

# Memo

To: Councillor Sam Merulla  
From: Craig Foye, Staff Lawyer  
CC:  
Date: April 19, 2016  
Re: Issue of the former "Permanently Unemployable" category from the former *Family Benefits Act*

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Thank you very much for supportive and thoughtful comments when I appeared in front of the Emergency & Community Services Committee on behalf of the Hamilton Community Legal Clinic on February 8<sup>th</sup>. Thank you also for your support of the City of Hamilton endorsing the report "The Right to An Adequate Standard of Living in Hamilton: Update to the 2006 Report", and, regarding research into Hamilton becoming a 'Human Rights City'.

During my delegation you also made reference to the former "permanently unemployable" class of recipients under the former *Family Benefits Act*. As promised, I wrote to you in order to follow up on that short discussion, and we have scheduled a meeting for today, Tuesday March 29, 2016.

Unfortunately, it is my opinion, and the opinion of the Hamilton Community Legal Clinic, that the "permanently unemployable" category ("PUE") of disability benefits should not be reintroduced. My legal opinion in this regard is based on two very important reasons:

1. The current test for "person with a disability" under the Ontario Disability Support Program ("ODSP") in my legal opinion actually encompasses applicants who would have been eligible for benefits under the former PUE category while also providing for a less stringent legal test in that regard (see attached copy of s. 4(1)(b) of the *Ontario Disability Support Program Act*). In particular, it should be noted that the former test required the applicant to show that they were "unable to engage in remunerative employment", while the current ODSP test only requires the applicant to show that they have a "substantial restriction" with regard to their "function in a workplace" with regard to employability. It should also be noted that the former PUE test makes reference to "objective medical findings" which can present problems for applicants who suffer from mental health issues.
2. Many advocates, and in particular advocates for persons with disabilities, object strongly to the language, "permanently unemployable". This type of language seems to sentence an applicant to a life without any hope of ever becoming employed. We believe it is better to refer to a recipient of benefits having "barriers to employment", or an applicant being "not employment-ready", and indeed this is language that is being used by the Province at this time.

Councillor Merulla, while I disagree that we should advocate for the reintroduction of the PUE category of disability benefits, I do strongly agree that there are many individuals in our community who are clearly disabled and financially eligible for ODSP, and yet are not receiving those benefits. In my opinion, this can be due to a number of critical issues ranging from: a medical professional failing to

accurately and comprehensively complete the ODSP application, to inconsistent and sometimes poor adjudication at the Disability Adjudication Unit, to inconsistent and sometimes poor adjudication of ODSP eligibility appeals at the Social Benefits Tribunal. These are issues that the Hamilton Community Legal Clinic is working on locally by offering training to local medical professionals regarding the ODSP application, and provincially by advocating with ODSP and the Tribunal in concert with our 74 sister general service community legal clinics in the province of Ontario, and our sister specialty clinic, the Income Security Advocacy Centre.

As you are aware, there are also many other persons who face barriers to employment and are in receipt of Ontario Works benefits (e.g. single parents with young children, newcomers with language barriers, persons who do not meet the ODSP test for disability yet are disabled, or who are pending a disability determination or appeal). The current practice under the Ontario Works program is to exempt these persons from certain participation requirements.

Councillor Merulla, it is my opinion that the major problems we witness with regard to provincial social assistance programs in our community lay not with the eligibility test under the Ontario Disability Support Program (although there are often some serious problems with the administration of that test), but rather with regard to the adequacy social assistance generally, and particularly of Ontario Works benefits and the structure of that program. As you are aware, the current benefits levels under the Ontario Works ("OW") program fall far below subsistence levels, and there is also no real acknowledgement within the structure of that program that many of the individuals in receipt of OW actually face long-term barriers to employment.

I would therefore suggest to you that what is needed is a more robust Ontario Works program. If you agree then I would be happy to work with you on language for a motion to Hamilton City Council with regard to the Ontario Works program. If that is the case, I would humbly provide the following suggested language for a motion:

*That Hamilton City Council write to the Premier of Ontario and the Minister of Community & Social Services to advocate that:*

- 1. The Government of Ontario immediately address the inadequacy of provincial social assistance benefits through a substantial increase to benefits, coupled with an arms-length mechanism to annually set future evidence-based rates that will allow individuals and families to meet at least their basic needs;*
- 2. The Government of Ontario proceed with social assistance reform to alter the structure of the Ontario Works program benefits to acknowledge that many individuals and families in receipt of Ontario Works benefits face long-term barriers to employability, and thus require additional financial assistance (for example, to replace items such as furniture).*

Councillor Merulla, thank you again for the opportunity to meet with you and to discuss these vital issues for our community.

**PUE and Disability Test From Pre-amendment version of O.Reg 366 made under the Family Benefits Act**

1. (5) "disabled person" means a person who has a **major** physical or mental impairment that is likely to continue for a prolonged period of time and who, as a result thereof, is **severely** limited in activities pertaining to normal living, as verified by **objective medical findings** accepted by the medical advisory board; **[1(3)(b)] [emphasis added]**

1. (5) "permanently unemployable person" means a person who is **unable** to engage in remunerative employment for a prolonged period of time as verified by **objective medical findings** accepted by the medical advisory board; **[1(3)(c)] [emphasis added]**

**Current Test for Disability under Ontario Disability Support Program Act**

**Person with a disability**

- 4. (1)** A person is a person with a disability for the purposes of this Part if,
- (a) the person has a **substantial** physical or mental impairment that is continuous or recurrent and expected to last one year or more; **[emphasis added]**
  - (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 **[emphasis added]**
  - (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. 1997, c. 25, Sched. B, s. 4 (1).