

CITATION: Swerdfiger v. Director of the Ontario Disability Support Program, 2025 ONSC 4829
DIVISIONAL COURT FILE NO.: DC-24-2939
DATE: 20250825

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
EDWARDS R.S.J., ELLIES AND MATHESON JJ.

BETWEEN:)	
)	
KATRINA SWERDFIGER)	Self-represented
)	
Appellant)	
)	
– and –)	
)	
DIRECTOR OF THE ONTARIO)	<i>Hera Evans and Sara Badawi</i> , Counsel for
DISABILITY SUPPORT PROGRAM)	the Respondent
(MCCSS))	
)	
Respondent)	HEARD: At Ottawa on April 30, 2025, via
)	videoconference

REASONS FOR DECISION

ELLIES J.:

OVERVIEW

[1] Katrina Swerdfiger appeals two decisions of the Social Benefits Tribunal (the “Tribunal”). In the first, the Tribunal upheld a decision by the Director of the Ontario Disability Support Program (“ODSP”) in which the Director denied the appellant’s application for a special diet allowance (“SDA”) based on a medical condition known as “Avoidant/Restrictive Food Intake Disorder” (“ARFID”). In the second, the Tribunal dismissed the appellant’s request for reconsideration of the first decision.

[2] The appellant raises numerous procedural, substantive, and constitutional issues. Among other things, she seeks an order amending the Tribunal's rules of procedure.¹ However, as I will explain, many of the issues raised and much of the relief requested is beyond the permissible scope of this appeal. With respect those parts of the appeal that are within the jurisdiction of this court, I find no errors of law. Therefore, the appeal must be dismissed.

BACKGROUND

[3] The applicant receives ODSP benefits under the *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sch. B (“ODSPA”). Under the ODSPA, an SDA is paid to eligible recipients to supplement the higher costs faced by individuals with specific dietary requirements resulting from a disability.

[4] Eligibility for the SDA is governed by O. Reg. 562/05 and O. Reg. 222/98, both of which are enacted under the ODSPA. Schedule 1 of O. Reg. 562/05 (the “Schedule”) contains a list of eligible medical conditions that require an SDA. For each medical condition listed, the Schedule specifies the monthly SDA available. The Schedule categorizes the medical conditions into those that may cause unintended weight loss and those that may not. Where the listed condition is one that may cause unintended weight loss (“MCCWL”), the amount of the monthly allowance is determined by the amount of weight the recipient has lost. Under s. 2(2), where the MCCWL causes a recipient to lose between five and ten percent of their usual body weight, the amount of the SDA is \$191 per month. Where the MCCWL causes a recipient to lose more than ten percent of their usual body weight, the amount of the SDA is \$242 per month.

[5] To be eligible for an SDA, recipients must submit an application form that states the medical condition for which funding is being sought. The application must then be approved by the Director of the ODSP.

[6] The appellant submitted an application for an SDA in August 2023, which was completed by a nurse practitioner on the appellant’s behalf. The application indicated that the appellant suffered from ARFID, causing a weight loss of more than ten percent of the appellant’s usual

¹ The appellant self-identifies using the pronouns “she/her/they/them”, from which we presume she is comfortable being identified as either female or non-binary. For the sake of these reasons, we will refer to the appellant as “she” or “her”.

body weight. The Director denied the appellant's application on the basis that ARFID is not a medical condition listed in the Schedule.

- [7] The appellant appealed the Director's decision to the Tribunal under the relevant provisions of the ODSPA, alleging, among other things, that the decision violated the *Human Rights Code*, R.S.O. 1990, c. H.19 (the "Code"). The appeal was bifurcated into two stages. Stage 1 dealt with the merits of the Director's decision. Stage 2 dealt with the allegations of discrimination under the Code.
- [8] Stage 1 was resolved on May 29, 2024, when the Tribunal issued an order on consent in which the appellant conceded the merits of the Director's decision and the parties agreed that, if Stage 2 was successful, the SDA would commence retroactively on March 1, 2023.
- [9] In a decision dated August 13, 2024, the Tribunal denied the Stage 2 appeal. In denying the appeal, the Tribunal applied the decision of the Ontario Human Rights Tribunal (the "HRTO") in *Ball v. Ontario (Community and Social Services)*, 2010 HRTO 360. In *Ball*, it was held that a claimant affected by a medical condition or conditions not listed in the Schedule will have demonstrated discrimination contrary to the Code where they establish:
- (1) that they have a disability or disabilities;
 - (2) that there is a general consensus in the Ontario medical community that modifications to a regular healthy diet should be made because of the disability or disabilities;
 - (3) that the diet leads to additional food costs as compared with a regular healthy diet for a person without the disability or disabilities; and
 - (4) that there is no funding for the additional costs or the funding is significantly disproportionate to the additional costs (up to a maximum of \$250).
- [10] In the appellant's case, the Director did not contest that the appellant met the first and the fourth *Ball* criteria, i.e. that the appellant had a disability and that there was no funding. The Tribunal therefore focused on the second and third criteria. The Tribunal found that the appellant met the second criterion, i.e., that there was a general recognition in the Ontario

medical community that modifications to a regular diet should be made because of the disability. However, the Tribunal held that the appellant had failed to establish the third *Ball* criterion, namely, that the diet leads to additional food costs as compared with a regular healthy diet for a person without the disability.

[11] The appellant applied to the Tribunal to reconsider the Stage 2 decision. In the reconsideration application, the appellant sought to introduce additional evidence, including a report from the appellant’s registered dietician expanding on evidence already submitted by the same dietician for the Stage 2 appeal, as well as a report prepared in April 2008 by a committee appointed by the Ontario Government called the “Special Diet Allowance Expert Review Committee” (the “SDERC”). In its report, the SDERC recommended various changes to the Schedule, including recommendations for the removal of certain medical conditions and the addition of others, changes to categories, and changes to certain benefit amounts.² The appellant sought to rely on the detailed costing information contained in the SDERC report and on the additional evidence of the dietician (collectively, the “additional costing evidence”) to prove the increased costs of her dietary requirements. The appellant also alleged procedural unfairness and legal errors on the part of Tribunal Member Brown in her application for reconsideration.

[12] On October 21, 2024, the Tribunal dismissed the appellant’s request for reconsideration. In the reconsideration decision, Vice Chair P. Brennan held that the appellant could have obtained the additional costing evidence with due diligence and put it before the Tribunal in the Stage 2 hearing. He further held that the evidence did not support the appellant’s claims of procedural unfairness, and that the appellant had failed to identify any legal errors.

ISSUES

[13] The issues raised by the appellant begin with the rules of the Tribunal and end with the *Canadian Charter of Rights and Freedoms*. She submits:

- (1) that the Tribunal’s rules are discriminatory because they required her to comply with timelines that she could not meet due to her disability;
- (2) that the Tribunal failed to apply its rules in a non-discriminatory way;

² The SDERC report’s recommendations were not implemented by the government: *Ball*, at para. 38.

- (3) that the reconsideration member applied too strict a test for reconsideration;
- (4) that the reconsideration decision was wrong when it held that the appellant could have obtained the additional costing evidence with due diligence;
- (5) that the Stage 2 Tribunal misinterpreted O. Reg. 562/05 by failing to find that the third *Ball* criterion is satisfied whenever a recipient applying for an SDA has lost more than ten percent of their usual body weight, regardless of the nature of the causative medical condition;
- (6) that the Stage 2 Tribunal erred in interpreting O. Reg. 562/05 because, based on the SDERC report, the Schedule was intended to be based on a Body Mass Index (“BMI”) below 18.5 and a greater than ten percent weight loss, both of which the appellant had established;
- (7) that the Stage 2 Tribunal erred in finding that the appellant had failed to provide the necessary costing evidence because increased costs can result from an oral nutritional supplement and not only from a food item;
- (8) that the Stage 2 decision resulted in an “absurdity” because anorexia nervosa, a condition similar to ARFID, qualifies for an SDA, but ARFID does not;
- (9) that the eligibility criteria in the Schedule violate the appellant’s equality rights under s. 15 of the *Canadian Charter of Rights and Freedoms*;
- (10) that the Stage 2 decision itself violated the appellant’s right to life, liberty and security of the person under s. 7 of the *Charter*; and
- (11) that the Schedule and the Code fail to meet the United Nations Convention on the Rights of Persons with Disabilities (“UNCRPD”).

[14] I will address each of the issues in turn. However, before I get to them, it is important to understand this court's jurisdiction and the applicable standard of review.

ANALYSIS

Jurisdiction

[15] The outcome of this appeal is limited by the scope of review provided for in the legislation under which it has been brought. Under s. 31(1) of the ODSPA, this court has jurisdiction to hear appeals regarding questions of law only, which include issues of procedural fairness. For this reason, as I will explain, the argument that the reconsideration decision was wrong to conclude that the additional evidence the appellant sought to rely on could have been called during the Stage 2 hearing must fail. So, too, must the appellant's arguments based on the SDERC report, which was not in evidence before the Stage 2 Tribunal.

[16] Equally fatal to certain aspects of the appeal are the provisions of s. 31(5) of the ODSPA, which provides that, in an appeal to this court, the court may:

- (a) deny the appeal;
- (b) grant the appeal;
- (c) grant the appeal in part; or
- (d) refer the matter back to the Tribunal or the Director for reconsideration with any directions the court considers proper.

[17] Because of the limited scope of the relief the court is permitted to grant, the appellant's request to amend the Tribunal's rules or to make declarations that have the effect of amending the relevant statutory provisions cannot be granted. The respondent also properly raises the objection that some of these arguments are being raised for the first time on this appeal and cannot fairly be addressed for that reason.

Standard of Review

[18] The appellant submits that there are two standards of review applicable in this case, one applicable to questions of law and the other applicable to questions of procedural fairness. With respect, this is not correct. The correctness standard applies to both types of questions in the context of a statutorily granted right of appeal such as this one: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at para. 37; *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, at para. 27.

Are the Tribunal's rules procedurally unfair?

- [19] The appellant submits that the rules of the Tribunal have failed to keep up with the Tribunal's power to review Code violations, a power that was made clear in *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14, because the rules themselves fail to accommodate individuals with disabilities.
- [20] The appellant refers to four rules in the Tribunal's rules of procedure: Ontario Social Benefits Tribunal, *Rules of Procedure for Appeals to the Social Benefits Tribunal*. She contends that, while rules 4.3 and 4.4 allow a respondent to change positions and to rely on additional facts up to 30 days before the hearing of an appeal, r. 5.11 precludes an appellant from filing new medical information later than 30 days before the hearing of an appeal. She submits that this guarantees that appellants have no opportunity to provide medical evidence concerning new arguments or positions where a respondent changes positions at the last possible opportunity.
- [21] As alluded to earlier, a stand-alone challenge to the Tribunal's rules is beyond the scope of this court's jurisdiction to consider under s. 31(1) of the ODSPA. Our jurisdiction is limited to questions of law. While a denial of procedural fairness is an issue of law, it must be shown that the rules resulted in the actual denial of procedural fairness, and not just that they might have done so: Sara Blake, *Administrative Law in Canada*, 7th ed. (Toronto: LexisNexis, 2022), at para. 6.05.
- [22] The appellant contends that the rules *did* result in a denial of procedural fairness in her case. However, as I will explain, none of the impugned rules were engaged in the dismissal of the appellant's claim.

Did the Tribunal apply its rules unfairly?

- [23] The appellant submits that the Tribunal failed to apply its rules in a “neutral way” when it allowed the respondent to change its position 10 days before the hearing and refused to give the appellant an opportunity to respond. I am unable to accept this argument.
- [24] The Stage 2 appeal was scheduled to be heard on July 25, 2024. The appellant filed her written submissions on June 24, 2024. Under rule 4.5, the respondent was required to file its response no later than 10 days before the hearing. The rule provides:

Unless the parties agree otherwise, where the respondent intends to rely on any further evidence or submissions *in reply* to the evidence

and submissions of the appellant it must be delivered to the appellant and filed with the [Tribunal] no later than 10 days before the hearing.

[Emphasis added.]

- [25] The respondent filed its written submissions on July 15, 2024, 10 days before the hearing. The appellant contends that she was denied procedural fairness because the respondent's written submissions raised new issues to which she was not permitted to respond. I disagree.
- [26] In her written submissions, the appellant argued that the decision in *Ball* had been altered by the HRTO's later decision in *Buklis v. Ontario (Community and Social Services)*, 2013 HRTO 918. She submitted that *Buklis* had changed the test set out in *Ball* to require only that a claimant for an SDA establish: (1) that the medical condition in question may cause weight loss, and (2) that it is generally recognized in the Ontario medical community that a person with the condition should increase food consumption in excess of a regular healthy diet as a result of the weight loss. If accepted, this argument would have eliminated the need to establish the third *Ball* criterion of increased food costs.
- [27] Contrary to the appellant's submission on this appeal, the respondent's written submissions did not raise any new issues. Instead, the respondent merely submitted that *Buklis* had not changed the test in *Ball* and that the appellant had not filed sufficient evidence to meet the second and the third criteria in the *Ball* test. The respondent's submissions were responsive only and complied fully with the provisions of rule 4.5. No new issues were raised and, consequently, the appellant was not denied procedural fairness.

Did the Tribunal apply too strict a test for reconsideration?

- [28] As mentioned earlier, in the reconsideration decision, the Tribunal held the appellant had failed to establish that she could not have called the additional costing evidence by exercising due diligence. It also held that there had been no procedural unfairness and that the Stage 2 Tribunal had made no legal errors. The appellant submits that the Tribunal employed too strict a test and was empowered to reconsider the Stage 2 decision for “any reasonable reason”. Again, I disagree.
- [29] The scope of the Tribunal's reconsideration process is governed by the Tribunal's practice direction: Ontario Social Benefits Tribunal, *Practice Direction on Reconsideration Requests*. Pursuant to the practice direction, new evidence is not permitted unless it “could

not have been obtained by reasonable diligence for the original hearing.” This is precisely the standard applied by the Tribunal with respect to the additional costing evidence the appellant sought to adduce.

[30] The practice direction also provides that the Tribunal will reconsider a decision where “a serious error or omission has occurred.” There is nothing in the reconsideration decision to suggest that the Vice Chair applied any criteria other than that referred to in the practice direction. As he wrote, “the decision is both reasonable and in accordance with the legislation and relevant caselaw.”

[31] As I will explain, I agree with the Vice Chair that the Stage 2 Tribunal committed no legal error.

Did the Tribunal err in finding that the appellant could have submitted the additional costing evidence with due diligence?

[32] The appellant submits that the Tribunal was wrong to conclude that she could have obtained the additional costing evidence with due diligence. She submits that she was mentally incapable of exercising the required diligence, the dietician was too busy to assist her when required, and that Ontario had improperly deleted the SDERC report from government websites between March 8, 2022, and June 29, 2024, just before the respondent's July 15, 2024, submissions were filed. The appellant submits that the SDERC report had to be found by someone on her behalf, proving that she was unable to obtain it herself.

[33] The Tribunal's conclusion on this issue is a finding of fact. As explained earlier, our jurisdiction is limited to questions of law. In certain circumstances, questions of fact can become questions of law. This can happen, for example, where a tribunal has ignored material evidence, relied on irrelevant evidence, or made a finding based on no evidence: *R. v. Kruk*, 2024 SCC 7, at para. 197; *Treuer v. Administrator, Social Services Department of Durham Region*, 2020 ONSC 303, at para. 27. However, the appellant has not established that the Tribunal made any such error here.

[34] The appellant argues that the Tribunal ought to have admitted the additional evidence even if it could have been obtained by due diligence prior to the Stage 2 hearing. She relies on the decision in *McMartin v. The Queen*, [1964] S.C.R. 484, in which it was held, at p. 491, that where the evidence is of sufficient strength that it might reasonably have affected the outcome of the case, “it should not be excluded on the ground that reasonable diligence was

not exercised to obtain it at or before the trial.” The appellant submits that the SDERC report is important because it is the sole source of the costing methodology upon which the decision in *Ball* was based.

- [35] The appellant has not established that this test should be applied. In any event, it is hard to see how the introduction of the SDERC as evidence before the Stage 2 Tribunal would have affected the outcome. As the excerpt from the Tribunal's decision set out above illustrates, one of the main reasons the appellant's appeal to the Tribunal failed is because she had not introduced evidence to clarify whether she was supplementing or supplanting a regular healthy diet. The SDERC report would not have filled that evidentiary gap.
- [36] Further, it is not clear from either the reconsideration decision or the record that this argument was made before the Tribunal. If it was, then it is at least a question of mixed fact and law that cannot be appealed under s. 31(1) of the ODSPA. If it was not, then it is also an issue being raised for the first time on appeal. This is not permitted, except where the interests of justice require it and where the court has a sufficient evidentiary record and findings of fact to consider the issue: *Quan v. Cusson*, 2009 SCC 62, [2009 3 S.C.R. 712, at para. 37. That threshold has not been established.
- [37] For these reasons, this ground of appeal must fail.

Did the Tribunal err in finding that mere weight loss is not enough to qualify for an SDA?

- [38] The appellant submits that the Stage 2 Tribunal was wrong not to conclude that a weight loss of more than 10 percent qualifies a recipient for an SDA regardless of the medical condition causing it. She argues that s. 2(2) of the Schedule was misinterpreted. To provide context, I set out ss. 2(1), (2), and (3), which read:

2. (1) For the purposes of subparagraph 4 i of subsection 30 (1) and subparagraph 4 i of subsection 33 (1) of Ontario Regulation 222/98 (General) made under the Act, the amount determined in accordance with Schedule 1 that the Director shall include in the recipient's budgetary requirements shall be, for each medical condition requiring a special diet that a member of the recipient's benefit unit has,

(a) the amount set out in Column C of Schedule 1, subject to subsections (4) to (9); or

(b) if Column B of Schedule 1 indicates that the medical condition is a condition that may cause weight loss, the amount determined in accordance with subsections (2) and (3).

(2) If a member of a recipient's benefit unit has a medical condition that may cause weight loss, as indicated in Column B of Schedule 1, the amount that shall be included in the recipient's budgetary requirements shall be, subject to subsection (3),

(a) if the member has lost more than 5 per cent but no more than 10 per cent of his or her usual body weight, the amount set out in Column C of Schedule 1; or

(b) if the member has lost more than 10 per cent of his or her usual body weight, \$242.

(3) If a member of a recipient's benefit unit has more than one medical condition that may cause weight loss, as indicated in Column B of Schedule 1, the amount to be included in the recipient's budgetary requirements shall be determined as if the member only had one such condition.

[39] The appellant points to the difference in wording between subsections (a) and (b) of s. 2(2). She contends that, because subsection (b) does not refer to any column in the Schedule nor to any medical condition, a recipient qualifies for an SDA under s. 2(2) so long as they have lost more than 10 percent of their usual body weight, regardless of the cause.

[40] Unlike the appellant's argument about the additional costing evidence, this submission does raise a question of law. However, this submission goes to the merits of the Director's decision, which the appellant conceded at Stage 1. Of course, given the bifurcation of the issues, this issue was not raised at Stage 2. I am not persuaded that the interests of justice

require this issue to be raised for the first time in an appeal in which the appellant conceded the issue in the proceedings below.

Did the Tribunal err in failing to find that a BMI of less than 18.5 and a weight loss of greater than 10 percent is enough to qualify for an SDA?

[41] The appellant submits that she qualified for a benefit of \$88 per month because her BMI was less than 18.5 and \$242 per month because she suffered unintended weight loss. In support of her argument, the appellant relies on the SDERC report, in which the committee recommended that recipients who have not yet been diagnosed with a qualifying medical condition, but who have a BMI of less than 18.5, receive a benefit of \$88 per month and those suffering from a “psychiatric disease” receive a benefit of \$242 per month.

[42] Once again, this issue was not raised at the Stage 2 hearing. For the reasons expressed earlier, it cannot be raised now.

Did the Tribunal err by failing to find that evidence of the consumption of oral nutritional supplements is sufficient evidence of costs?

[43] The appellant introduced evidence at the hearing that she was consuming three oral nutritional supplement drinks per day, costing \$412.30 per month. The Tribunal accepted this evidence, but held that it was insufficient to satisfy the third *Ball* criterion. The Tribunal Member wrote, at para. 45, that:

[T]he Appellant failed to provide evidence identifying a specified prescribed, or recommended amount or quantity regarding the supplement drinks from her medical providers. The Appellant also failed to lead evidence on the costs of the Appellant's modified diet in contrast with those costs of a regular healthy diet as little evidence was presented with respect to the cost of a regular healthy diet.

[44] The appellant also argued before the Stage 2 Tribunal that the *Ball* test had been modified by the decision in *Buklis*. She submitted that *Buklis* had eliminated the onus of proving costs and, instead, only required that an applicant demonstrate an increase in consumption to prove additional costs.

[45] Without accepting the appellant's argument about the effect of *Buklis*, the Tribunal considered the appellant's evidence of consumption. However, the Tribunal found that this

evidence was insufficient even to meet the purportedly different test in *Buklis*. At para. 49 of the decision, the Tribunal Member wrote:

[T]he Tribunal finds insufficient evidence to support or suggest that the Appellant is required to increase consumption in excess of a regular healthy diet as outlined in *Buklis*. The Appellant's evidence did not support that the Appellant's supplementation is over and above a regular healthy diet. It was not made clear to the Tribunal if the Appellant consumed a regular healthy diet *and* required additional supplementation, or if the Appellant was simply relying on the supplements in place of a regular healthy diet. [Emphasis in original.]

[46] Once again relying on the SDERC report, the appellant argues before us that, using the costing methodology employed by the Expert Review Committee to come up with its recommendations, the cost of three oral nutritional supplements per day presently exceeds the cost of even a basic needs diet. Therefore, she submits, there was sufficient evidence before the Stage 2 Tribunal to satisfy either the *Ball* or the *Buklis* test.

[47] In my view, for the same reasons that the court is unable to consider the appellant's other SDERC report-based arguments, it is also unable to consider this one.

Did the Tribunal err by not granting the appeal based on ARFID's similarity to anorexia nervosa?

[48] The appellant argues that, by failing to find that a recipient affected by ARFID qualifies for an SDA, the Stage 2 Tribunal's decision resulted in a legal “absurdity” because ARFID is closely related to anorexia nervosa, which is a disability recognized in the Schedule. Again, she bases her argument on the SDERC report, in which the committee listed certain MCCWLs. Among the conditions were “Psychiatric Diseases [for example: anorexia nervosa, schizophrenia]”. As mentioned above, the appellant argues that this wording ought to be interpreted in such a way that *all* psychiatric diseases causing unintended weight loss should be included in the Schedule, including ARFID. Instead, only anorexia nervosa is listed.

- [49] For the reasons expressed earlier, because this argument is based on the SDERC report and is being made for the first time on appeal, I would decline to consider it.
- [50] Nonetheless, although the SDERC report was not before the Stage 2 Tribunal, the appellant did argue before Tribunal that ARFID should be recognized as a MCCWL based on its similarity to anorexia nervosa. At the Stage 2 hearing, she based her argument on the evidence of the nurse practitioner that ARFID's similarity to anorexia can lead to a similar failure to meet nutritional needs and, therefore, to weight loss. The appellant also relied on the similarities between the two medical conditions as described in the *Diagnostic and Statistical Manual of Mental Disorders*, 5th ed., published by the American Psychiatric Association (“DSM-5”). The DSM-5 had been relied upon by the Stage 2 Tribunal to find that the appellant had satisfied the second *Ball* criterion, i.e. that there is a general recognition in the medical community that modifications to a regular healthy diet should be made because of the disability.
- [51] The Stage 2 Tribunal acknowledged the similarities and overlap between ARFID and anorexia nervosa. However, Tribunal Member Brown held that these were not enough to bridge the evidentiary gap relating to the third *Ball* criterion, namely, whether the appellant was supplementing a regular healthy diet, rather than substituting for one.
- [52] I see no legal error in the Tribunal Member's conclusion on this issue. His decision was based on the framework set out in *Ball*, which required the appellant to establish not only that she has a disability that requires modifications to a regular healthy diet, but also that the diet leads to *additional* food costs as compared with a regular healthy diet for a person without the disability. The Tribunal’s conclusion was supported by the evidence, or rather, the lack of evidence. I agree with the Tribunal Member that it was not open to the appellant to “bootstrap” her medical condition onto another medical condition to satisfy the third criterion in *Ball*.

Does the Schedule violate the appellant's s. 15 Charter rights?

- [53] The appellant submits that the failure to fund an SDA for recipients with ARFID while funding one for recipients with anorexia nervosa constitutes discrimination contrary to s. 15 of the *Charter*. Section 15(1) reads:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[54] Like many of the submissions mentioned earlier, this submission is also being made for the first time on this appeal. There is no sufficient record, nor are there reasons of the Tribunal to review on this issue. Further, unlike the submissions mentioned earlier, this submission requires that the appellant provide notice to the Attorneys General of both Ontario and Canada. Section 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, requires that a party challenging the constitutional validity or constitutional applicability of an Act of the legislature serve a notice of constitutional question on both Attorneys General. The appellant has not done that.

[55] In these circumstances, I cannot conclude that the interests of justice require that we allow the appellant to raise this issue for the first time on appeal. It would be unfair to the federal and provincial governments to decide this issue without providing them an opportunity to be heard on the issue and we do not have a sufficient record upon which to decide it: *Eaton v. Brant County Board of Education*, [1997] 1 S.C.R. 241, at para. 48.

Did the Stage 2 decisions violate the appellant's *Charter* rights?

[56] The appellant also submits that withholding an SDA for a recipient affected by ARFID constitutes a deprivation of her right to life, liberty, and security of the person under s. 7 of the *Charter*.

[57] Again, this was not raised before the Tribunal and no notice of this constitutional issue has been provided to either Attorney General. For the reasons expressed immediately above, I would decline to entertain this submission.

Do the Schedule and the Code fail to meet the UNCRPD standard?

[58] Finally, the appellant submits that the *Charter* violations alleged also constitute a failure to meet Canada's obligations to protect disabled individuals under the UNCRPD.

[59] Once again, this argument is new and I would decline to consider it.

CONCLUSION

[60] This court's jurisdiction in this appeal is limited to questions of law. The appellant has failed to demonstrate any legal errors in either the Stage 2 or the reconsideration decisions. For that reason, the appeal must be dismissed.

COSTS

[61] The parties have agreed that no costs should be payable in any event.

M.G. Ellies J.

I agree

M. Edwards R.S.J.

I agree

W. Matheson J.

Released: August 25, 2025

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BETWEEN:

KATRINA SWERDFIGER

Appellant

– and –

DIRECTOR OF THE ONTARIO DISABILITY
SUPPORT PROGRAM (MCCSS)

Respondent

REASONS FOR DECISION

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