take place to ensure that an individual's income support benefits are not jeopardized. ODSP does not provide an exemption beyond the prescribed limits for testamentary inheritances or life insurance proceeds. To further clarify, if an ODSP recipient receives an inheritance from a family member that results in the recipient's asset limit exceeding \$5,000 (assuming that the recipient is not married and that the inheritance is not an exempt asset), the recipient's ODSP benefits would be suspended.

In lieu of being named a beneficiary, ODSP allows individuals to be the beneficiaries of discretionary and non-discretionary trusts. Income from such trusts is subject to the eligibility rules and restrictions identified above. While these instruments do allow the recipient's income support to be supplemented by trust proceeds, some question whether this approach is consistent with the principles adopted by the Rights-Outcome Lens. While a non-discretionary trust allows the recipient some shared decision-making authority over the proceeds, there is a \$100,000 monetary limit associated with this type of trust and the beneficiary must always seek approval from the trustee when accessing the funds. There is no monetary limit associated with discretionary trusts; however, all decision-making authority over investment and spending of the funds is assigned to the

named trustee(s) of the trust, thereby creating a relationship of dependency between the beneficiary and trustee(s).

People related their frustration about the lack of autonomy on ODSP – even the ability to handle an inheritance which should provide some independence is restricted – while others are asking why ODSP does not do more to empower and encourage independence.¹³¹

Less restrictive rules regarding the accumulation of assets, especially with respect to inheritances, would likely raise the standard of living for ODSP recipients in a way that promotes their dignity, autonomy and financial independence.

Conclusion: Eligibility based on Financial Status

Financial eligibility criteria for income support programs too often require persons with disabilities to be living in poverty in order to qualify for benefits. The combination of the overly restrictive rules relating to the definition of the benefit unit, and income and asset allowances, perpetuate a poor standard of living for many individuals that must rely on such supports. Although section 7 of the Charter has not yet been found to create a positive obligation on the state with respect to the enjoyment of life, liberty or security of the person, the majority decision in *Gosselin* leaves this open this possibility.¹³² Arbour J.'s dissent in that case went one step further by suggesting that individuals' economic rights, in particular "those economic rights fundamental to human life or survival"¹³³ fall within the scope of section 7. Perhaps the application of the Rights-Outcome Lens to the determination of financial eligibility criteria for disability-related income support programs will be a means to realize this assertion that ultimately promotes acceptable living standards for persons with disabilities.

D. Process & Administrative Factors that Influence Access to ODSP

Individuals may be both financially eligible and meet the definition of disability for income support programs, but may nonetheless be unable to access benefits due to barriers in administrative processes. An evaluation of the accessibility of such programs is beyond the scope of this paper and is better addressed by accessibility standards and frameworks applied in the policy and legislative drafting phases of each initiative.¹³⁴ However, for the purposes of illustration, some examples are outlined below.

Community and academic articles have recognized the numerous, complex processes that make it difficult for an individual to apply, ask for a review and appeal decisions under ODSP.¹³⁵ Section 2 of the *Accessibility For Ontarians with Disabilities Act*¹³⁶ (AODA) defines a barrier as “anything that prevents a person with a disability from fully participating in all aspects of society because of his or her disability, including a physical barrier, an architectural barrier, an information or communications barrier, an attitudinal barrier, a technological barrier, a policy or a practice.”¹³⁷ Income support programs, particularly those directed specifically at persons with disabilities must ensure that its legislation, policies and procedures are free of such barriers by allowing for the individual accommodation of applicants and recipients. The applicable legislation should embrace established Charter principles, human rights legislation and accessibility laws. For example, the Ontario Human Rights Code requires the persons with disabilities be accommodated with respect to services, goods and facilities. The *Ontarians with Disabilities Act, 2001*¹³⁸ (ODA) requires government bodies to develop

annual accessibility plans and the AODA prescribes a process for developing and implementing enforceable accessibility standards. In addition to these laws, income support programs should include explicit references to reasonable accommodation and accessibility.

Moreover, although a comprehensive discussion of the operational processes of social assistance programs is beyond the scope of this paper, the authors have included one process-driven outcome that applies to both the disability determination and financial eligibility of processes of such programs.

1. Accessible and Respectful Administrative Processes for Eligibility Determination

ODSP receives approximately 30,000- 35,000 new applications each year, approximately half of which are granted at the initial application stage, indicating a massive caseload for adjudication.¹³⁹ For those who are initially denied benefits, the entire process through to the point of adjudication by the SBT can take more than one year, a fact critically commented upon by the Ombudsman of Ontario in his report “Losing the Waiting Game” which found that persons with disabilities were losing access to benefits because of administrative bureaucracy and delay.¹⁴⁰ The Auditor General of Ontario also commented on delays in processing disability applications, delays in payment of benefits, inconsistent adjudication of “disability” and the significant cost to tax payers involved in appeals, particularly given the fact that the majority of cases are ultimately granted.¹⁴¹

One significant issue impacting initial administrative adjudication of disability, as identified by an internal review, is missing or inadequate medical information.¹⁴² As stated above, the legislation only requires minimal verification by medical practitioners and the practice of application review must incorporate this threshold into its process. However, to the degree that medical materials are necessary or helpful, multiple factors may influence the completeness of that material. Medical professionals are paid little to complete forms and receive little or no training in the complex processes under ODSP. Medical judgments are also different from DAU expectations. Where a patient's condition is chronic, there may be no need to conduct investigations such as MRIs; however, the DAU invariably requires this information. If specialists are unavailable or not medically necessary, those reports may not make up the ODSP application, again leading to probable denial.¹⁴³

Those who are unable to invest in a lengthy appeal process are simply denied benefits. It is this system that led to the title of an early review of ODSP: "Denial by Design" which speaks to the multiple barriers seemingly intentionally built into ODSP to disentitle large numbers of potential recipients. While a number of changes have been made to the administration of ODSP since its inception, many individuals continue to fall between the cracks, not because they do not meet the eligibility criteria for the benefit but because ODSP procedures act to discourage applications and appeals.¹⁴⁴

The failure to reconcile the administrative application processes with the legislative test, as interpreted judicially, leads to inappropriate denials and a general lack of access to

ODSP. The frustration, confusion and heavy onus on the applicant limits the ability of ODSP to meet this outcome measure.

Conclusion: Application of the Rights-Based Lens to ODSP:

Application of the Rights-Outcome Lens to ODSP provides an opportunity to consider the outcome measures in the context of eligibility criteria for a particular disability-related support program. The analysis reveals a number of weaknesses in the eligibility criteria dealing with both disability and financial status and general problems with the administrative processes. Nonetheless, ODSP eligibility criteria also exhibit some strengths: the legislative definition of disability is broad, flexible and non-medical while the financial criteria, despite their weaknesses, provide levels of income and asset exclusions that are above those offered in other provinces.

This review provides the building blocks from which to assess the degree to which eligibility criteria, particularly for income support programs, fulfill principle-based outcome measures. However, the application of the Rights-Outcome Lens to ODSP eligibility criteria can only be a starting point for discussions about disability-related income support programs in Ontario. Given the multiple programs offered by different levels of government and private resources, a comprehensive consideration of the intersections of these programs would be necessary for a complete picture of the sufficiency of ODSP eligibility criteria.

In June 2010, the Social Assistance Advisory Council released its report “Recommendations for an Ontario Income Security Review.”¹⁴⁵ That Report indicated

the need for a comprehensive review of Ontario's social assistance programs with a view to investigating the jurisdictional overlap between the federal, provincial and municipal governments:

The Social Assistance Review Advisory Council recommends that the Ontario Income Security Review be asked to undertake a comprehensive assessment of income security, employment supports and related services for working-age adults. The Review should include federal programs such as Employment Insurance, provincial programs such as Ontario Works and the Ontario Disability Support Program, as well as municipal, local and community roles... The process of transformation will necessarily involve other orders of government: the federal government must eventually be engaged. Lack of federal government co-operation, however, should not impede Ontario's work to define the reforms needed in federal programs to meet Ontario's interests.¹⁴⁶

The Report recognizes the vital nature of income support programs to the lives of individuals in Ontario, including persons with disabilities. The Rights-Outcome Lens provides a mechanism to begin that discussion.

VII. CONCLUSIONS AND FURTHER RESEARCH

This paper provides a foundational tool to begin the discussion of assessing existing programs and envisioning future directives that include eligibility criteria developed in a principled manner. It is premised on the evolution of society's understanding of disability as well as national and international legal and policy developments that have taken place over the last thirty years. Canada's recent ratification of the CPRD, in March 2010, provides a progressive step towards integrating such principles into the design, development and delivery of income support programs for persons with disabilities.

Our application of the Rights-Outcome Lens to ODSP eligibility criteria identified the positive aspects of the program as well as areas that require immediate attention. The application of this theoretical framework that includes base principles and outcome measures is a starting point for creating a fuller means of moving forward with disability policy in the Province of Ontario. Next steps may include the derivation of key performance indicators to be used to conduct a comprehensive evaluation of disability-related income support programs.

It is important that the relationship among programs be taken into account, and any contemplated changes should be examined from a systemic rather than a program-specific perspective. Tightening eligibility criteria in one program most likely will lead to increased costs in another, or worse, will let individuals who use and need these programs fall between the cracks.¹⁴⁷

¹ Human Resources Development Canada (HRDC), *Defining Disability: A Complex Issue* (Ottawa: Office of Disability Issues, 2003) at 2 notes that it may be neither possible nor desirable to develop a uniform definition of disability as various programs serve a different purpose and restrict eligibility accordingly. See also Social Development Canada, *Advancing the Inclusion of Persons with Disabilities, 2004* (Ottawa: Social Development Canada, 2004) at 12.

² See Law Commission of Ontario, *The Law as it Affects Persons with Disabilities: Background Paper* (Toronto: Law Commission of Ontario, 2010) at 7 in which the following six principles are adopted, on preliminary basis: 1. Respect for the dignity and worth of persons with disabilities; 2. Autonomy and independence; 3. Inclusion and participation; 4. Equality and non-discrimination; 5. Recognition that humans vary infinitely along a spectrum of abilities and that society must accommodate these variances into its mainstream; and 6. Respect for the diversity among persons with disabilities in the experience of disability. (hereinafter “the principles”). [Law Commission of Ontario (2010)]

³ The Ontario Disability Support Plan is established and governed by the *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Schedule B [ODSPA]

⁴ Law Commission of Ontario (2010), note 2.

⁵ An extensive review of this shift in conceptualization and its impact on legal definitions of disability is found in Law Commission of Ontario, *The Law as it Affects Persons with Disabilities: Preliminary Consultation Paper: Approaches to Defining Disability* (Toronto: Law Commission of Ontario, 2009) [Law Commission of Ontario (2009)].

⁶ See generally Mike Oliver, *Understanding Disability: From Theory to Practice* (London: Macmillan, 1996); Marcia Rioux, “On Second Thought: Constructing Knowledge, Law, Disability and Inequality” in S.Herr, L. Gostin and H. Koh, eds., *The Human Rights of Persons with Intellectual Disabilities: Different but Equal* (Oxford: Oxford University Press, 2003) 287 [Rioux (2003)]; Colin Barnes and Geoffrey Mercer, “Disability, Work and Welfare: Challenging the Social Exclusion of Disabled People” (2005) 19 *Work Employment and Society* 527 [Barnes and Mercer]; Colin Barnes, Geof Mercer & Tom Shakespeare, *Exploring Disability: A Sociological Introduction* (Cambridge, UK: Polity Press, 1999).

⁷ Rioux (2003), note 6 at 290.

⁸ Michael J. Prince *Absent Citizens: Disability Politics and Policy in Canada* (Toronto: University of Toronto Press, 2009) at 16 [Prince (2009)].

⁹ Barnes and Mercer, note 6; Rioux (2003), note 6.

¹⁰ Rioux (2003), note 6; Law Commission of Ontario (2009), note 5 divides the social model into the ‘social approach’ and the ‘human rights approach’.

¹¹ Catherine Frazee, Joan Gilmour and Roxanne Mykitiuk “Now you See Her, Now you Don’t: How Law Shapes Disabled Women’s Experience of the Exposure, Surveillance and Assessment in the Clinical Encounter” in Dianne Pothier and Richard Devlin, eds., *Critical Disability Theory: Essays in Philosophy, Politics and Law* (Vancouver: University of British Columbia Press, 2006) 129 [Frazee, Gilmour and Mykitiuk]; Sally French, “Disability Impairment or Something in Between?” in John Swain, Vic Finkelstein, Sally French and Mike Oliver, *Disabling Barriers – Enabling Environments* (London, Sage, 1993) 17; Carol Thomas, “How is Disability Understood? An Examination of Sociological Approaches” (2004) 19 *Disability and Society* 225.

¹² Joan Gilmour, “Retrenchment not Reform Using Law and Policy to Restrict the Entitlement of Women with Disabilities to Social Assistance” in S. Gavigan and D. Chunn, eds., *The Legal Tender of Gender:*

Historical and Contemporary Perspectives on Welfare Law, State Policies and the Regulation of Women's Poverty (Oxford: Hart Publishing, in press) [Gilmour in press]; Frazee, Gilmour and Mykitiuk, note 11.

¹³ *Convention on the Rights of Persons with Disabilities*, 30 March 2007, U.N. Doc. A/61/611, (entered into force 3 May, 2008) [*CRPD*]

¹⁴ *CRPD*, note 13 at Preamble.

¹⁵ *Canadian Charter of Rights and Freedoms*, s. 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

¹⁶ *Human Rights Code*. R.S.O.1990, c. H.19 [*Human Rights Code*]

¹⁷ *CRPD*, note 13 at Preamble.

¹⁸ Federal/Provincial/Territorial Ministers Responsible for Social Services, Canada, *In Unison: A Canadian Approach to Disability Issues*, (Hull, Quebec: Human Resources Development Canada, 2000) [*In Unison*].

¹⁹ *In Unison*, note 18.

²⁰ *CRPD*, note 13 at Article 3.

²¹ Law Commission of Ontario (2010), note 2 at 4. Note that in its report released in June, 2010, , "Recommendations for an Ontario Income Security Review", the Social Assistance Review Advisory Council identified a number of similar principles that it recommends serve as the outcomes for the measurement of performance of the province's income system:

1. Autonomy, responsibility and dignity of recipients
2. Income for all Ontarians that at least meets a liveable income standard
3. Human capacity development and its optimal employment to contribute to the economic prosperity of Ontarians
4. Public and fiscal sustainability
5. Fairness, equity and transparency
6. Empowerment of recipients to improve their economic circumstances.

See Social Assistance Review Advisory Council, "Recommendations for an Ontario Income Security Review: Report of the Ontario Social Assistance Review Advisory Council" (May 2010), online: Ministry of Community and Social Services, <<http://www.mcsc.gov.on.ca/documents/en/mcsc/publications/social/sarac%20report/SARAC%20Report%20-%20FINAL.pdf>> at 18 [Social Assistance Review Advisory Council].

²² *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 at para. 21, McLachlin C.J. and Abella, J. [*Kapp*]

²³ *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 54, La Forest J. [*Eldridge*].

²⁴ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 171, McIntyre J. [*Andrews*]. Note that McIntyre J. dissented, in part, but not on this issue.

²⁵ Michael Prince, "A National Strategy for Disability Supports: Where is the Government of Canada in this Social Project?", Presentation for the Seminar Series School of Rehabilitation Therapy, Faculty of Health Sciences L.D. Acton Building, Queen's University (March 10, 2005), online: University of Victoria, <<http://web.uvic.ca/spp/documents/nationalstratdisa.pdf>> at 4 [Prince (2005)].

²⁶ Prince (2005), note 25 at 4.

²⁷ Shier et al., “Barriers to Employment as Experienced by Disabled People: a qualitative analysis in Calgary and Regina, Canada” (2006) 21 *Disability & Society* 2 [Shier et al.]; Lyn Jongbloed, “Disability Policy in Canada: an Overview” (2003) 13 *Journal of Disability Policy Studies* 203 [Jongbloed (2003)]; V.A. Crooks & V. Chouinard, “Because they have all the power and I have none: state restructuring of income and employment supports and disabled women’s lives in Ontario, Canada” (2005) 20 *Disability & Society* 19 [Crooks & Chouinard (2005)].

²⁸ Jongbloed (2003), note 27 at 204; see also Gilmour (in press), note 12 and Shier et al., note 27.

²⁹ Prince (2009), note 8 at 16.

³⁰ Gilmour (in press), note 12; Crooks & Chouinard (2005), note 27, at 20 argue that governments have engaged in an “actively deliberate political retreat from prior commitments to developing more socially and spatially just societies; societies which protect everyone’s rights and well-being at least at some minimally collectively acceptable level.”

³¹ *Falkiner v. Director, Income Maintenance Branch, Ministry of Community and Social Services & Attorney General of Ontario* [2002], 50 O.R. (3d) 481 (C.A.), leave to appeal to S.C.C. granted, [2004] SCCB 130, the Attorney General of Ontario withdrew its appeal. Case cited in Gilmour (in press), note 12.

³² Prince (2005), note 25 at 3.

³³ Prince (2005), note 25 at 3.

³⁴ *Eaton v. Brant County Board of Education* [1997] 1 S.C.R. 241, Lamer C.J.C at para. 67.

³⁵ Gilmour (in press), note 12 at 201, speaking about *In Unison*, note 18.

³⁶ Rick August, *Paved with Good Intentions: The Failure of Passive Disability Policy in Canada* (April 2009), online: Caledon Institute <<http://www.caledoninst.org/Publications/PDF/763ENG.pdf>>, who argues that passive cash transfers reinforce unemployability [August]. See also Shier et al., note 27 for a discussion of internalized “inabilities.”

³⁷ *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at 368, Dickson C.J.C. Dickson C.J.C writes in dissent but not on this issue.

³⁸ Crooks & Chouinard (2005), note 27 at 24. These authors argue, for example, that ODSP is not a benevolent attempt by the government to recognize abilities of persons with disabilities but rather a means of reducing welfare roles thus providing evidence of continuing attitudinal barriers.

³⁹ See *Kapp*, note 22, in which the Supreme Court of Canada reviews its decisions in *Andrews*, note 24 and *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

⁴⁰ *Andrews*, note 24, at 165.

⁴¹ *Eldridge* note 23, at para. 79: “reasonable accommodation” referring to the obligation to take steps to the point of “undue hardship.”

⁴² See also the other examples cited by LaForest J. in *Eldridge*, note 23 : *Re Saskatchewan Human Rights Commission and Canadian Odeon Theatres Ltd.* (1985), 18 D.L.R. (4th) 93 (Sask. C.A.), leave to appeal to S.C.C. refused, [1985] 1 S.C.R. vi. The S.C.A. found that the failure of a theatre to provide a disabled person a choice of place from which to view a film comparable to that offered to the general public was discriminatory; *Howard v. University of British Columbia* (1993), 18 C.H.R.R. D/353 held that

the university was obligated to provide a deaf student with a sign language interpreter for his classes: “[W]ithout interpreters”, the Human Rights Council held, at p. D/358, “the complainant did not have meaningful access to the service”; *Centre de la communauté sourde du Montréal métropolitain inc. v. Régie du logement*, [1996] R.J.Q. 1776, where the Quebec Tribunal des droits de la personne determined that a rent review tribunal must accommodate a deaf litigant by providing sign language interpretation.

⁴³ Marcia Rioux, “Towards a Concept of Equality of Well-Being: Overcoming the Social and Legal Construction of Inequality” (1994) 7 Can. J.L. & Juris. 127 at para. 50.

⁴⁴ Further examples of equality, specifically within the context of ODSP are discussed below, in the application of the Rights-Outcome Lens to ODSP.

⁴⁵ Council of Canadians with Disabilities, “As a Matter of Fact: Poverty and Disability in Canada,” (2010), online: Council of Canadians with Disabilities <<http://www.ccdonline.ca/en/socialpolicy/poverty-citizenship/poverty-disability-canada>>.

⁴⁶ Gilmour (in press), note 12 at 191.

⁴⁷ *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, [2004] 3 S.C.R. 657 at para. 46, McLachlin C.J.C.

⁴⁸ *Andrews*, note 24 at 169.

⁴⁹ Caledon Institute, “The Disability Income System in Canada: Options for Reform” (2003), online: Caledon Institute <<http://www.caledoninst.org/Publications/PDF/1-895796-72-5.pdf>> at 8 [Caledon Institute].

⁵⁰ *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Montréal (City)*, 2008 SCC 48, [2008] 2 S.C.R. 698; *Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Boisbriand (City)*, [2000] 1 S.C.R. 665.

⁵¹ World Health Organization, “Disabilities,” (2010), online: World Health Organization <<http://www.who.int/topics/disabilities/en/>>.

⁵² Burt Perrin, “Lessons Learned From Evaluation of Disability Policy and Programs” (Human Resources Development Canada Evaluation and Data Development Branch, 1999), online: Disability Policy in Canada, <<http://www.disabilitypolicy.ca/groups/employment/edocs.php>> at 2-3 [Perrin].

⁵³ Harry Beatty, “Comprehensive Disability Compensation in Ontario,” (1991) 7 *Journal of Law and Social Policy* 100 at 118.

⁵⁴ *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703 at paras. 28-29.

⁵⁵ Lyn Jongbloed, “Disability Income: the experiences of women with multiple sclerosis,” (October 1998) *Canadian Journal of Occupational Therapy*, online: OTWorks <<http://www.otworks.ca/pdf/MSJongbloed98.pdf>> [Jongbloed (1998)]

⁵⁶ National Alliance on Mental Illness Multicultural Action Centre, “Facts about Stigma and Mental Illness in Diverse Communities,” online: National Alliance on Mental Illness <<http://www.nami.org/ContentManagement/ContentDisplay.cfm?ContentFileID=5148>> [National Alliance on Mental Illness Multicultural Action Centre].

⁵⁷ Both eligibility criteria based on the definition of “disability” and financial circumstances are reviewed in detail below.

⁵⁸ Gilmour (in press), note 12 discusses two initiatives at the federal level where transfer payments for social programs generally were reduced. She also addresses the constitutional division of powers on the provision of social programs.

⁵⁹ Tanya Hyland, *A Critical Analysis of the Ontario Disability Support Program Act and Social Citizenship Rights in Ontario* (Ottawa: Institute of Political Economy, Carleton University, 2001), online: DAWN Ontario <<http://dawn.thot.net/odsp2.html>> quoting Janet Ecker, then Minister of Community and Social Services, in a speech given June 2, 1998 [Hyland].

⁶⁰ *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513 at para. 3 [Tranchemontagne S.C.C.]

⁶¹ See generally Hyland, note 59; Gilmour (in press), note 12 and Joan Gilmour & Dianne Martin, "Women's Poverty, Women's Health: the Role of Access to Justice" (2003) in P. Van Esterik, ed., *Head, Heart and Hand: Partnerships for Women's Health in Canadian Environments* (Toronto: National Network on Environments and Women's Health, York University, 2001).

⁶² *Ball v. Ontario (Community and Social Services)*, 2010 H.R.T.O. 360 (CanLII) at para. 71. See also *Tranchemontagne* S.C.C., note 60.

⁶³ *ODSPA*, note 3 at Section 4

⁶⁴ *Gray v. Director of the Ontario Disability Support Program*, (2002) 59 O.R. (3d) 364 (C.A.) at para. 15 [Gray]

⁶⁵ Provincial regimes vary, however British Columbia, Alberta, New Brunswick, New Brunswick, North West Territories and Nunavut all require a "severe" impairment as does the Canada Pension Plan criteria. See John Stapleton & Anne Tweddle, "Navigating the Maze: Improving Coordination and Integration of Disability Income and Employment Policies and Programs for People living with HIV/AIDS" (Toronto: Canadian Working Group on HIV and Rehabilitation, 2008) online: Canadian Working Group on HIV and Rehabilitation <http://www.hivandrehab.ca/EN/episodic_disabilities/documents/NavigatingtheMazeFinal.pdf> [Stapleton & Tweddle]

⁶⁶ See other legislative regimes in other Canadian jurisdictions, note 65.

⁶⁷ August, note 36 at 4 argues that social assistance programs tend to separate persons with disabilities from others, leading to the treatment of disability as "a discrete concept" rather than one that is the natural experience of all people, over the course of their lives.

⁶⁸ Centre for Addictions and Mental Health, *Barriers to ODSP: Experiences of People with Mental Health and Addictions*. (Toronto: Centre for Addictions and Mental Health, 2003), online: Centre for Addictions and Mental Health, <http://www.camh.net/Public_policy/Public_policy_papers/barrierstoodsp.html> [Centre for Addiction and Mental Health].

⁶⁹ *Gray*, note 64 at para. 27.

⁷⁰ *Gray*, note 64 at paras. 13-15. See also *Ontario (Disability Support Program) v. Crane*, (2006) 83 O.R. (3d) 321 (C.A.), which adopted the analysis under the *Insurance Act* as described in *Meyer v. Bright* (1993), 15 O.R. (3d) 129 (C.A.).

⁷¹ *Sandiford v. Ontario (Ministry of Community, Family and Children's Services)*, [2005] 195 O.A.C. 143 (S.C.D.C.) at para. 20 [*Sandiford*]

⁷² See *Ball v. Ontario (Community and Social Services)*, 2010 H.R.T.O. 360 (CanLII) at para. 93 for a discussion about the difficulties in using "categorical" and medical definitions of disabilities to include some while excluding others.

⁷³ *Ontario (Director, Disability Support Program) v. Gallier* (2000) O.J. No. 4541 (Div. Ct.), leave to appeal to O.C.A. refused, M26675 (7 June 2001) [*Gallier*]; *Gray*, note 64.

⁷⁴ *ODSPA*, note 3 at s.5(2).

⁷⁵ *Ontario Disability Support Program v. Tranchemontagne*, (2009) 95 O.R. (3d) 327 (Ont.S.C.D.C.) [*Tranchemontagne Ont. S.C.D.C.*]

⁷⁶ *Tranchemontagne Ont. S.C.D.C.*, note 75 at para.69.

⁷⁷ *Tranchemontagne Ont. S.C.D.C.*, note 75.

⁷⁸ Tiina Kaigas, External Review of the Ontario Disability Support Program (2008) [unpublished] at 17-18 [*Kaigas*].

⁷⁹ Ernie Lightman et al., "Not Disabled Enough: Episodic disabilities and the Ontario Disability Support Program" (2009) 29 *Disability Studies Quarterly* 3 [Lightman et al.]

⁸⁰ John Fraser, Cynthia Wilkey & JoAnne Frenschowski, *Denial by design... The Ontario Disability Support Program*, (Toronto: Income Security Advocacy Centre, 2003), online: Income Security Advocacy Centre <<http://www.incomesecurity.org/documents/DenialByDesignfinal.pdf>> at 19 [Fraser, Wilkey & Frenschowski].

⁸¹ Harry Beatty, *Possible Improvements to the Ontario Disability Support Programme: a Scoping Exercise*, (Toronto: Modernizing Income Security for Working-Age Adults Project, 2005), online: St. Christopher's House <<http://www.stchrishouse.org/get-involved/community-dev/modernizing-income-work-adults/MISWAA%20Commisioned%20Papers/>>.

⁸² Lynn Cockburn et al., "Work and Psychiatric Disability in Canadian Disability Policy" (2006) 32 *Canadian Public Policy* 2, (discuss the difficulty of defining mental health in Canadian disability materials.)

⁸³ Income Security Advocacy Centre, "Disability Adjudication Summaries Review," (2008) [unpublished] [Income Security Advocacy Centre].

⁸⁴ For further discussion of mental health and ODSP see Centre for Addiction and Mental Health, note 68.

⁸⁵ Income Security Advocacy Centre, note 83.

⁸⁶ Lightman et al., note 79.

⁸⁷ *Gray*, note 64.

⁸⁸ Jongbloed (1998), note 55.

⁸⁹ Many studies have noted the disproportionate impact on women, in particular. See generally, Jongbloed (1998), note 55; Crooks & Chouinard (2005), note 27; Gilmour & Martin, note 61 and Gilmour

(in press), note 12. Given differential impacts of types of disabilities on cultural and ethnic groups, further study on these factors is also warranted.

⁹⁰ See for example National Alliance on Mental Illness Multicultural Action Centre, note 56.

⁹¹ *Family Benefits Act*, R.S.O. 1990, c. F-2.

⁹² Gilmour (in press), note 12 at 203. See also Frazee, Gilmour & Mykitiuk, note 11.

⁹³ *Gallier*, note 73 stated that it was necessary to consider the person within his or her own context to understand how the substantial impairment may cause restrictions.

⁹⁴ At the federal level, the *Employment Equity Act*, S.C. 1995, c. 44 seeks to reintegrate persons with disabilities into employment by acknowledging that those individuals should have the same opportunity for full participation. Underlying employment equity legislation is the realization that persons with disabilities face barriers in pre-employment conditions and employment environments and despite more than twenty-five years of efforts to reduce those barriers, persons with disabilities continue to be employed at levels below workforce availability.

⁹⁵ Melodie Mayson, Nancy Vander Plaats & Dianne Wintermute, *Ontario Disability Support Program: Disability Determination and Appeals to the Social Benefits Tribunal* (Toronto: Neighbourhood Legal Services, 2005) [Mayson, Vander Plaats & Wintermute].

⁹⁶ Ken Battle & Sherri Torjman, *Social Policy That Works: An Agenda*, (Ottawa: Caledon Institute of Social Policy, 2002), online: Caledon Institute of Social Policy <<http://www.caledoninst.org/PDF/553820304.pdf>> describe the ways in which persons with disabilities, who may be able to perform job functions, are excluded from work due to environmental, attitudinal and social barriers [Battle & Torjman]

⁹⁷ *Human Rights Code*, note 16 at s. 5(1) (prohibition against direct discrimination on the basis of disability); s. 11(1) (prohibition against indirect discrimination); s. 17(2) (requirement of 'reasonable accommodation' in employment).

⁹⁸ *Accessibility for Ontarians with Disabilities Act, 2005*, S.O. 2005, c.11 [AODA]

⁹⁹ Battle & Torjman, note 96 note the different labour market and impact on persons with disabilities and the failure of social assistance programs to recognize reality of work.

¹⁰⁰ Caledon Institute, note 49 at 10 and the other studies cited in that report.

¹⁰¹ *ODSPA*, note 3, s. 4(1)(c). Regulations define the medical professionals able to verify this information and include physicians, social workers and others.

¹⁰² *Sandiford*, note 71; *Ginter v. Director, Employment and Income Assistance*, 2003 MBCA 36, 173 Man. R. (2d) 104; D. Matthews, *Report to the Honourable Sandra Pupatello, Minister of Community and Social Services: Review of Employment Assistance Programs under Ontario Works and ODSP*, (Toronto: Ontario, Ministry of Community and Social Services, 2004) online: Ontario, Ministry of Community and Social Services <<http://www.mcscs.gov.on.ca/NR/MCFCS/OW/Report/EmploymentAssistanceProgram.pdf>>.

¹⁰³ See generally Frazee, Gilmour & Mykitiuk, note 11 and Jongbloed (1998), note 55

¹⁰⁴ Frazee, Gilmour & Mykitiuk, note 11.

¹⁰⁵ Frazee, Gilmour & Mykitiuk, note 11 at 240. Also see Jongbloed (1998), note 55.

¹⁰⁶ Frazee, Gilmour & Mykitiuk, note 11 at 241.

¹⁰⁷ Jongbloed (1998), note 55. See also: V. A. Crooks & V. Chouinard, "An embodied geography of disablement: Chronically ill women's struggles for enabling places in spaces of health care and daily life" (2006) 12 *Health & Place* 345; Lightman et al., note 79.

¹⁰⁸ Frazee, Gilmour & Mykitiuk, note 11 at 243.

¹⁰⁹ *ODSPA*, note 3 s. 1.

¹¹⁰ Gilmour (in press), note 12.

¹¹¹ Gilmour (in press), note 12; Hyland, note 59.

¹¹² Crooks & Chouinard (2005), note 27 at 21.

¹¹³ Stapleton & Tweddle, note 65.

¹¹⁴ Fraser, Wilkey & Frenschowski, note 80 at 3.

¹¹⁵ Ontario, ODSP Branch, "ODSP Directive 2.3, Who is Eligible: Spouse" (November, 2006), online: Ministry of Community and Social Services Ontario online: <http://www.accesson.ca/en/mcss/programs/social/directives/directives/ODSPDirectives/income_support/2_3_ODSP_ISDirectives.aspx>.

¹¹⁶ The authors recognize that the definition of the benefit unit presents many complex issues surrounding economic dependency and relationship dynamics. The discussion is meant to draw attention to such issues; however, a comprehensive analysis is beyond the scope of this paper.

¹¹⁷ See generally *In Unison*, note 18 and Fraser, Wilkey & Frenschowski, note 80.

¹¹⁸ See *In Unison*, note 18.

¹¹⁹ See O. Reg. 222/98 under the *ODSPA*, note 3 at s. 30 and 31.

¹²⁰ Canadian Council on Social Development, Stats & Facts, online: Canadian Council on Social Development <http://www.ccsd.ca/factsheets/economic_security/poverty/lico_06.htm>, (last accessed: July 21, 2010).

¹²¹ Centre for Independent Living Toronto, "ODSP and the Extended Health Benefit: to pay for drugs and other medical costs", (May, 2006) 2 *Prime Timers Focus* 2. online: Centre for Independent Living Toronto <http://www.cilt.ca/Documents%20of%20the%20CILT%20Website/PTF_02_02.txt>, (last accessed July 21, 2010).

¹²² Up to \$600. See O. Reg 222/98 under the *ODSPA*, note 3 at s.38(2).

¹²³ Up to \$300. See O. Reg 222/98 under the *ODSPA*, note 3 at s. 38(1)(v).

¹²⁴ O. Reg 222/98 under the *ODSPA*, note 3 at s.43(1)(9) and 43(1)(13).

¹²⁵ O. Reg 222/98 under the *ODSPA*, note 3 at s. 30 and 31.

¹²⁶ O. Reg 222/98 under the *ODSPA*, note 3 at s. 41(1) and 42.

¹²⁷ O. Reg 222/98 under the *ODSPA*, note 3 at s. 27(1).

¹²⁸ O. Reg 222/98 under the *ODSPA*, note 3 at s. 28(1) and 28(6).

¹²⁹ Note that government contributions are based on the beneficiary's family income and age of the beneficiary. For further information, please contact Human Resources and Skills Development Canada - <http://www.hrsdc.gc.ca/eng/disability_issues/disability_savings/index.shtml.

¹³⁰ O. Reg 222/98 under the *ODSPA*, note 3 at s. 28(1)(26.1).

¹³¹ ODSP. Action Coalition, *Telling Our Stories: Disability Should Not Equal Poverty* (July 2010) online: ODSP Action Coalition <<http://www.odspaction.ca/story/telling-our-stories-disability-should-not-equal-poverty-report-released>> at 40.

¹³² *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429 at paras. 81-82, McLachlin C.J.C. [*Gosselin*]

¹³³ *Gosselin* note 132 at para. 311, Arbour J. citing *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927.

¹³⁴ For further information, refer to the standards and diversity lenses established by the Accessibility Directorate of Ontario and the Ontario Public Service Diversity Office. Also, please see David Lepofsky and Randal Graham, "Universal Design in Legislative Drafting – How to Ensure that Legislation is Barrier-Free for People with Disabilities," online: Centre for Research and Education on Violence Against Women and Children <<http://www.crvawc.ca/documents/Universal%20design%20in%20drafting%20barrier%20free%20legislation%20for%20people%20with%20disabilities.pdf>>.

¹³⁵ Fraser, Wilkey & Frenschowski, note 80; Centre for Addiction and Mental Health, note 68; Gilmour (in press), note 12; Gilmour & Martin, note 61; Mayson, Vander Plaats & Wintermute, note 95.

¹³⁶ AODA note 98.

¹³⁷ *Ontarians with Disabilities Act*, 2001, S.O. 2001, c.32 [*Ontarians with Disabilities Act*].

¹³⁸ *Ontarians with Disabilities Act*, note 137.

¹³⁹ Kaigas, note 78 at 4.

¹⁴⁰ Ontario, Ombudsman, *Losing the Waiting Game. Investigation into Unreasonable Delay at the Ministry of Community and Social Services' Ontario Disability Support Program's Disability Adjudication Unit*. (Toronto: Ontario, Ombudsman, 2006), online: Ontario Ombudsman <http://www.ombudsman.on.ca/media/3289/losing_the_waiting_game_20060531.pdf>.

¹⁴¹ Ontario, Office of the Auditor General, *Annual Report* (Ontario: Queen's Printer, 2009), online: Ontario, Office of the Auditor General <http://www.auditor.on.ca/en/reports_2009_en.htm> at 227. The report notes that more than 55% of appeals to the S.B.T on the question of "disability" were successful. A Ministry report placed the success rate at closer to 80% when taking into account unsuccessful appeals resulting from the applicant's non-attendance at hearing.

¹⁴² Kaigas, note 78.

¹⁴³ See Canadian HIV/AIDS Legal Network, *Support for Survival: barriers to income security for people living with HIV/AIDS and directions for reform* (Toronto: Canadian HIV/AIDS Legal Network, 2005); Income Security Advocacy Centre, note 83.

¹⁴⁴ Gilmour & Martin, note 61.

¹⁴⁵ Social Assistance Review Advisory Council, note 21.

¹⁴⁶ Social Assistance Review Advisory Council, note 21 at ii and iii.

¹⁴⁷ Perrin, note 52 at 13.