

TOP 10

THINGS LITIGATORS NEED TO KNOW

The Ontario Disability Support Program (“ODSP”) is run by the provincial government and provides financial assistance to qualifying Ontarians with disabilities.

According to the latest statistics from April 2024, there are over 496,000 program “beneficiaries”, which includes ODSP recipients, their spouses and any minor or adult dependants. Given the large number of ODSP recipients, it is not uncommon for ODSP issues to arise in legal matters across many practice areas.

This article aims to provide a summary of the top ten things that personal injury lawyers should know about ODSP in order to effectively advocate for clients who receive ODSP benefits.

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1. ODSP Asset Rules and Exemptions

In order to be eligible for ODSP, the basic asset rule is that a single person can own \$40,000 worth of assets; a person with a spouse can own \$50,000 worth of assets; and an additional \$500 is allowed for each dependent (other than the spouse) living with the person.

However, there are several items that are exempt from being included in the calculation of a person's assets for the purposes of ODSP eligibility, including:

- a principal residence;
- a motor vehicle of any value;
- funds held in a Registered Disability Savings Plan ("RDSP");
- the full value of any damages or compensation award for pain and suffering as a result of injury to or the death of a member of the benefit unit;
- The full value of damages or a compensation award for loss of care, guidance, and companionship due to an injury to or the death of a family

member under the *Family Law Act* (Ontario);

- The full value of damages or a compensation award for non-economic loss under section 46 of the *Workplace Safety and Insurance Act, 1997* (Ontario) or section 42 of the *Workers' Compensation Act* (Ontario).

There are other exempt assets not included in the list above and they should be reviewed prior to advising a client who is in receipt of or applying for ODSP.¹

2. ODSP Income Rules and Exemptions

With respect to the income rules, the basic rule is that income is determined for a month by totaling all payments of any nature paid to every member of the benefit unit. This amount must be reported to ODSP.² However, the items and assets listed as exempt assets are generally considered exempt as income to the benefit unit. The following are

examples of payments that are exempt from being considered income:

- An amount up to \$10,000 in a 12-month period in the form of gifts or voluntary payments for any purpose and from any source;
- Casual gifts of insignificant value (e.g. basic clothing, meals, occasional food purchases);
- Payments from any source for disability-related items and services; and
- Payments related to RDSPs, including voluntary contributions made to RDSPs by family members and other third parties, Canada Disability Savings Grants, Canada Disability Savings Bonds, income earned and re-invested in RDSPs, and all withdrawals from an RDSP for any purpose.

A further discussion of the specific income rules is beyond the scope of this article, but these rules can be reviewed at sections 37 to 43 of the *ODSP Act*, Ontario Regulation 222/98.³

3. Accident Benefits Can Impact ODSP

The receipt of certain types of accident benefits from an insurer can impact ODSP eligibility. Any past, future or ongoing accident benefits that are payable on account of "economic loss", including non-earner benefits, may disentitle an ODSP recipient from receiving income support benefits or may trigger a repayment obligation for past benefits (discussed further below).

In limited circumstances, an ODSP recipient may be disentitled to income support benefits but may be eligible to continue to receive other types of benefits, like drug and dental benefits. Sometimes, these other benefits are of

significant value to the ODSP recipient. For this reason, it is critical to canvas with your client what types of benefits they may be receiving beyond income support.

4. Damages for “Economic Loss” Can Trigger a Repayment Obligation

Proceeds of a personal injury settlement or an award of damages are treated differently under the ODSP rules than other sources of income or windfalls, such as inheritances and life insurance proceeds.

Where the personal injury settlement or award contains categories of damages that are not exempt by ODSP, such as those related to economic loss, the ODSP recipient may require advice and assistance making a proposal to the Director of ODSP to structure the non-exempt portion of the settlement in a way that will allow the ODSP recipient to preserve his or her eligibility for ODSP benefits.

If the settlement proceeds or insurance benefits were intended to compensate the incapable person for economic loss during the same period that he or she also received ODSP benefits, it is likely that a re-payment obligation will be triggered. Care should be taken to determine the correct amount that must be re-paid to ODSP, as it may be the case that the economic loss portion of the settlement or insurance benefits do not cover the entire period that the person has been receiving ODSP – there is no “double-dipping” permitted by the ODSP recipient.

Where a re-payment obligation or over-payment has arisen, inquiries should be made into the circumstances of the ODSP recipient during the relevant time period to determine whether a

request to waive or reduce the over-payment received may be appropriate.⁴

5. Exempt Categories of Damages

As described above, several categories of damages are included in ODSP’s list of exempt assets and income, such as: damages for pain and suffering; *Family Law Act* damages; workers compensation for non-economic loss; and expenses actually and reasonably incurred or to be incurred as a result of injury to or the death of a member of the benefit unit. These exemptions have no monetary limit.

For this reason, it is preferable for a settlement or award to categorize the maximum amount that is reasonable to an exempt category of damages, as the principal value of these damages will not adversely impact ODSP eligibility.

6. ODSP Benefits Must be Addressed in Guardianship Applications

In situations where a mentally incapable person is receiving a significant settlement or award of damages that need to be managed on their behalf, a guardianship application will likely be required.

If the incapable person receives ODSP benefits, this must be disclosed in the management plan as a source of income. The applicant seeking to become guardian should also take care to ensure that the proposed management plan adheres to the ODSP asset and income rules if preserving entitlement to ODSP is in the best interest of the incapable person.

The proposed guardian should also carefully consider any plans for the management of specific assets of the incapable person to ensure they do

not jeopardize the incapable person’s eligibility for ODSP benefits.

7. ODSP Trusteeship Instead of Guardianship

If the situation at hand involves a mentally incapable person who is an ODSP benefits recipient and if ODSP benefits are that person’s only source of income and there are no other significant assets for which that person requires the assistance of a guardian of property to manage, then you should consider whether an “ODSP Trusteeship” would be a more appropriate arrangement rather than a full guardianship application.

It is intended that the “ODSP Trustee” would be able to help the ODSP recipient in managing his or her income support and in complying with his or her reporting obligations where that person does not have an attorney for property or guardian of property.⁵ Sometimes this is an appropriate option during the course of litigation when a settlement or award has not yet been obtained, but the incapable person still requires assistance managing their ODSP benefits and any other assets.

8. Making a Proposal to ODSP

ODSP recipients have an obligation to report any changes in their assets or income to ODSP. In certain cases, an award of damages or a settlement may at first instance disentitle the client from continued eligibility for income support benefits.

A discussion should be had with the client to determine whether a proposal is going to be made to ODSP to structure the full proceeds of settlement or award to comply with the ODSP rules, or whether it would be more

advantageous for the ODSP recipient to discontinue receiving ODSP benefits and instead use the settlement or award as they choose (or as their substitute decisions makers choose, if the recipient at issue is incapable of managing property).

Depending on the nature and value of the settlement, making a proposal to ODSP to exempt the full proceeds of settlement or award can be complex and can involve onerous reporting obligations on an ongoing basis. For this reason, it will be important to determine the level of responsibility and complexity the ODSP recipient or their substitute decision maker can tolerate.

If a proposal is to be made to ODSP which sets out a plan to structure the person's assets in a way that will preserve their ongoing eligibility, both the principal amount and any interest or income earned or to be earned on that amount will need to be considered.

The type of proposal that can be made to ODSP will depend on a number of factors, including: the amount of the damages awarded or settled; the quantum of interest or income anticipated; the types of assets the person already owns; the person's reasonable needs; and eligibility for the disability tax credit.

Typically, a proposal will involve structuring any non-exempt portion of the settlement or award into one or more exempt assets, like an RDSP or a principal residence. The principal value of a structure is also considered an exempt asset. However, the proposal also needs to address any income/interest that may be earned in the future on both the exempt and non-exempt portions of the settlement or award as the interest earned on an exempt settlement is generally *not* exempt as income for the

purposes of ODSP eligibility. This can include interest earned on the principal of a structured settlement. If all or some of the settlement or award will be structured, the proposal should include a description of how any interest earned on the structured settlement will be addressed.

A detailed proposal letter to ODSP should be drafted setting out the client's plans for the use of the settlement or award, including any applicable interest, and sent to their caseworker for review and approval. If the caseworker rejects the proposal, an internal review of the decision can be made.

9. Internal Reviews and Appeals to the Social Benefits Tribunal

An ODSP recipient can request an internal review of a decision to suspend

or terminate benefits, or regarding an overpayment. An internal review is an informal, administrative process. While the ODSP recipient does not need legal representation during the internal review, they may want to involve counsel to assist them.

The ODSP recipient must request the internal review within thirty calendar days of receiving the written notice of decision from their caseworker. The person conducting the review will have the same or a higher level of decision-making authority as the original decision-maker. The reviewer must complete the review and issue a decision within thirty days of receiving the request. Ultimately, the reviewer will either confirm, vary or overturn the original decision. Written reasons must be provided summarizing the reviewer's decision.

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other types of benefits that
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If the ODSP recipient disagrees with the outcome of the internal review, he or she can commence an appeal before the Social Benefits Tribunal (“SBT”). The SBT hears appeals under the *Ontario Works Act* and the *Ontario Disability Support Program Act* regarding decisions affecting eligibility for or the amount of social assistance, subject to a prescribed list of exceptions. There are prescribed time periods to commence the appeal and to file written submissions. The SBT is then required to provide a written decision within the prescribed time period.

A reconsideration of an SBT decision can be requested by a party to the appeal within a prescribed time period. A further appeal of an SBT decision can be made to Divisional Court in certain circumstances.

A full discussion of the SBT appeal process is beyond the scope of this article, but more information can be found in Section 13.2- Appeals of the ODSP Policy Directives (See Ontario Disability Support Program, Policy Directives for Income Support.)

10. Don't Forget to Consider Other Benefits

In addition to ODSP, a client may be entitled to or may receive other types of benefits that need to be considered throughout the course of litigation. These might include CPP Disability, rent geared to income housing, Ontario Works and others. Each of these types of benefits have their own governing rules and/or regulations that may not be consistent with one another. If a client receives benefits that could be impacted

by the outcome of litigation, the lawyer should take care to inform themselves about the nature and value of those benefits to the client and consider whether preserving those benefits is possible and desirable.



Brittany Miller is a lawyer and practices with Goddard Gamage LLP

NOTES

- ¹ *Ontario Disability Support Program Act*, Ontario Regulation 222/98, s. 28 (1)
- ² *Ontario Disability Support Program Act*, Ontario Regulation 222/98, s. 37 (1)
- ³ *Ontario Disability Support Program Act*, Ontario Regulation 222/98, s. 37-43.
- ⁴ *Surdivall v. Ontario (Disability Support Program)*, 2014 ONCA 240
- ⁵ *Ontario Disability Support Program Act*, s. 12.

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