

Electronic Thesis and Dissertation Repository

8-21-2014 12:00 AM

Hearing Voices: Judicial Consideration of Ontario's Social Assistance Legislation

Teri Muszak, *The University of Western Ontario*

Supervisor: Dr. Randal Graham, *The University of Western Ontario*

A thesis submitted in partial fulfillment of the requirements for the Master of Laws degree in Law

© Teri Muszak 2014

Follow this and additional works at: <https://ir.lib.uwo.ca/etd>



Part of the [Law and Politics Commons](#), [Law and Society Commons](#), [Legislation Commons](#), [Public Law and Legal Theory Commons](#), and the [Social Welfare Law Commons](#)

Recommended Citation

Muszak, Teri, "Hearing Voices: Judicial Consideration of Ontario's Social Assistance Legislation" (2014). *Electronic Thesis and Dissertation Repository*. 2335.
<https://ir.lib.uwo.ca/etd/2335>

This Dissertation/Thesis is brought to you for free and open access by Scholarship@Western. It has been accepted for inclusion in Electronic Thesis and Dissertation Repository by an authorized administrator of Scholarship@Western. For more information, please contact wlsadmin@uwo.ca.

Hearing Voices:

Judicial Consideration of Ontario's Social Assistance Legislation

(Thesis format: Monograph)

by

Teri Muszak

Graduate Program in Law

A thesis submitted in partial fulfillment
of the requirements for the degree of
Master of Laws

The School of Graduate and Postdoctoral Studies
The University of Western Ontario
London, Ontario, Canada

© Teri Muszak 2014

ABSTRACT

Legal decision-makers use language that can convey assumptions about poverty and the poor. These assumptions conflict with an alternate narrative based on lived-experience. The words can function as objects of investigation which potentially reveal assumptions. By inserting an alternate narrative into the discourse, these assumptions can be challenged. This thesis analyzes the words that judges and adjudicators use when writing about, talking about, and applying social assistance legislation. In many instances, these assumptions do not align with the lived-experience of persons who receive government income support. This thesis aims to uncover the assumptions made in appellate-level decisions through the method of discourse analysis. It uses discourse theory to suggest that the ways imprecise words are given meaning in a legal field can have a profound influence on how the law is understood. It attempts to reorganize the way certain things are talked about and understood by using the tool of “oppositional narrative”.

Keywords: Social Assistance, Poverty Studies, Law, Statutory Interpretation, Language, Social Inclusion, Social Construction, Discourse Theory, Discourse Studies, Discourse Analysis, Critical Discourse Studies

ACKNOWLEDEMENTS

Many thanks to my thesis supervisor, Professor Randal N. M. Graham, who expressed his support from the beginning and remained patient with my numerous revisions until the very end. His work demonstrated to me that concern for the law and language is a valuable foundation for research. Thanks also to Professor Carl MacArthur whose helpful feedback and criticisms made this thesis much more focused than it would have been. I appreciate my family and friends for their support throughout this process. Finally, I wish to thank the University of Western Ontario Faculty of Law for providing me with the financial support to make this endeavour possible.

I dedicate this to my Dad, who continues to inspire me and give me strength. And to DMC, “whom” I love.

TABLE OF CONTENTS

ABSTRACT.....	i
ACKNOWLEDGEMENTS.....	ii
TABLE OF CONTENTS	
CHAPTER 1: Making Room for a New Methodology.....	1
1.1 Introduction.....	1
1.2 The Special Meaning of Discourse	5
1.3 The Development of Discourse.....	9
1.4 The Theoretical Interest.....	11
1.5 The Concept of Discourse.....	13
1.6 The Concept of Discourse as Driving this Study.....	16
1.7 Methodological Approach: Critical Discourse Analysis.....	16
1.8 The Use of Tools from Critical Discourse Analysis.....	19
CHAPTER 2.....	22
2.1 Introduction.....	22
2.2 Political Debate Prior to the Enactment of Ontario's Current Social Assistance Legislation.....	22
2.3 Discourse Research meets Statutory Interpretation: Unconstrained Meaning- Making and the Law.....	31
2.4 Contemporary Statutory Interpretation Studies as Critique of Unconstrained Meaning-Making.....	35
2.5 Discourse Approach to Meaning-Making in Law.....	37
2.6 The Administrative Regime.....	39

CHAPTER 3.....	46
3.1 Critical Discourse Analysis (CDA): Setting Up the Analysis.....	46
3.2 Arriving at the Data Set.....	46
3.3 Data Selection Process.....	49
3.4 Assumptions.....	51
3.5 Research Design.....	52
CHAPTER 4: Discourse Analysis.....	55
4.1 Introduction.....	55
4.2. <i>Gray</i>	56
4.2.a <i>Gray</i> : Divisional Court	58
4.2.b <i>Gray</i> : Court of Appeal.....	77
4.3 <i>Tranchemontagne</i>	85
4.3.a Round One, <i>Tranchemontagne</i> : Divisional Court.....	86
4.3.b Round One, <i>Tranchemontagne</i> : Court of Appeal.....	87
4.3.c Round One, <i>Tranchemontagne</i> : The Supreme Court.....	91
4.3.d Round Two, <i>Tranchemontagne</i> : Divisional Court.....	96
4.3.e Round Two, <i>Tranchemontagne</i> : Court of Appeal.....	99
4.4 <i>Surdivall</i>	101
4.4.a <i>Surdivall</i> : Divisional Court.....	103
4.4.b <i>Surdivall</i> : Court of Appeal.....	104
CHAPTER 5: Conclusion.....	111
5.1 Introduction.....	111
5.2 The Need for Reframing: Preliminary Suggestions.....	116
5.3 Preserving a Distinct Judicial Discourse.....	117

5.4 Conclusion.....	121
BIBLIOGRAPHY.....	122
VITA.....	133

CHAPTER 1: Making Room for a New Methodology

1.1 Introduction

Judges and administrative adjudicators use language that can convey unwarranted assumptions about poverty and the poor. These assumptions can be challenged by analyzing the words that judges and adjudicators use when writing about, talking about, and applying social assistance legislation. In many instances, these assumptions do not align with the lived-experience of persons who receive government income support. These assumptions can perpetuate or exacerbate misunderstandings about individuals living in poverty. This thesis aims to uncover the assumptions made in appellate-level decisions through the method of discourse analysis. It uses discourse theory to suggest that the ways imprecise words are given meaning in a legal field can have a profound effect on how the law is understood. It attempts to reorganize the way certain things are talked about and understood.

When it comes to social assistance law, an individual's circumstances can be profoundly impacted by what other people understand certain words to mean.¹ Discourse analysis is a method that attends to the simple precept that words matter. The law, like many things, is established and communicated through words. From this perspective, the law is language – it is set down in the legislative text and developed through judicial decisions that can give more information about how the text is supposed to apply in specific circumstances. For this reason, lawyers and legal academics are used to taking

¹ While the meaning of what the “law” “means” is a topic that can be endlessly debated, in this thesis I adopt a view that the meaning of words is based on a process of meaning-construction. The words are used by speakers to convey information about meaning and the words are used by others to understand information about meaning in a particular field. Rather than focussing on the issue of what the law means, this thesis is focussing on the process by which meaning is generated and understood.

words seriously. This thesis follows in that path by studying the words of appellate-level decisions made in a specific field of poverty law.

Although there may be general agreement on what social assistance legislation *says*, many legal arguments are spawned from different positions on what the words mean. These arguments are often based on what the text is *understood* to mean. In law, how that understanding comes about may be strengthened through reference to any number of sources.² Judicial decisions, legislation, articles, and commentary are all influential sources used for informing legal positions.³ However, when such information is used to talk about the law, there is a risk of reinforcing assumptions embedded in these sources. This can have the effect of closing down consideration of the real experiences of an individual when determining how the law applies to him or her.

Thinking about something in *some* way (that is our understanding of it) usually has to happen in order to be able to articulate a position on what that “something” means. To do this, attention must be paid to what human senses can reveal to us about that thing. This is a process involving internal and external mechanisms. Internally people have thoughts. Externally people interact. One way to practically analyze this process is to turn the attention onto the manifestations of that process. In the legal field, a researcher can

² This is because no one person or text can conclusively and precisely convey what the law “means” and how it is to apply in every conceivable circumstance that will or could arise. Even guidance for how to arrive at “meaning” is itself imprecise. For example Ontario’s *Legislation Act, 2006*, S.O. 2006, c.21, Sch. F, ss. 64(1) provides that “An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects”. This does not conclusively or precisely convey what the law means or how to determine what the law means. Further, it expressly states that an expansive (fair, large, and liberal) determination of legal meaning shall be taken.

³ While judicial decisions and legislative text can be more authoritative pronouncements of law, articles and commentary can provide information about how the law ought to work if it is to keep pace with social progress. See generally William Eskridge, *Dynamic Statutory Interpretation* (Cambridge, MA: Harvard University Press, 1994).

see processes whereby an academic communicates something about what the law means based on an idea he or she has about it. This might be used by a lawyer to inform his or her position about a legal issue. As that lawyer argues a case in front of an adjudicator or judge, the information he or she used may work its way into how the decision-maker understands and applies the law in that case. In this way, the sources of information used to inform understanding contribute to how the law takes shape and grows.

However, in the process of “meaning making” certain dimensions of potential understanding can be closed down. For example, in the above process where the academic articulation informs the lawyer's position, the opportunity for probing the underlying assumptions that founded the original idea generating the academic's articulation are closed down.⁴ Given that the law is language, it is necessary to think about how assumptions can work their way into the law. A study of the actual process of meaning making in the field of law can reveal assumptions that may become taken-for-granted representations of meaning in that field while at the same time providing an alternate narrative to raise consciousness about assumptions that seem to have worked their way into the law.

In this thesis, I will adopt a method that probes assumptions embedded in the text and talk of law. Specifically, this thesis provides a method to analyze assumptions that arise in the judicial decisions about social assistance legislation in Ontario. Generally,

⁴ Note that here I am using the term “assumptions” simply to mean underlying cognitions about things. The assumptions need not be negative or false. Teun A. van Dijk, ed., “Discourse Studies” in Sage Benchmarks in Discourse Studies (London, Sage Publications: 2007) online: <<http://www.discourses.org/OldArticles/The%20study%20of%20discourse.pdf>>.

When I refer to cognitions, I am referring to thoughts that may or may not be conscious. I do not wish to delve into cognitive processes in this thesis. While personal experiences and imagination may inform articulations and comprehension, in this work I remain focussed on the actual articulations that have been made.

words that make up legal decisions have been the object of analysis for legal scholars (and others) interested in what the law “means” and how it “applies”.⁵ Words are also an object of analysis for those seeking to put forward ideas about what the law *can* mean and how it *should* apply.⁶ Some scholars have taken a more detached view of the words of law to argue words themselves can never mean some “thing” and so the law can never be understood (or applied) in a neutral, predictable way.⁷ Approaches to and theories about law depend almost entirely on the legal scholar. The theories adopted and tools used by legal scholars have sufficiently opened the field to those wanting to analyze the language of law. However, legal scholarship lacks a single, universally accepted qualitative methodology for analyzing assumptions about meaning that are *exhibited* in the language of law.⁸

This thesis uses a methodology based on discourse theory to offer a way to study the language of legal decisions. The focus is on decisions about social assistance law in

⁵ For example, scholars who take a more “formalist” approach to the law may adopt a method of “scientific jurisprudence”. The discipline holds that the law embodies general, logically connected legal principles that can be discerned by studying judicial decisions. See Edward L. Rubin, “The New Legal Process: the Synthesis of Discourse and the Microanalysis of Institutions” (1996) 109 Harv. L. Rev. 1393 at 1394.

⁶ For example, legal process scholars developed a theory that defined the boundaries of each governmental institution. When courts went beyond their role and impinged on the political or executive domain, it could be criticized as being illegitimate. *Ibid.* at 1394. Note also that many outsider scholarship or Post-Critical Legal scholars have opted to adopt a more melioristic view of the law. Given recognition that fatalism toward the law is fatalism toward marginalization, such scholars make suggestions on how to improve the legal system from a marginalized perspective rather than suggestions that the only solution is to completely dispose of it. *Ibid.* at 1407.

⁷ For example, legal realism attacked formalism on the basis that general legal principles do not exist. Instead, it is a creation of a “lawmaker” (whether that be a legislator, an administrator or a judge). *Ibid.* at 1395.

⁸ See Edward L. Rubin, “The Practice and Discourse of Legal Scholarship” (1988) 86 Michigan Law Review 1835, who points out that a frequently expressed idea underlying a broader “critique of methodology” is that scholarship operates as part of the existing power structure thereby contributing to its continuation (at 1847). With the ever-increasing concern of access to justice, it is important to identify how meaning has been constructed and applied in judicial discourse in order to expose under-informed assumption in the present practice. Discourse analysis enables a researcher to engage in counter-interpretations that challenge the dominant legal practices that, “legitimately” or not, violate a researchers own constructs of fairness and natural justice.

Ontario. I will analyze the words of three decisions by treating them as “artifacts of meaning-making” that reveal (potentially influential) latent assumptions about the individuals to whom they purport to apply.⁹ My study is founded on discourse theory but more practically draws on actual tools from discourse methodology to identify the assumptions embedded in these judicial decisions. I will examine the words that judges of appellate-level courts use in order to draw attention to the assumptions about recipients of social assistance that underlie the discourse.¹⁰ While the main goal of this thesis is to reveal and oppose the hidden assumptions in judicial talk about impoverished individuals in order to reorganize representations made in a way that opens up space for a changed discourse, I also hope to demonstrate the methodological value of using a discourse-oriented approach to study law.

1.2 The Special Meaning of Discourse

Discourse theory rests on the basic presumption, common in many modern and post-modern theories about the world, that *things* have no real-concrete or objective

⁹ Discourse theory is used by some scholars in law already. See Robert Alexy, “A Discourse-Theoretical Conception of Practical Reason” (1992) 5 *Ratio Juris* 231 and “Of Necessary Relation Between Law and Morality” (1989) 2 *Ratio Juris* 167. And see Jurgen Habermas, generally. Whereas these theorists use the concept of discourse more abstractly, I am basing my work on the theory of discourse but using the methodology for more practical purposes.

¹⁰ The meaning of “discourse” in this context will be established below beginning at section 1.2. First I will deal with articulations. Articulations can be more influential (i.e. have more power to shape the discourse) in a field when they are accepted as authoritative within that field. For example, in the legal field lawyers tend to listen more to what the Chief Justice of Canada says about the law versus what the average lawyer says about the law. And, in that same field, lawyers tend to listen more to what the average lawyer says about the law versus what the average high school student says about the law. Judges in appellate-level decisions have more authority in the practice of “legal meaning-making” than administrative tribunals. I also speak to this more below beginning at section 1.2.

meaning.¹¹ This is also a point argued by many modern legal theorists.¹² Legal discourse theorists specifically depart from a presumption that legal concepts are *things*. They argue that what those legal *things* come to mean is shaped according to the discourse.¹³ Taking a step back from the debate about what exactly a legal concept “is”, it seems evident that most *things* written or talked about in law are conceptually ambiguous: What *is* “reasonable”? What *is* “correct”? What *is* “right”? Or, at a more abstract level of contemplation, what *is* “justice”? For a discourse theorist, what these *things* mean is based on what people say and others accept those things to mean. In other words,

¹¹ David Howarth, “The method of articulation” in Margo van den Brink & Tamara Metzke, eds., *Words Matter in Policy and Planning: Discourse Theory and Method in the Social Sciences*, (Utrecht, the Netherlands: Labor Grafimedia, 2006) 23 at 28. Michel Foucault, perhaps the best-known discourse analyst, goes a step further. He does not believe there is such a thing as objective knowledge. See Alan Hunt & Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (Boulder Colorado: Pluto Press, 1994) at 5.

¹² See for example John Willis, “Statutory Interpretation in a Nutshell” (1938) Can. Bar. Rev. 1. Also see Robert Benson, *The Interpretation Game: How Judges and Lawyers Make the Law* (Durham, NC: Carolina Academic Press, 2008) at 26 - 30: “The assumption that words do have inherent meaning historically put social blinders on lawyers and judges who defined law only as something in authoritative texts. This restricted them to techniques of logic and sentence-parsing when interpreting legal texts.”; Jim Evans, *Statutory Interpretation: Problems of Communication* (Oxford: Oxford University Press, 1988), especially chapter 2; Ruth Sullivan, “The Plain Meaning Rule and Other Ways to Cheat at Statutory Interpretation” online: Legal Drafting <<http://aix1.uottawa.ca/~resulliv/legdr/pmr.html>>; Randal N.M. Graham, *Statutory Interpretation: Theory and Practice*, (Toronto: Emond Montgomery Publications, 2001), especially chapter 4 where he talks about the meaning that underlies vague language as on a continuum with no single “right” construction; Ronald Benton Brown, *Statutory Interpretation: The Search for Legislative Intent*, 2d ed., (Boulder, CO: National Institute for Trial Advocacy, 2011).

¹³ See Christopher Berry Gray, ed., *The Philosophy of Law: An Encyclopedia*, vol. 1 (London: Garland Publishing Inc., 1999) at 212. On a lexical level, discourse analysis relies upon the understanding of legal concepts as discursive concepts. I am looking at more-general concepts. In the entry under discourse epistemology in this work it is noted that “the concept of discourse itself seems, however, to remain unreflected and to be used as self-evident”. This overlooks one of the foundational tenets of discourse theory that concepts themselves are too nebulous to have a concrete meaning. Thus, the concept of discourse may never be satisfactorily reflected on in the sense that is meaning is precise and unequivocal.

Also see Clark D. Cunningham, “Symposium - The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse” (1992) 77 Cornell L. Rev. 1298 at 1349 who mentions that one type of analysis “is more qualitative, showing the influence of ethnography and ethnomethodology: a smaller set of recorded discourse, sometimes only one speech event is read closely and repeatedly to identify features apparently significant to the speakers rather than to a researcher's pre-existing theory”. In effect, this is the beginning point of my discourse analysis.

“meaning” is constructed from (and constrained by) a discourse.

In discourse studies, the term “discourse” has a special meaning apart from that used to describe everyday communication in a given field. Discourse theorists argue that communications (such as text and talk) play an active role in actually shaping how people understand the world.¹⁴ The discourse is used by speakers to communicate *things* to other participants in a field. In turn, the discourse is used by participants to understand what *things* mean in a particular field. The discourse has the power to give *things* meaning when it is used for these purposes. As such an “interface” the discourse itself is a facilitator to establish a connection between interaction and cognition.

In order to explain how this works I will begin by explaining the concept of “articulations” because that is the foundational component of a larger discourse structure. Articulations are expressions used by speakers to convey meaning to other participants in a discourse. The articulation is embedded with information about the “thing” being talked about. However, not all information about what a *thing* means can be conveyed due to the natural limitations of language. A word used to convey information rarely (if ever) has a fully exhaustible or concrete meaning.¹⁵ As a result, discourse theorists presume that articulations are embedded with *selective* information about things. The articulations may exhibit information that is actually a generalization or presupposition about conceptually

¹⁴ That is, they shape our imagination and experience (see generally *supra* note 4). Articulations have communicative value in a discourse. Van Dijk, *supra* note 4.

¹⁵ For example, pretend you are interested in food. If you see me sitting on a bench having lunch, you might come up and ask me what I am eating. If I pointed to a sandwich and told you what it was and what went into it you would have a decent picture of what I was eating. If you tasted it, you would have a better picture. But, say we are talking on the phone and you ask me the same question. If I say I am eating a sandwich and tell you when went into it, you would have a less clear picture than in the other two instances. The “picture” is your understanding, and the mere use of words to communicate what I am eating is inherently less informative than having the opportunity to use other senses to glean more information about it. Communication itself is a limited and limiting action.

ambiguous things. The information that is selected (and not selected) to be conveyed is shaped by discourse. This, discourse theorists say, is one way that speakers use the discourse. Participants of that discourse then use those articulations to understand what conceptually ambiguous *things* mean.

For example, when you attempt to throw a baseball and someone makes the comment that “you throw like a girl” the articulation conveys that the subject (you) has a throwing ability equivalent to that of a “girl”. Without using a discourse, it is hard to figure out what this means. If the speaker's comment is intended to be a negative evaluation of your ability to throw, he or she may be drawing on a sexist discourse that reinforces assumptions about “girls” having a deficient throwing ability. If you understand the comment to be a negative evaluation of your ability to throw, you are also referencing assumptions established in that same sexist discourse. Not only does the critical nature of the comment convey sexist assumptions, it also *relies* on those sexist assumptions being shared among those to whom the comment is made. Generalizations and presuppositions are made. Through such an articulation, those generalizations and presuppositions are also revealed. Articulations are based on and reveal assumptions.

For a discourse researcher, articulations are the object of analysis for two reasons. First, articulations exhibit *select* information that can provide insight into the assumptions made by a speaker. Second, articulations convey information about taken-for-granted assumptions acceptable in the wider discourse structure. Articulations contributing to discourse can be in any form including text, talk or more subtle forms such as gestures, signs or logos. When an expression conveys some meaning to other participants in the discourse it can be considered an “articulation”. It is irrelevant whether the meaning itself

is uniformly understood by all participants for an articulation to potentially affect the shape of the discourse. For example, you need not understand the comment “you throw like a girl” is intended as criticism in order for the speaker to have made an articulation that may affect the general discourse. The very act of articulation can affect the general shape of discourse in the field it is articulated into. This has the potential to affect how *things* are understood by participants in that field.

1.3 The Development of Discourse

How does using assumptive language actually relate to the wider discourse structure? Discourse theorists believe that when people articulate something they draw on generally accepted assumptions about meaning common to a particular “discourse field”.¹⁶ In the interactive process of meaning-making, a speaker in the field can expect to be understood better by participants in that field if he or she uses assumptions considered to be appropriate in that field. For discourse theorists, this is how articulated meanings can be connected to the wider discourse. The latent assumptions embedded in articulations can provide information about more generally-held assumptions accepted in the wider discourse.¹⁷ For example, a speaker would not use the “you throw like a girl” comment as a criticism of the abilities of the thrower, without having some basis to take-for-granted that the comment would be understood as such. Thus, the articulation is itself (tacit) evidence of an acceptance of assumptions established and reinforced in a wider

¹⁶ By this I mean a discourse field, not any category of field that is more or less defined. For example, I am not using it in the sense of medical field or teaching field. As I will show, the concept of discourse can be refined differently which would necessarily define a different “discourse field”.

¹⁷ They can exhibit what may be accepted as “appropriate” assumptions in a field. See van Dijk, *supra* note 4: Articulations are the rhetorical manifestations of tacit knowledge shaped by discourse.

discourse field.

However, because discourse is an interface it is also shaped by articulations in a field. The more speakers use articulations embedded with assumed meanings of the discourse the more taken-for-granted that meaning becomes in the discourse. This also has the effect of rendering the underlying assumptions less noticeable to participants in that field. In other words, speakers and participants are more likely to accept that those articulations are a true picture or accurate representation of meaning without querying the underlying assumptions that they support.

That said, the shape of discourse is not static. Depending on how open the discourse is to the influence of other speakers,¹⁸ alternate articulations can be used to challenge taken-for-granted meanings that have been reinforced through articulations. The assumptions that underlie words can be targeted and dislodged by drawing from other discourses or using the discourse in a different way. For example, softball legend and Olympic gold medalist Jennie Finch entitled her autobiography “*Throw Like a Girl*”.¹⁹ By juxtaposing those words (and the generally accepted sexist notions that inform them) against her clear throwing ability, she manages to fracture the embedded assumptions those words are sometimes used to convey. This is one way to attempt to change the shape of discourse.²⁰

¹⁸ Rubin, *supra* note 8 at 1843. As noted, Rubin uses the insight developed by the critique of methodology in assessing standard legal scholarship. He points out that a frequently expressed idea of this critique is that scholarship operates as part of the existing power structure and contributes to its continuation without self-reflective awareness that this is the relationship. Discourse studies are a type of methodology that demands a researcher become consciously reflective of these kinds of structural relations and her position within them.

¹⁹ Jennie Finch & Ann Killion, *Throw Like a Girl: How to Dream Big & Believe in Yourself* (Chicago: Triumph Books, 2011).

²⁰ For example, it challenges wider assumptions about females being deficient in athletic ability.

1.4 The Theoretical Interest

In a given field, there is often a discourse with a particular claim to power.²¹ That discourse has a greater ability to frame how *things* are talked about and understood. The power comes from the greater ability to establish and reinforce assumptions of meaning. The more speakers use particular articulations, embedded as they are with assumed meanings, the less obvious underlying assumptions used by the speakers become. The more others use those articulations, the more they are to be taken-for-granted as accurate/complete representations of what the thing articulated *is*. This has constructive power. With enough influence, assumptions about what *things* mean can become reinforced as representations of what things are. Given that words can shape how people understand the world, it follows that words used by more influential speakers have a better chance of “shaping” the world. It is this component of text and talk that gives rise to more critical branches of discourse theory.²²

Social assistance and poverty discourses have been challenged using a variety of methods, some of which draw attention to the assumptions latent in the discourse.²³ This

²¹ See Maarten A. Hajer, “Doing discourse analysis: coalitions, practices, meaning” in van den Brink & Metzke, eds., *supra* note 11, 65 at 70. Here, I am using the term power in the sense of “overcoming opposition” or “having influence” in a consensual way. Norman Fairclough, “The Discourse of New Labour: Critical Discourse Analysis” in Margaret Wetherell, Stephanie Taylor & Simeon J. Yates, eds., *Discourse as Data: A Guide for Analysis*. (London: Sage Publications Ltd., 2001) 229 at 232. And see Andrew W. Dobelstein, *Social Welfare Policy and Analysis* (Chicago: Nelson Hall Publishers, 1990) at 11, who quotes from a definition of power as “the capacity to overcome part or all of the resistance to induce changes in the face of opposition”. This word is used interchangeably with “authority” in this thesis.

²² See generally works by leading discourse analysts who take a critical approach to the field such as Norman Fairclough, Ruth Wodak or Teun A. van Dijk.

²³ For example see Elena Iarskaia-Smirnova & Pavel Romanov, “Doing Class in Social Welfare Discourses: Social Welfare Discourses” in Suvi Salmenniemi, ed., *Rethinking Class in Russia* (Burlington, VT: Ashgate, 2012) at 85 (applying a textual method); Bratton Thomas, *Understanding How the Discourses of Welfare Impact the Subjectivities of OW Participants*, (Ph.D. Dissertation, Windsor University, 2002) online: <<http://scholar.uwindsor.ca/cgi/viewcontent.cgi?article=1500&context=etd>> (applying an ethnographical/narrative approach based on interviews with social assistance recipients); Ruth Levitas, *The Inclusive Society?: Social Exclusion and New Labour*

is also the point of my own analysis. In social assistance law, speakers in the legal discourse field (judges, adjudicators, lawyers, social assistance applicants and recipients) are also participants in that field. However, by virtue of the hierarchy of the system and the nature of the appeals process (e.g. a social assistance recipient hardly attends and rarely speaks at higher levels of court), articulations made by some speakers have more influence over the general shape of the discourse.²⁴ When articulations are made about differences between individuals supported under the *Ontario Works Act* (OWA)²⁵ and the *Ontario Disability Support Program Act* (ODSPA),²⁶ they can shape how differences between the application of legislation is understood by others. Discourse researchers take up the work they do because they identify a need to detach from the influential discourse frame and work on dislodging taken-for-granted assumptions that appear to support it.

Being as discourse work is based on a rather broad theoretical foundation that informs an equally varied field of research, it is hard to encapsulate an explanation of the entire theory or field in a few short paragraphs. On a very general level, discourse researchers can be understood to approach linguistic meaning on the basis of a theory that intertwines thinking and interacting. They work to apply different approaches to study language and communication. The tools they use to do this are designed to deconstruct meaning, dislodge taken-for-granted assumptions, and reorganize social meanings.

Researchers that approach their work from a critical perspective do this by directly

(New York: Palgrave Macmillan, 2005) (using the concepts of MUD (“the moral underclass discourse”), SID (the social integration discourse), and RED (the redistribution discourse) to apply a critical discourse analysis).

²⁴ According to general legal principles and traditions of deference (i.e. referencing interpretations that others have placed on statutory language), *stare decisis* (i.e. following higher-level court statements about statutory language), etc., appellate-level judges potentially have more influence over the general shape of discourse in the legal field.

²⁵ *Ontario Works Act, 1997*, S.O. 1997, c. 25, Sch. A, s. 1. [OWA]

²⁶ *Ontario Disability Support Program Act, 1997*, S.O. 1997, c. 25, Sch. B, s. 1. [ODSPA]

challenging the underlying assumptions exhibited in articulations in an attempt to reframe the discourse. This thesis takes that approach.

1.5 The Concept of Discourse

Although the rather broad theoretical foundation of discourse theory opens the field up to criticisms that there is a lack of consistency within it,²⁷ my goal is not to provide a thorough theoretical account to sufficiently counter such criticisms. While this makes any discourse-based analysis vulnerable to criticism for being “too relativistic” or “anything goes”, the concept of discourse is valuable for enriching a researcher's ability to gain and share insight on word use.²⁸ The concept of discourse has been informed through interdisciplinary efforts to account for the imprecision of language.²⁹ To that extent, understanding of “discourse” renders a precise explanation of the theory that underlies it nearly futile. Instead of fully providing a detailed refutation of the criticism, I will acknowledge it as a weakness but note that other qualitative studies are subject to the

²⁷ See, e.g., Alistair Pennycook *Critical Applied Linguistics: A critical introduction* (London, UK: Lawrence Erlbaum Associates, 2001) at 87, who criticizes the analytics as being a strange mixture of theoretical eclecticism and unreflexive modernism. The father of discourse analysis is Michel Foucault whose own studies could hardly be characterized as explicit. However, Foucault's work has given rise to “tendencies found in the work of those who declare a preoccupation with language on the assumption that the nature of action can be revealed by various kinds of linguistic analysis.” (Paul Chilton, “Missing links in mainstream CDA: Modules, blends and the critical instinct” in Ruth Wodak & Paul Chilton, eds., *A New Agenda in (Critical) Discourse Analysis: Discourse Approaches to Politics, Society and Culture*, (Amsterdam: John Benjamins Publishing Company, 2005) 20 at 20). Discourse as a concept is to be understood in a variety of ways. Margo van den Brink & Tamara Metze, “Words matter in policy and planning” in van den Brink & Metze, eds., *supra* note 11, 13 at 15; Stephanie Taylor, “Locating and Conducting Discourse Analytic Research” in Wetherell, Taylor & Yates, eds., *supra* note 21, 5 at 8.

²⁸ See generally Howarth, *supra* note 11. Discourse analysis is concerned with understanding and interpreting socially produced meanings rather than searching for objective causal explanations. Howarth, *supra* note 11 at 28.

²⁹ See Teun A. Van Dijk, ed., *Handbook of Discourse Analysis Volume 1: Disciplines of Discourse* (London: Academic Press Ltd., 1985), chapter 1, where he explains that discourse research is underpinned by both linguistically-inspired semiotics research and socio-cultural and historical contextual research. Early interest in discourse research connected the descriptive analysis of semiotics with the structural analysis of more sociological research.

same insuperable criticisms.³⁰ At any rate, this thesis uses the “concept of discourse” as a place of departure to apply a more-sustained methodological analysis.

However, there is not an utter lack of unity in discourse research. An important rallying point on which discourse studies are based is the importance of attending to the inherent instability of meaning. From there discourse researchers take an unconventional approach to their studies by defining “discourse” *according to* their work.³¹ Meaning is not precise or stable, but it comes from somewhere. A discourse researcher is open to frame her study according to the level of articulations she focuses on. When a discourse researcher departs on her study, she is the one who must establish the meaning of “discourse”. As *things* are given meaning through the discourse,³² a researcher works to reveal the assumptions that may be embedded in the meanings conveyed. She must, however, study “the discourse” by framing what “a discourse” is for the purposes of the study. In this thesis I will study articulations to reveal embedded assumptions about individuals who receive social assistance. Just as articulations about throwing “like a girl” can exhibit embedded sexist assumptions, articulations about social assistance recipients may exhibit assumptions about poverty. When conveyed into the judicial discourse, those

³⁰ Selection bias, interpretation bias, comprehension bias, what factors controlled for, what factors overlooked, how a problem is approached, involvement of a researcher with subject, effect of researcher on subject, etc. etc. Also see Rubin, *supra* note 8 at 1840 “The problems people perceive, the categories they establish, the hypotheses they generate, the methodologies they employ, the arguments they use, and the criteria of validity they accept are all specific choices, made in the midst of history, as part of ongoing intellectual traditions.” Discourse researchers, at least, are explicitly aware of the skewed nature of analysis. They are charged to stick to the words of the text to ground the analysis and to lay bare their own assumptions and biases when conducting their research and disseminating their results. Howarth, *supra* note 11 at 28. See also *infra*, note 38 where I discuss this further.

³¹ For support that the beginning point of research is to define discourse in its own way and relate it to the researcher's argumentative approach to analysis, see van den Brink & Metze, *supra* note 27 at 15.

³² Kateryna Pishchikova, “Civil Society Assistance Discourse: A Case of USAID in Ukraine” in van den Brink & Metze, eds., *supra* note 11, 91 at 95: while things may have extra-discursive existence, their meaning does not.

assumptions have the potential to influence how social assistance law is understood.

I have identified that, broadly speaking, a rallying point for those using discourse theory is recognition that meaning is not precise or stable and that it comes from something called discourse. Discourse is generated through language, so the language that is used by a speaker has an effect.³³ I noted that discourse is an interface between interaction and cognition in section 1.2. On a more practical level, discourse is the interface between words and understanding. As assumptions about meaning that are exhibited in words can be connected to overarching patterns of acceptable discourse in that field, I will focus on analyzing assumptions embedded in articulations about social assistance. Such talk may affect how the law is understood. By borrowing certain discourse tools to perform a critical discourse analysis, I will show how articulations differentiating impoverished individuals found to be disabled from those not found to be disabled can reveal assumptions about those individuals. From my perspective, the assumptions are under-informed. This thesis will also make a connection to the wider discourse field by tracing how understanding of individual lived-experience has been closed off in the discourse.³⁴ This may lead to a less-informed interpretation of the law.

³³ As Aharon Barak points out in his book *Purposive Interpretation in Law*, trans. by Sari Bashi (New Jersey: Princeton University Press, 2005) at 24, “Language is not, however, infinitely malleable. It may be vague, ambiguous, and capable of meaning different things in different contexts. But language cannot take on any meaning an interpreter wishes.” Also see Randal N.M. Graham, “What Judges Want: Judicial Self-Interest and Statutory Interpretation” (2009) Stat. L. Rev. 38 at 16 – 17 where Professor Graham points out that the endless deconstruction of language would frustrate our communication with other people; Benson, *supra* note 12 at 54: “the way to control the decision maker is to narrow the channel by adding weights and words that narrow and limit the paths leading to statutory law”. In other words, there are ways to constrain the practice of meaning making (although the extent of that constraint is itself limited due to the inherent imprecision of language). Discourse analysts also point out that articulations must be appropriate to the discourse. See, for example, van den Brink & Metzke, *supra* note 27 at 15; Teun A. Van Dijk, “Discourse Studies and Education January” (1981) II(1) Discourse Studies 1 at 5.

³⁴ Meaning is not a proposition, it is a construction of and within a framework that creates “conditions of possibility” for what is sayable, doable and thinkable. Pishchikova, *supra* note 32 at 95; Hajer *supra* note 21 at 44; Hunt & Wickham, *supra* note 11.

1.6 The Concept of Discourse as Driving this Study

The easiest way to understand a discourse researcher's definition of the concept of discourse is by seeing how she uses it in her work. Although I will make use of the concept mostly in chapters 4 and 5 of this thesis, it is important to set out some general comments about the approach I have selected in order for you to understand how it drives the study. I will depart from the critical discourse field to apply a method that is designed to expose assumptions that may be exhibited in articulations. To do this I will use the tool of “oppositional narrative”. This is a tool modified from an approach to discourse studies known as critical discourse analysis (CDA).³⁵

1.7 Methodological Approach: Critical Discourse Analysis

In this thesis, I will analyze what judges say about *things* while bearing in mind that *things* have no single or exhaustible meaning. The information conveyed cannot be considered apart from the discourse. The articulations that I will focus on use words that have imprecise meaning. Different assumptions may be exhibited according to the range of meanings these words could have. While some researchers may look at words to understand meaning, discourse studies take a step back to approach words as artifacts of meaning.³⁶ While it is difficult to depart from a basic theoretical presumption where the

³⁵ Note that Teun A. van Dijk and others advocate for the use of the term Critical Discourse Studies because the discipline extends beyond critical analysis to critical theory and critical application (See Teun A. van Dijk “Critical Discourse Studies: A Sociocognitive Approach” in Ruth Wodak & Michel Meyer, eds., *Methods of Critical Discourse Analysis*, 2d ed., (Thousand Oaks, California: Sage Publications, 2009) 62 at 62. CDA as a school or paradigm is characterized by a number of principles: for example, all approaches are problem-oriented, and thus necessarily interdisciplinary and eclectic. See Ruth Wodak & Michel Meyer, “Critical discourse analysis: history, agenda, theory, and methodology” in Ruth Wodak & Michel Meyer, eds., *Methods of Critical Discourse Analysis*, 2d ed., (Thousand Oaks, California: Sage Publications, 2009) 1 at 5-6. Also see Chilton, *supra* note 27.

³⁶ I make the analogy to examining artifacts because the level of analysis is at concrete articulations that exhibit meaning. This is a better level of analysis for qualitative research because it allows focus on

object of study (the *things* that are articulated) will never really dovetail into a concise conclusion of what they mean, the approach is used to achieve a different goal. In this thesis, the goal is to reveal and challenge the underlying assumptions potentially conveyed into a particular discourse by using an “oppositional narrative” in order to reorganize representations made about *things*.³⁷ Specifically, I will focus on articulations made in three judicial decisions about Ontario social assistance legislation. By introducing the tool of an oppositional narrative,³⁸ I will argue that articulations that convey under-informed meanings of *things* into the discourse have the potential to reinforce assumptions about those *things*. This can affect how the law is understood. I will suggest that attempts to talk about the meaning of social assistance in Ontario could be reframed to better inform understanding of how the law applies to individuals.

visible language that is established and reinforced in a certain field. In discourse analysis, text is visible evidence of a reasonably contained purposeful action between one or more speakers and one or more participants, in which the speakers control the interaction and produce most of (or all) of the language. See Theo van Leeuwen, “Three models of interdisciplinarity” in Wodak & Chilton, eds., *supra* note 27 at 11 where he talks about this relationship as between writers and readers in a certain discourse. The same must be true, I think, about speakers and participants. Also see Howarth, *supra* note 11. The language is used by participants so that they may understand meaning.

³⁷ CDA researchers play an advocacy role for socially marginalized groups. Wodak & Meyer, *supra* note 35 at 19.

³⁸ As mentioned above in section 1.5 (particularly my comments at *supra* note 30) one of the obvious weaknesses of discourse research is that the researcher brings in her own biases and assumptions. For this reason, a discourse researcher must be self-aware and reflective in order to clarify her own belief and values that impact her perspective in research settings (see Ruth Wodak & Gilbert Weiss, “Analyzing European Union discourses: Theories and applications” in Wodak & Chilton, eds., *supra* note 27 at 124). Given that CD Analysts invoke values, norms or universal human rights, especially when using the tool of oppositional narrative, the analyst must be clear that her position is also the result of a discursive practice (*Ibid.*, at 36). In the next chapter of this thesis, that aspect of my research will be tied into my critical commentary on the articulations and discourse pattern. This weakness of discourse is no different from other approaches to qualitative research and definitely not foreign to legal research. As Edward L. Rubin points out in “The Practice and Discourse of Legal Scholarship”, *supra* note 8 at 1843, “our effort to understand our scholarly endeavors requires that we do more than recognize the limits of our mental frameworks. We must comprehend the way that we construct or select those frameworks. We must comprehend the way that we construct or select those frameworks. This difficult but necessary project requires collective self-awareness, the ability of a community of scholars to develop an understanding of their own pattern of thought, and to evaluate its operation.” The introspection enabled through discourse research both acknowledges and challenges a researcher's own perspective. In this way, it a method that can potentially enable self-awareness and reflection through research (as part of a process of understanding).

CDA is a critical approach focused on power asymmetries in discourse. It is helpful to use in an analysis of how influential discourse strands³⁹ convey inequalities and oppositions that are themselves discursive constructs. CDA has been used across disciplines to look at how power, domination, and social inequality manifest in articulations about subjective social classifications such as gender, race and class.⁴⁰ Linguists, sociologists and researchers in the humanities have all employed it as a method of analysis. While the approach is most often used to dislodge the claim specific power structures have over meaning, the tools need not be uniformly deployed to condemn abstract “power structures”. In the field of law, where the institutional structure operates as a hierarchy of power (e.g. the Supreme Court is the highest court in Canada, thus it has the most influence in the judicial hierarchy),⁴¹ blanket condemnation can lead to

³⁹ Discourse strands can be pictured as a selected string of articulations that are one of a number of smaller units of study in a discourse analysis. Florian Schneider, “Setting Up a Discourse Analysis” *Politics EastAsia* (6 May 2013), online: <<http://www.politicseastasia.com/studying/setting-up-a-discourse-analysis-of-political-texts-from-east-asia/>>. For example, the discourse “strand” I am looking at are Ontario Division Court, Ontario Court of Appeal, and Supreme Court of Canada decisions that I have selected for my analysis. These are smaller units of analysis of the (imprecise) “appellate-level discourse” and of the particular legal field of social assistance decisions. See *supra* note 16.

⁴⁰ See the works of Norman Fairclough, especially *Language and Power* (London: Longman, 1989); Teun A. van Dijk and Ruth Wodak. For a helpful introduction to CDA, see Wodak & Chilton, eds., *supra* note 27. A good example of the method, see the discourse analysis of Robert F. Barsky, *Constructing a Productive Other: Discourse theory and the Convention Refugee hearing* (Amsterdam: John Benjamins Publishing Company, 1994). Note that Barsky does not explicitly adopt CDA as a framework of analysis. He does, however, argue that language issues at refugee hearings often relate back to “interests of the ruling class” which explicitly connects his work to the problem-driven approach and focus on power akin to CDA research.

⁴¹ As noted above, I am using the term power in the sense of “overcoming opposition” in a consensual way. (See *supra* note 21, especially Fairclough, *supra* note 21 at 232). Also see Andrew W. Dobelstein, *supra* note 21 at 11, who quotes from a definition of power as “the capacity to overcome part or all of the resistance to induce changes in the face of opposition”. I use the term “power”, “authority”, and “influence” in this sense throughout the thesis. The legal field is necessarily hierarchical.

While not in equally 'authoritative' positions, all members of the Court have an opportunity to convey assumptions of meaning. For example, a dissenting judge at the Divisional Court may articulate a different assumption of meaning than the majority judges. The Court of Appeal may reinforce the articulation made by the dissenting judge or the majority or both or neither. That is the same with the Supreme Court. Any level may use past case law or other sources of meaning. They may reinforce meanings and come to opposite conclusions. In another case, the Divisional Court may reinforce whatever articulation was made at the Supreme Court. All of the articulations have potential to shape the

unforeseen consequences. But, the practice of critique can be used to raise consciousness about assumptions potentially reinforced by the discourse.⁴²

CDA presupposes that certain assumptions in meaning may be “uncovered” or “discovered” by a close reading or systematic analysis of the articulations in text.⁴³ While most people have experienced the feeling of reading something and coming away with a sense that what they just read was “biased”, the more analytically explicit study of discourse spells out the unfair assumptions in articulations that give that sense of bias. It is the words that do this. In this thesis, I will engage in a study of articulations made by appellate-level judges. These articulations have the potential to reinforce assumptions about individuals who receive social assistance support when talked about as members of certain groups. As social constructs, those groups (and, by extension, the individuals) may be divided according to under-informed notions about the experiences of poverty.⁴⁴ That may unfairly reinforce under-informed and assumption-based understanding of the law.

1.8 The Use of Tools from Critical Discourse Analysis

As mentioned, I will be introducing the tool of oppositional narrative. This tool is one that enables a researcher to herself become an active participant in the discourse.⁴⁵

discourse.

⁴² The practice of critique reveals the “contingency of sedimented and exclusionary identities”, “exposes foreclosures” that mark their construction, and can recommend alternative interpretations that emerge from this engagement. See Howarth, *supra* note 11 at 37.

⁴³ Chilton uses the term “elucidated” or “unmasked”. See Chilton, *supra* note 27 at 20.

⁴⁴ As Jim Evans, *Statutory Interpretation: Problems of Communication* (Oxford: Oxford University Press, 1988) at 15 points out: “there is no such thing as a meaning of a class term simply because meanings are not things (class terms i.e. “bachelors”, “women”).” Using such class terms is unavoidable and not (in itself) a problem in legislation.

⁴⁵ In this thesis I will use discourse analysis to engage in counter-interpretations which challenge the authoritative legal articulations. Although the obvious relativism or personal bias discussed at *supra* note 30 and against at *supra* note 38 is essential to use the tool, I do not think that it diminishes the value of the analysis. A researcher deploying most methods to study most phenomena will bring their own

She injects an oppositional narrative to juxtapose the assumptions potentially embedded in word-use. To accomplish this I will specifically address how certain articulations made by the judiciary exhibit meanings that may convey biased understanding of individuals on social assistance. My aim is to draw attention to how those articulations are contradictory to the lived-experience of individuals supported by social assistance.⁴⁶ The main explanatory task of CDA is to produce new interpretations by pointing out assumptive language. Tools are used to identify words that convey selective meanings based on assumptions and then to dislodge those assumptions.⁴⁷ CDA is a problem-oriented approach for tackling any area where articulations about *things* may have serious effects.⁴⁸ CDA provides a starting point for studying something that I believe a lot more people should be thinking about, namely, how to understand individuals receiving social assistance.⁴⁹ Assumptive language can work its way into how individuals are thought

ideas to that research study. The best any researcher can do is make these ideas as obvious as possible. A discourse analyst accomplishes this through the very tools she deploys.

⁴⁶ In Chapter 4 of this thesis I actually do the analysis.

⁴⁷ In the view of critical discourse analysts, like discourse theorists, discourse operates as an interface for understanding. For CD Analysts, that interface governs actions based on how *things* are understood. If an authoritative speaker can make the ways of talking about things “stick”, the language can affect how others participating in the discourse think and act (as people act toward things according to what they understand those things to be/mean). Thus, words can encourage and constrain specific action. The purpose of CDA is to reframe the discourse. See Levitas, *supra* note 23 at 3 – 9. See also Howarth, *supra* note 11 at 26. Also see Roos Pijpers, “Exposing Fears of Mass Migration in the Netherlands: A Narrative Approach to Discourse Analysis” in van den Brink & Metze, eds., *supra* note 11, 133 at 141.

⁴⁸ Social Assistance recipients are often in a precarious position. They experience financial instability which exacerbates pre-existing or resulting physical and mental health issues. Their “treatment” by all legal actors (as speakers) matters. The outcome of decisions can further destabilize an individual's dubious financial security and the entire process has the potential to further alienate an individual. Legal decisions impact a person's ability to obtain and maintain their basic needs. Basic needs are “basic” because they are required for human survival. Such needs must be fulfilled in order for their to be even a potential for human flourishing.

⁴⁹ See Siegfried Jäger & Florentine Maier, “Theoretical and Methodological Aspects of Foucauldian Critical Discourse Analysis and Dispositive Analysis” in Wodak & Meyer, eds., *supra* note 35, 34 at 38: CDA aims to reveal the previously undetected contradictions within and between discourses, the limits of what can be said and what can be done, and the means by which discourses make particular statements seem rational and beyond all doubt, even though they are only valid at a certain time or place.

about by legal decision-makers (especially when that language is seen in influential appellate-level decisions). For the purpose of this thesis I am not looking at the rules or principles of law⁵⁰ that are the typical material of other kinds of legal analysis and debate.⁵¹ Instead, I am analyzing assumptions conveyed through the words of law.⁵²

⁵⁰ It may help to think of discourse as a set of words that construct meaning about what is and is not. See Joan Carabine, “Unmarried motherhood 1830-1990: A genealogical analysis” in Wetherell, Taylor & Yates, eds., *supra* note 21, 267 at 275, where she talks about discourse as the historical construction of rules. However, discursive rules are presumed to always be in flux which separates the foundation of discourse studies from that of many traditional kinds of legal methodologies.

⁵¹ Barsky, *supra* note 40 at 102. Of course the focus of analysis and debate, the legal premise, and the effect it has on future decisions with similar facts are themselves subjective assessments (for example, determinations about the binding vs. merely persuasive parts of a decision). Also see Rubin, *supra* note 8 at 1840 “In fact, our very perception of reality, the things “out there” that empirical disciplines believe themselves to be describing, is also a product of through processes, and possibly our language.” This is how words encourage or constrain action and delineate the conditions of possibility for constructing meaning.

⁵² Howarth, *supra* note 11 at 32: “The main point of [discourse analysis] is to lay bare the questions and presuppositions that led to the production of a particular concept or logic”. Here I am focussing on the concept of poverty and the assumptions of differentiation between those who experience poverty.

CHAPTER 2

2.1 Introduction

The previous chapter provided an overview of discourse studies. I discussed the theoretical foundation of discourse theory, my definition of the concept of discourse, and how that concept connects to the methodology and tools I will be using in chapter 4 of this thesis.⁵³ This section will connect discourse studies to the practice of statutory interpretation. In this chapter I will explain the important role words have for understanding social assistance in the legal sphere. I will begin by reviewing the political debates leading up to the proclamation of Ontario's social assistance legislation to demonstrate just how contentious the political ideas informing that text were. I will then discuss the legislative text that forms the basis of social assistance law. I will then talk about how the flexibility of statutory interpretation is a practice of meaning-making that is well-suited to the critical discourse analysis methodology.

2.2 Political Debate Prior to the Enactment of Ontario's Current Social Assistance Legislation

Social assistance is an important program that helps to alleviate some of the barriers to equal participation in society which are exacerbated by extended periods of income insecurity.⁵⁴ They say money makes the world go 'round. Without an income, people are typically unable to afford the basic necessities of life in Ontario. Welfare and

⁵³ My analysis is in chapter 4.

⁵⁴ Although it can also be argued that social assistance also creates barriers to social participation, for example through its stigmatizing status. See *Gwinner v. Alberta (Human Resources and Employment)*, [2002] A.J. No. 1045 (Q.B.) (QL) at paras. 2, 6 and 110, where the Court repeatedly mentions the stigma of being on social assistance.

benefits contribute to the ability of people living in poverty to meet their requirements of daily survival.⁵⁵ In politics, the debate over social assistance has shifted from whether social assistance should exist to how the program should be implemented.⁵⁶ Political speakers who participate in this debate take different positions over how social assistance should be implemented.⁵⁷

After Ontario's Progressive Conservative Party defeated the New Democratic Party in the 1995 election, the province's social assistance programs were significantly overhauled.⁵⁸ Income assistance amounts were significantly reduced.⁵⁹ Three years later,

⁵⁵ At the time of writing the Ontario Works "support" for a single renter was \$626 monthly. This amount will be raised to \$656 a month in the Fall of 2014. The current Ontario Disability support rate is \$1086 a month for a single renter. The exact amount of assistance a person receives varies from month to month depending on various penalties and benefits as well as his or her living arrangements. See *Broomer v. Ontario (Attorney General)*, [2002] O.J. No. 2196 at para. 47 (Sup. Ct.) (QL) where Justice Nordheimer states: "The level at which social assistance is paid provides only a minimum level of subsistence and, consequently, places all recipients in a position where any negative impact on the payments being received can have very serious effects."

⁵⁶ Peter Morton, *An Institutional Theory of Law* (New York: Clarendon Press, 1998) at 284, fn 39: Although welfare provisions are now generally regarded as a fundamental duty of the state, the existence and extent of that duty remain politically controversial.

⁵⁷ See Income Security Advocacy Centre, "Ontario Election 2014: Where do the Parties Stand in Income security?", online: <<http://www.incomesecurity.org/documents/OntarioElection2014-PartyResponsesonIncomeSecurity.pdf>>.

⁵⁸ Both the Liberal Party and Conservative Party election platforms indicated a swing to the right on welfare. At that time, opinion polls reflected agreement that Canada's social program service spending was too high. See Tony Eardley *et al.*, "Country Reports: A Study Carried Out on Behalf of the Department of Social Security and the OECD by the Social Policy Research Unit Department of Social Security Research", Report No. 47 in *Social Assistance in OECD Countries*, vol. 2, (London, UK: HMSO Crown Copyright, 1996) at 103 - 105.

⁵⁹ See Andrew Mitchell, ed., *Welfare Cuts in Ontario, Punishing the Poor*, vol. 14 (Ontario: Social Planning Council of Metropolitan Toronto Social Infopac., September 1995) at 5, which establishes that after the cuts in 1995, the single Ontario Works recipient amount for basic needs was equivalent to \$3/month if he or she were paying average rent. This effectively reduced the basic needs rate to 98% below the average for other provinces at that time.

For an interesting case that challenged the deep cuts to social assistance rates in 1995 see *Masse v. Ontario (Ministry of Community and Social Services)* (1996), 89 O.A.C. 81, 40 Admin L.R. (2d) 87 (Div. Ct.), leave to appeal to C.A. refused [1996] O.J. No. 1526 (QL), leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 373 (QL).

Note that these cuts have never been reversed notwithstanding changes in government regimes. Social assistance rates in 2014 are less now if you account for inflation and stubbornly low yearly rate increases.

Ontario's then-existing *General Welfare Assistance Act*⁶⁰ and *Family Benefits Act*⁶¹ were replaced by the current social assistance legislation known as the *Ontario Works Act* (OWA)⁶² and the *Ontario Disability Support Program Act* (ODSPA).⁶³ Under the OWA and ODSPA, Ontario operationalized two government income support programs known as Ontario Works and the Ontario Disability Support Program (ODSP). The two pieces of legislation, however, are often considered together in the administrative, judicial and legislative sphere.

From an administrative standpoint, individuals must be eligible for income support based on a financial assessment regardless of the program to which they apply. It is much quicker to be approved for Ontario Works because, subject to limited exceptions, ODSP requires a person to fill out an application and have a qualified health care provider “confirm” the applicant's “health status”. The applicant's “medical eligibility” is then assessed by a government employee. Consequently, in most cases it is better to get the initial financial assessment out of the way through an application to Ontario Works. Also, simply by virtue of the fact that the processing time for an ODSP application can be quite long, especially if the applicant is denied, individuals often require support from Ontario Works while their application for ODSP is processed.

From a legal standpoint, the Supreme Court of Canada has recognized the OWA and ODSPA as:

“[T]win components of the Ontario government’s scheme for delivering

⁶⁰ *General Welfare Assistance Act*, R.S.O. 1990, c. G.6 as rep. by *Social Assistance Reform Act, 1997*, S.O. 1997, c. 25.

⁶¹ *Family Benefits Act*, R.S.O. 1990, c. F-2 as rep. by *Social Assistance Reform Act, 1997*, S.O. 1997, c. 25 [FBA]

⁶² OWA, *supra* note 25, s. 1.

⁶³ ODSPA, *supra* note 26, s. 1.

social assistance to deserving applicants.”⁶⁴

When an individual disagrees with how the legislation has been applied in his or her situation, he or she may appeal to decision-makers at the Social Benefits Tribunal (which I will refer to herein as “the Tribunal”). Both pieces of legislation are designed to provide income support to Ontarians in need and operationalize the programs for doing so.⁶⁵ Impoverished individuals who are found to *not be* medically eligible for disability support under the ODSPA are confined to the lower level of support under the OWA, provided they otherwise meet the OWA's eligibility requirements.

From a legislative standpoint, the process leading up to the passing of the legislation seems to indicate that the social assistance system should be understood as related in the legal field. Both the OWA and ODSPA were passed under one piece of legislation, the *Social Assistance Reform Act*.⁶⁶ The opening text of each piece of legislation sets out the purpose of each Act. These purposes, if considered together, convey important similarities and differences in how the programs are to be operationalized.

Section 1 of the OWA provides that:

1. The purpose of this Act is to establish a program that,
 - (a) recognizes individual responsibility and promotes self reliance through employment;
 - (b) provides temporary financial assistance to those most in

⁶⁴ *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513 [Tranchemontagne S.C.C. RI] at para 18.

⁶⁵ Note that the programs are administered by different levels of government.

⁶⁶ *Social Assistance Reform Act, 1997*, S.O. 1997, c. 25.

need while they satisfy obligations to become and stay employed;

(c) effectively serves people needing assistance; and

(d) is accountable to the taxpayers of Ontario.

Similarly, section 1 of the ODSPA provides that:

1. The purpose of this Act is to establish a program that,

(a) provides income and employment supports to eligible persons with disabilities;

(b) recognizes that government, communities, families and individuals share responsibility for providing such supports;

(c) effectively serves persons with disabilities who need assistance; and

(d) is accountable to the taxpayers of Ontario.

In some ways the legislative text itself evidences how the system could be understood as related by emphasizing the needs of individuals. Section 1 of the OWA and ODSPA both talk about providing support to individuals (in the OWA the support is to “people most in need”, while in the ODSPA the support is to “eligible persons with disabilities”), and about “effectively serving” those individuals who “need assistance”.

They also both talk about accountability to taxpayers. The text also evidences clear differences between the programs. The important policy distinction between the two purpose sections is that the ODSPA is clearly designed to provide support for impoverished “persons with disabilities” while the OWA is designed to support impoverished Ontarians *without* a disability⁶⁷ by “promot[ing] self-reliance through employment”.

In the same passage quoted above, the Supreme Court also recognized that, while the OWA and ODSPA are “twin components” of the government's social assistance scheme, there are differences:

“The ODSPA deals with disabled applicants, while the OWA provides assistance for eligible applicants who are not disabled. Reference can be made to the opening sections of each statute in order to discern the policy differences between the two.”⁶⁸

How is this relationship between differently-abled impoverished Ontarians to be understood? Certainly, the legislative text leaves some room to consider this question. There are different ways to understand how the system should provide support and effective service to those in need. How the question is framed in the legal field can have serious consequences for an individual who is contesting how the law has been applied to them by a government actor in the course of their administrative decision-making. To study the frame, a researcher can examine the discourse.

A review of the legislative record reveals how different frames articulated by

⁶⁷ By this I mean Ontarians without a “disability” according to the definition as set out in the ODSPA. Arguably the conditions of poverty are “disabling”, especially in terms of finding and retaining a secure and adequate source of income. However, this definition of disability is not embraced by the legislation.

⁶⁸ *Tranchemontagne*, *supra* note 65 at para. 18.

members of the legislature exhibit contentious positions on the text. During the debates leading up to the passing of the legislation, members of the legislature objected to the OWA and ODSPA being considered under a single piece of legislation. That interfered with adequate debates about each program and prevented those who wanted to support the ODSPA but objected to the OWA from voting in a manner that represented their views.⁶⁹ Their urgings for the release of the supplementary regulations so they too could be subjected to debate also went unheeded.⁷⁰ This limited the ability of members of the

⁶⁹ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, sess. 36:1 (04 September 1997) at 1630 (Bud Wildman): “These two pieces of legislation dealt with in Bill 142 should be separate. They should be dealt with separately. We should be having adequate hearings so we can hear what the concerns are about them both, particularly the Ontario Works program, so they can have proper amendments to improve the Ontario Disability Support Program Act and then move forward, rather than having a government that is so determined to move forward on its agenda that it isn't prepared to listen and give adequate time to ensure we do these things right”

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, sess. 36:1 (04 September 1997) at 1630 (Frances Lankin): “But in terms of the Ontario Works portion of this, on second reading, in principle I am opposed to this, so what do I do when the vote comes? You have combined two very disparate, separate pieces of legislation together in one. Not only that, you've now allocated it with less than eight hours of discussion in the House”.

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, sess. 36:1 (28 August 1997) at 1740 (Jack Carroll): “I am vehemently opposed to some of the elements contained in the Ontario Works Act... On the other hand, I'm generally supportive of the Ontario Disability Support Program Act.”

⁷⁰ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, sess. 36:1 (12 June 1997) at 1350 (Sandra Pupatello): “All we know is that the criteria are changing and we have no detail again. In fact, it will likely all be controlled by regulation, which will allow you to make the changes you want without the benefit of debate in this House, and this is very much par for the course”.

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, sess. 36:1 (19 August 1997) at 1740 (Gilles Pouliot): “The devil is in the regulations. The devil is in the detail.”

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, sess. 36:1 (19 August 1997) at 1740 (Frank Miclash): “it would be much easier had the minister brought forth the regulations...”

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, sess. 36:1 (19 August 1997) at 1740 (Sandra Pupatello) “Everything that is in the bill is a shell that is totally dependent on regulations -- that is, levels that will be set -- that are not known by us, so we don't know how fully people will be impacted. It's only fair, as the minister says, that we should have access to information to make very meaningful debate, especially when we go on hearings, and we hope that's soon.”

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, sess. 36:1 (28 August 1997) at 1750 (Frances Lankin) [agreeing to comments made by the member from Algoma]: “.it would be helpful if the regulations were published so we could debate them in accordance with or at the same

legislature to fully articulate the basis of their disapproval for aspects of the legislation. Those opposing the legislation and the procedures were denied requests for more sustained debate (at both second and third reading),⁷¹ and for more public input through consultations and hearings.⁷² This limited the sources of information that could be used to add to a more inclusive debate about the legislation. These concerns were exacerbated by other procedural concerns such as the newly introduced timing limitations placed on opposition members.⁷³ This limited the amount of information that was made a part of the

time of the legislation...”

A search of the current version of the OWA, *supra* note 25, reveals that reference to the Regulations is made 84 times (excluding the three times reference is made in the definitions section of the legislation). This means that in the legislature, 84 references to how something was to be done were not subjected to legislative debate prior to the passing of the Act.

⁷¹ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, sess. 36:1 (19 August 1997) at 1600 (Sandra Pupatello) where she comments on how large and detailed the Bill is, how much time it will take, and her expectation that there will be additional debate at third reading.

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, sess. 36:1 (04 September 1997) at 1603 (James J. Bradley): “We see the question period, which is so significant in our society, relegated to seventh place [due to procedural rule changes]... therefore question period is pushed back potentially and shortened by the fact that government business must be at 4 pm”.

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, sess. 36:1 (04 September 1997) at 1750 (Frances Lankin) [re time allocation motion]: “Third reading is an opportunity and is an attempt to have on the record of the Legislative Assembly those changes that have been made to the bill since the first presentation of the bill to the House ... it should not be allowed under a time allocation motion to proceed straight to a vote”. The motion passed.

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, sess. 36:1 (04 September 1997) at 1730 (Frances Lankin) [re time allocation motion]: “I’m sure when I inform the public that three days in this Legislature means less than eight hours of debate.. on a very controversial bill which is actually two pieces of legislation...”

⁷² Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, sess. 36:1 (04 September 1997) at 1620 (James J. Bradley): “What I have noticed... is that provision is made for only two more days of hearing in Toronto and four presumably outside Toronto”.

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, sess. 36:1 (04 September 1997) at 1710 (James J. Bradley): “... implore the Minister of Community and Social Services and the government House leader to provide more time for committee hearings for this particular piece of information”.

⁷³ Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, sess. 36:1 (02 July 1997) at 2040 (Peter Kormos): “Witness the Tory rule changes: a debate wherein a member is denied the opportunity to speak to the issue and is restricted to a mere 10 minutes”.

public record. In the end the OWA and ODSPA passed into law with no clear articulation on how the legislation should be understood.

A review of the debates leading up to the passing of this legislation provides a good deal of insight into different understandings of how to effectively implement the social assistance system. There are competing ideas about what it means to “help people in need” versus what it means to be “accountable to the taxpayer”. This issue framed the debate. The legislative body never reached a consensus about how to understand the legislation. The “purpose sections” of the OWA and ODSPA that passed into law contain ideas about how the system should support “individuals needing assistance” with a mind to being responsible to “taxpayers”. The purpose sections also contain imprecise concepts such as “disability” and/or “personal responsibility” as the basis to distinguish the programs.

Information about what those *things* mean can not be conveyed beyond the inherently uncertain nature of words. The record shows that the discourse informing what those concepts mean was never settled. The only certain information about meaning that can be taken from the record of the debate before the legislation passed is that the members of the legislature did not agree on how to frame the issue. At any rate the text was eventually proclaimed as law. That text is laden with imprecise language used to

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, sess. 36:1 (04 September 1997) at 1730 (Frances Lankin) “In 20 minutes I didn't get through the key areas of amendments to a substantive piece of legislation which is only one half of the bill”.

Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, sess. 36:1 (04 September 1997) at 1740 (Frances Lankin): “I don't care what your rules say, you have no right to force a process where there is just a vote and there is no third reading debate, there is no input into the legislative record of this assembly in Ontario of what has occurred to this bill as it went through the public process and the amendment process. Third reading debate is there for a difference ... your time allocation motion attempts to truncate the public hearing process.”

frame the social assistance legislation. This leaves space open for the judiciary to assess what those imprecise *things* mean in individual cases.

As was discussed in chapter 1, a discourse analyst is attentive to the process of meaning-making, especially when meaning is made of concepts that can have profound effects on individual circumstances. It seems to me that the imprecision of language in the legislation is fairly evident and the political discourse reveals no hope of coming to a precise understanding of what those things mean. That means that there is little external guidance on how to differentiate these *things*. Although this thesis assumes that the position of the judiciary is separate from the legislature, I will look at how political articulations can inform that discourse. Having discussed the efforts to inform and frame the politically-divisive social assistance issue prior to the legislative text passing into law, I will now move on to discuss how that imprecision of words affects the meaning of law.

2.3 Discourse Research meets Statutory Interpretation: Unconstrained

Meaning-Making and the Law

It is the words of the legislation that have passed into law.⁷⁴ The courts play an important role by articulating what the law means based on those words. The extent of judicial power to “give the law meaning”, however, is open to debate.⁷⁵ As a legal principle, judicial powers in statutory interpretation are to be constrained by “rules”

⁷⁴ Morton, *supra* note 56 at 266 and 284: Legislation is not a government policy statement, but at best a vectored compromise upon whose exact words the legislators have agreed.

⁷⁵ See, for example, the debate between the originalists (who view the historical meaning intended by the legislation as the only legitimate goal of interpretation) and those who support courts taking a dynamic approach to interpretation (where the law is interpreted by reference to contemporary ideals with little or no attention paid to the original intent.) See Graham, *supra* note 12 at 31; for a well-known argument in favour of taking the latter approach, see William Eskridge, *supra* note 3.

because judges are not supposed to be able to “make” law. Many theorists who focus on statutory interpretation take up the same basic presumption of discourse theorists that words have no inherent meaning. This leads to arguments that judges are hardly constrained by interpretive rules which are themselves devised through words.⁷⁶ Essentially, in the practice of meaning-making, the argument goes that interpretive rules do no more to limit meaning than the words of the text themselves. Perhaps the most enduring example of this argument is found in John Willis' 1938 article “Statutory Interpretation in a Nutshell”. In this article Professor Willis deconstructs traditional “rules” of statutory interpretation in order to argue that they do nothing to constrain the practice of statutory interpretation.⁷⁷ Professor Willis points out that the plain meaning rule, the golden rule, and the mischief rule (three of the leading “rules” of statutory interpretation) are themselves imprecise due to a lack of inherent meaning. They are, therefore, unable to meaningfully constrain the judges that purport to apply them.⁷⁸ His

⁷⁶ See, for example, Sullivan, *supra* note 12: “Even when the meaning is not plain and interpretation is required, the judges who carry out this interpretation are constrained by the fixed intention of the legislature. Upon enactment, the content of the law is fixed once and for all; through interpretation the judges discover that content -- not change it, not create it -- and ensure that it applies equally to all. At least this is how it goes in rule of law heaven. What are things like here on earth?”; and see Pierre-André Côté, *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville, Québec: Yvon Blais, 1992) at 12 who argues that “seeking authorial intent” ignores the impact on the law when it is applied to facts by a judge who interprets the legislation; see generally Graham, *supra* note 12, chapter 2.

But see David C. Elliott, *Legal Drafting: Language and the Law* (Ottawa: Canadian Institute for the Administration of Justice, 1990) at 7 “Every Act is passed for a reason... there is, in the collective 'mind' of Parliament, a reason for every Act that passes”, which suggests that some objective meaning can be found in the legislation. This view is officially recognized in interpretation legislation and to that extent Mr. Elliott is not wrong. From a discourse perspective the “reason” for every Act is itself an imprecise concept.

⁷⁷ Willis, *supra* note 12.

⁷⁸ See *ibid.* at 11 – 16, where Professor Willis discusses three of the leading “rules” of interpretation. With regards to the “plain-meaning rule” he concludes that the plain meaning of words can never be decisively plain (because meaning itself is never plain) and thus the rule cannot guide or constrain the practice. He also struggles with the “golden rule” (plain meaning must be avoided when it would lead to an absurd outcome) by pointing out that “absurdity” is a concept no less vague and indefinite than “plain meaning”. Finally, in regards to the “mischief rule” (where statutory interpretation is to be guided and constrained by looking to the “mischief” the legislator was trying to avoid). Professor Willis points out

argument is convincing.⁷⁹

In comparison to the traditional rules of statutory interpretation reviewed by Professor Willis, the currently accepted “constraint” on judicial interpretation in Canadian courts is not commonly referenced as a “rule”. Instead, it is called the “modern approach” or “modern principle” and is arguably more overtly flexible than the traditional “rules”. That approach, (originally based on the research and ideas of a legal scholar named Professor Elmer Driedger) is articulated as:

The question is one of statutory interpretation and the object is to seek the intent of Parliament by reading the words of the provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament.⁸⁰

that this is merely “a convenient device which enables the court to take a wide view of an apparently narrow expression, or a narrow view of an apparently wide expression”.

Professor Willis identifies the source as the difference between the mischief rule (text) and golden rule (external sources – although at the time his article was published it was still an accepted rule that external legislative sources such as Hansard were not permitted to factor into how the meaning of the words were understood). Hansard material was not admissible as evidence of legislative intent, largely on the basis that it reveals the intention of only some political actors and not the intention of the legislature as a whole until *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 46. In that decision the court notes “the frailties of Hansard evidence are many”. Prior to this the courts had gradually included this material in the context of Constitutional cases.

The view that meaning cannot realize any one ultimate outcome because language is indefinite is not confined to the Western world either. For example, see Barak, *supra* note 33. Specifically, at p. 4 he makes an argument similar to professor Willis about the plainness of language: “the plainness of a text does not obviate the need for interpretation, because such plainness is itself a result of interpretation”. Justice Barak divides authorial intent along expressed intent (from the legal text itself) or the true intent (from any source).

⁷⁹ The enduring reference to Professor Willis' article in contemporary legal research may be taken to be evidence of the wisdom of his conclusions. A Google search returned 194 references to the article (published in two different law journals). A less charitable assessment is that rules do not aid in ascertaining meaning or deciding cases but rather serve only to “classify and label results reached by other means”. See Reed Dickerson, *The Interpretation and Application of Statutes* (Boston, MA: Little, Brown & Co., 1975) at 234. See also *infra*, note 84.

⁸⁰ First formulated by Elmer A. Driedger in *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983)

While the interpretive rules that were the subject of Professor Willis' critique at least constrained meaning-making to a consideration of three sources (the plain words, the outcome, and the purpose of the law), the modern approach is more linguistically expansive. Not only are the three considerations to be accounted for, but they can be informed by many more sources. One is “constrained” by seeing what “Parliament intended” according to the “words of the provision” in their “entire context”. Also, the words must be read according to their “grammatical sense” and “ordinary sense”, harmoniously with the “scheme of the Act” and the “object of the Act”, and the “intent of Parliament”. The words in the quotation marks are all subject to their own interpretation.

While John Willis destabilizes the constraint of rules by asking: “what plainness? what absurdity? what purpose?”, the modern principle gives rise to more questions. Who or what is “Parliament”? Is it what Parliament intended when the statute passed? Is it the intent of Parliament in the current legal landscape? Which “words of the provision” (all the words? some words?) What is “context”? Is this social context or their historical context? Or, is the context something more distinct? Is it the theme of the legislation or the topic the law is supposed to cover? What is the “ordinary sense of a word”? Again, is that what the ordinary sense has historically been or what it is now? In terms of the “object of the Act”, whose object is to be considered? Is it the object of the person that tabled the bill? Is it the object of the legislature that passed the legislation? Or, is it some

at 87 and was quoted with approval in *Rizzo*, supra note 78 at para. 21. This approach has been consistently applied and affirmed at all Court levels. See *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 (CanLII) at para. 33; *Blue Star Trailer Rentals Inc. v. 407 ETR Concession Co. Ltd.* (2008) CanLII 3422 (S.C.J.) at para. 28. This may be collapsed into consideration of the “text, context, and purpose” see *Canada (Attorney General) v. Telezone Inc.*, 2010 SCC 62 (CanLII) at para. 23. *Bell ExpressVu Limited Partnership v. R.*, [2002] 2 S.C.R. 559 at para. 30: “It is necessary in every case for the Court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger and thereafter...”

greater social object that civil society (through its elected members of Parliament) was supporting?

Interpretation directives in provincial interpretation legislation provide little more in the way of constraint on this flexible way for judges to articulate meaning. Ontario's *Legislation Act* provides that:

“An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects”.⁸¹

If the practice of judicial meaning-making is (in principle) constrained only by this broad legislative directive and the flexible modern approach to statutory interpretation, one need not guess as to why a discourse researcher would be interested in the judicial discourse field. The modern approach has accommodated the use of more and more sources to inform the meaning of words.⁸² For example, the judiciary may take account of social fact, legislative records, sociological evidence, expert evidence, academic articles, dictionaries, prior case law, potential outcomes, legal arguments, intervenor arguments, etc. to inform their position on what the law means.⁸³ Thus, the practice of meaning-making in law depends on how the approach is framed and how that position is informed. A discourse researcher uses various tools to study the artifacts of meaning-making in a specific discourse.

⁸¹ See *Legislation Act, 2006*, *supra* note 2.

⁸² I am not using the legislative rule as evidence that the approach has become more overtly flexible. However, the directive does not seem to limit the sources used to inform meaning. To the degree that flexibility and meaning making may be opened up or closed down through words, surely the introduction of more conceptually ambiguous words into the pursuit makes the pursuit more flexible.

⁸³ See Randal N. Graham, *Statutory Interpretation: Cases, Text and Materials*, (Toronto: Emond Montgomery Publications Ltd., 2002) 176 – 177: Professor Graham points out that while Canadian courts used to be confined to “intrinsic aids” (the text of the legislation itself) they may now consider a variety of “extrinsic aids”, including the sources that I have listed above. See also *supra* note 78.

2.4 Contemporary Statutory Interpretation Studies as Critique of Unconstrained Meaning-Making

Contemporary statutory interpretation theorists draw attention to the conceptual imprecision of language and the lack of constraint on meaning-making that is provided by modern approaches to interpretation. For example, when analyzing the “modern principle” set out above, Stéphane Beaulac and Pierre-André Côté conclude that:

“For over 20 years now, the “modern principle” has been presented by the Supreme Court of Canada as THE approach to statutory interpretation and the pronouncements have had a definite influence in the way all Canadian courts justify their interpretive decisions, albeit not necessarily on the way they actually determine statutory meaning.”⁸⁴

More quantitative studies that analyze legal decisions where the “modern approach” is supposedly being relied on reveal that there is no insight emanating from those decisions to determine what that approach is or how it guides meaning.⁸⁵

A clear point emanating from contemporary studies is that (for better or for worse) judges and adjudicators understand what the law means through information gleaned from a variety of other sources. While much effort has already contributed to insight into the many ways that the statutory interpretation rules do not constrain judicial meaning-making, there is potential to learn more about how meaning-making is actually

⁸⁴ Stéphane Beaulac and Pierre-André Côté, “Driedger's “Modern Principle” at the Supreme Court of Canada: Interpretation, Justification, Legitimization” (2006) 40 R.J.T. 131 at 171. In other words, the approach is a justificatory tool for some unstated way the meaning is determined.

⁸⁵ See Graham, *supra* note 12 beginning at 215, which provides actual examples of the failure of the Supreme Court to clarify what the modern approach entails and for examples where the Court purports to use the approach but do so in an inconsistent way.

constrained (or not). By looking at articulations and where those articulations come from, discourse analysis opens space to think differently about how sources used can come to influence the meaning of words in the text. Assumptions can seep into the discourse. Given the convincing argument that “rules” have little to do with how interpretation is constrained, I believe it is important to challenge the assumptions about poverty that have been conveyed into the legal discourse.

2.5 Discourse Approach to Meaning-Making in Law

For the discourse researcher these critical questions are important for a reason quite apart from the legal principles that judges must be constrained in their practice of statutory interpretation. The fact that something actually happens is considered to be at least as important an object of analysis as more abstract considerations about the legitimacy of that thing happening. For a discourse analyst, it is the actuality of a practice (that is, that it simply happens) that merits its consideration.⁸⁶ From a discourse perspective, the modern approach is nothing more or less than a way that the courts can “make meaning” out of the legislated directive that “an Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best attains its objects.”⁸⁷ Discourse analysis can look at various ways that the courts “make meaning”.

If a researcher fully adopts the presumption of discourse theorists and statutory interpretation theorists that words have no inherent meaning, then she may arrive at the view that any interpretive approach has little constraint on the potential meaning made

⁸⁶ See generally Maarten A. Hajer, *supra* note 21.

⁸⁷ See *Legislation Act, 2006*, *supra* note 2. This provision seems to be related to the language used by Elmer A. Driedger in *Construction of Statutes*, *supra* note 80 at 87 when he explains the modern approach of courts.

out of imprecise words in legislation. A discourse researcher attends to the actual process of meaning-making in a discourse field because she presumes that process itself informs understanding of the law. If she wants to determine what something means in a particular discourse field, she must attend to the articulations made in that field. If she knows that understanding the meaning of legislation is hardly constrained in the field, she must attend to the assumptions made in that field. These may be exhibited in articulations and can be traced to the sources to which the judiciary refers. There is potential that messages conveyed about the “purpose” of the legislation should be challenged, lest it establish or reinforce biased assumptions about individuals in the discourse.

Legal scholars have made space for discourse-focused research by convincingly arguing that words have imprecise and uncertain meanings.⁸⁸ From there, a discourse researcher takes up her study by looking at where that meaning comes from and what the words used have the potential to convey.⁸⁹ In the decisions pertaining to social assistance, the courts are informed by different sources and use different words when framing the meaning of legislation.⁹⁰ Although the sources and words are familiar in the practice of statutory interpretation,⁹¹ I will use the tool of oppositional narrative to expose how they

⁸⁸ Including other linguistic theories. See Gray, *supra* note 13 for discourse theorists in the law. Also see Michael King, “Child Welfare Within Law: The Emergence of a Hybrid Discourse” (1991) 18 *Journal of Law and Society* 3 for a work of discourse analysis. And see Benson, *supra* note 12 at 26: “Near the turn of the century philosophers began to point out that words have no inherent meanings, contrary to the millenia-old assumptions that words did qualify as reference labels”.

⁸⁹ Discourse analysis is concerned with understanding and interpreting socially produced meanings rather than searching for objective causal explanations. See Howarth, *supra* note 11 at 28.

⁹⁰ For example the legislative record, the nature of the legislation (as benefits-conferring legislation), and the section 1 statements in the OWA and ODSPA.

⁹¹ See *Rizzo*, *supra* note 78, where the court held that the legislative history of the provision at issue, as well as other relevant provision, supported their understanding of how to interpret the legislation. See Ruth Sullivan, *Statutory Interpretation*, 2d ed. (Toronto: Irwin Law Inc, 2007) at 575 (QL): “If the materials discuss the purpose or meaning of the legislation, this may be persuasive evidence of the legislators' intent”; and see Sullivan, *supra* note 12 pointing out that “to draw inferences [about legislative intent] even competent speakers must rely on a wide range of contextual factors, both textual and extra-textual. See section 1.5 of this thesis where I refer to the discourse as being like an “interface”

may potentially convey under-informed assumptions about *things* into the judicial discourse. Given that the approach to determining the meaning of law is flexible and informed by various sources of meaning, my concern is with words that may be used as under-informed representations of the lived-experience of individuals who receive social assistance support. That has the potential to affect how the legislation is understood.

In the next section I will talk about the administrative regime that social assistance is situated in. In that regime, individuals are provided only a limited chance to challenge how a statute is interpreted and applied to them by the government.⁹² This is why it is important to look at the assumptions that may be conveyed through the practice of meaning-making in the judicial discourse. Articulations can shape how differences between the law and individuals who challenge that law are understood by Tribunal members responsible for making the quasi-judicial decisions about how the legislation applies to an individual.

2.6 The Administrative Regime

The regulatory system underpinning Ontario's social assistance regime has been described by appellate-level courts as “complex”, “fiendishly difficult”, “Kafkaesque” and “a lawyer's nightmare”.⁹³ Although it would be far beyond the scope of this thesis to

between words and understanding.

⁹² See Sullivan, *supra* note 91 at 300-305 (QL) where she says “it is a clear wish on the part of executives with effective voting control over the legislative branch to take more and more matters of general public significance out of the hands of Parliament and to arrogate it to themselves or agencies acting under their dictation, control or strong influence.

See also Steven Vago and Adie Nelson, *Law and Society* (Toronto: Pearson Education Canada, 2004) at 48: administrative agencies are established to determine the applicability of often vaguely written legislation to specific situations.

⁹³ *Kerr v. Metropolitan Toronto* (1991), 4 O.R. (3d) 430 (Div. Ct.) at 446, although this was under the previous social assistance regime. But see the more recent case, *R. v. Maldonado* [1998] O.J. No. 3209

provide a thorough explanation of that system here, I will outline the basic information that a social assistance applicant or recipient should be aware of in order to navigate the nightmarish regime.

Under the OWA, the Ontario Works program provides two forms of assistance: employment assistance and basic financial assistance.⁹⁴ Pursuant to section 4 of the OWA, employment assistance is supposed to help a person become and stay employed through community participation (which is defined as activities that contribute to the “betterment of the community”) and by the individual undertaking other employment measures (such as job searching, job placement, basic education, etc.).⁹⁵ These activities are generally called “workfare”. In order to bind an Ontario Works recipient to his or her obligations, he or she is often required to sign a participation agreement. Failure to follow the participation agreement requirements can result in the reduction or cancellation of benefits.⁹⁶ Workfare is exempt from provincial labour relations legislation and “participants” are prohibited from joining a labour union, entering into collective bargaining agreements, or participating in strike activities.⁹⁷ Basic financial assistance is income to address basic needs and rent.⁹⁸ In addition to the requirements of workfare, a recipient of Ontario Works must also abide by a whole host of other rules such as monthly reporting requirements and minimum asset requirements in order to remain eligible.⁹⁹

(Ct. J. (Prov. Div.)) at para. 41, where the court adopts this phrase to describe the current OWA Regulations.

⁹⁴ OWA, *supra* note 25 at s. 3.

⁹⁵ *Ibid.*, s. 4; and see *General*, O. Reg. 222/98 [ODSPR] at s. 26.

⁹⁶ See *Broomer*, *supra* note 55, where the judge takes notice of the fact that the income level provided by social assistance is a “minimum level of subsistence” and “places all recipients in a position where any negative impact on the payments being received can have very serious effects”.

⁹⁷ OWA, *supra* note 25 at s. 73.

⁹⁸ OWA, *supra* note 25 at s. 5.

⁹⁹ *General*, O. Reg. 134/98 [OWR] at s. 33(1)(b). See also, ODSPR, *supra* note 95 at s. 24(1)(a) (non-disabled members of an ODSP recipient's “benefit unit”). See also *Broomer*, *supra* note 55.

The program is different for those who are eligible for support under the ODSPA. If a person qualifies as a person with a disability as set out in section 4 of the ODSPA he or she receives income support for basic needs, shelter, disability-related costs, as well as other prescribed needs and benefits.¹⁰⁰ In addition, a recipient of ODSP income support may be eligible for employment supports (ostensibly to “remove barriers” to competitive employment),¹⁰¹ including employment consultation, job placement services, job coaching, and mobility devices.¹⁰² However, these supports do not cover educational programs established under education legislation, nor do they cover the purchase or modification of a vehicle, goods or services available from other disability-support government funds, etc.¹⁰³ Employment support participation is not an obligation in order to continue to receive support. However, a recipient of ODSP must abide by other (albeit relaxed) rules similar to those on Ontario Works such as monthly reporting requirements and maximum asset requirements. These are requirements of eligibility.

While the programs may be different, the decision making process is quite similar. Applicants must submit information for a determination of whether they are eligible based on income. In the case of an ODSP application, applicants must also submit information to support that their “health status” meets the test for “disability”. Under both programs, eligibility and administration decisions are made by government actors.¹⁰⁴

¹⁰⁰ ODSPA, *supra* note 26 at s. 2.

¹⁰¹ *Ibid*, at s. 32(2).

¹⁰² ODSPR, *supra* note 95 at s. 4(1).

¹⁰³ *Ibid*, at s. 4(2).

¹⁰⁴ Although provincial social assistance policy is rooted in statutes, regulations and policy manuals, there are many areas where administrative discretion plays a significant role. See *supra* note 59 at 81. Ministry policy has no legal force unless it has been made a Prescribed Policy under OWA, *supra* note 25 at s.74(2)(3) or ODSPA, *supra* note 26 at s. 55(2)(2). At present there has only been one policy so prescribed (see ODSPA, O. Reg. 562/05 and OWA, O. Reg. 564/05 – Special Diet).

Note that because the administration of Ontario Work is done municipally and the administration of

These government actors make decisions by interpreting the legislation and applying it to individuals in conjunction with policies drafted by the Ministry of Community and Social Services (the Ministry). The policies are meant to be used by government officials to “interpret the laws that govern Ontario's social assistance programs”.¹⁰⁵ When an individual disagrees with how the law is applied to them, they may have the opportunity to appeal to the Tribunal. The Tribunal renders legal decisions (it is a quasi-judicial body). The policies do not have the force of law and are not binding on any level of the adjudicative sphere, including the Tribunal.¹⁰⁶

In the social assistance regime, the Tribunal is the first judicial setting where the power of the government to make decisions that affect individual applicants or recipients

ODSP is done provincially, decisions are made on behalf of the Administrator or the Director (respectively). See *supra* note 64. However, as far as interpretation directives go the Ministry publishes interpretive policies which government staff must follow. This is why I have chosen to refer to the provincial Ministry as having the primary policy-making role.

¹⁰⁵ Officials are to follow the directives when making decisions about eligibility and benefits. See s. OWA, *supra* note 25, s. 39(2) and see *Social Assistance Policy Directives*, online: the Ministry of Community and Social Services <<http://www.mcscs.gov.on.ca/en/mcscs/programs/social/directives/>>.

¹⁰⁶ Matters dealt with by the Tribunal can be appealed to appellate-level Courts on a question of law (see OWA, *supra* note 25 at 36(1)). Historically the standard of review has been “correctness”. However, recent decisions seem to indicate an incremental shift toward “reasonableness” (See *Pavon v. Ontario (Disability Support Program)*, 2013 ONSC 4309 (Div. Ct.) available online: IncomeSecurity.org <<http://www.incomesecurity.org/challenges/documents/Pavon-DivisionalCourtDecision.pdf>> and *Fournier v. Ontario (Ministry of Community & Social Services, Director)*, [2013] O.J. No. 2761 (SCJ).)

This shift is part of a more general trend in case law showing deference to administrative tribunals when they are interpreting their home legislation (for a recent case on this, see *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67 especially paras.21 – 22, 25 – 27 (CanLII). That decision also notes an exception to the standard of reasonableness rule for “general questions of law that are both of central importance to the legal system as a whole and outside the adjudicator’s specialized area of expertise” citing *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, [2011] 3 S.C.R. 471 at para. 22, *Nor-Man Regional Health Authority Inc. v. Manitoba Association of Health Care Professionals*, [2011] 3 S.C.R. 616; *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, [2013] 2 S.C.R. 458. A debate about the appropriate standard of correctness is beyond the scope of this thesis.

Also note that parties that disagree with a Tribunal decision or order can first file a Reconsideration with the Tribunal itself before appealing to the Divisional Court.

is reviewed.¹⁰⁷ However, only certain decisions are appealable to the Tribunal¹⁰⁸ and such decisions can only be appealed if an internal review has been requested.¹⁰⁹ An internal review is a review of a decision conducted by a different government actor in the same office. Internal reviews are not normally successful.¹¹⁰ If a person requests an internal review and the original decision is confirmed, that decision can then be appealed to the Tribunal. In this process, the Tribunal is a practically unavoidable forum for Ontario social assistance applicants and recipients who disagree with how the social assistance legislation has been interpreted and applied in their case.¹¹¹

¹⁰⁷ Administrative law deals “with the legal limitations on the actions of governmental officials, and on the remedies which are available to anyone affected by transgression of their limits.” Barsky, *supra* note 40 at 102 quoting from Jones and de Villars.

¹⁰⁸ See OWA, *supra* note 25, s. 26(2) and ODSPA, *supra* note 26, s. 21(1) for decisions that cannot be appealed. Generally speaking, appealable decisions are related to the amount of social assistance or eligibility for social assistance under either the OWA or ODSPA.

Where no statutory appeal route exists, an application for judicial review may be used to challenge a government decision. These proceedings will not be discussed in this paper. A debate about the legitimacy of judicial review is beyond the scope of this thesis.

¹⁰⁹ Within the time period set out in the regulations (unless an extension is granted by the Ontario Works or ODSP office). OWA, *supra* note 25 at s. 27(1). The same rule applies regarding appeals under ODSPA, *supra* note 26 at s. 22(1).

¹¹⁰ John Fraser et al., “Denial by Design: The Ontario Disability Support Program” (Toronto: Income Security Advocacy Centre, 2003) at 5, online: <<http://www.incomesecurity.org/documents/DenialByDesignfinal.pdf>>; and Ontario Coalition Against Poverty, “The Straight up Truth about Applying for ODSP” (15 October 2008) at step 3, online: <<http://www.ocap.ca/node/18>>.

¹¹¹ See the comments of the Right Honourable Beverley McLachlin, P.C. Chief Justice of Canada, “Administrative Tribunals and the Courts: An Evolutionary Relationship” *Judges of the Court, Speeches*, online: The Supreme Court of Canada <<http://www.scc-csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2013-05-27-eng.aspx>>: “The rule of law requires that all official power be exercised within the framework of the law – fairly, reasonably and in accordance with the powers duly conferred on the body exercising them. The challenge is ensuring this in the modern regulatory state”.

See *supra* note 92 and *supra* note 104. As International Monetary Fund Tribunal judge and member of the Anti-corruption Tribunal of the Inter-American Development Bank, Andrew Rigo Sureda, says in his book *Investment Treaty Arbitration: Judging in Uncertainty*, (New York: Cambridge University Press, 2012) at 3: “The vague nature of standards by which arbitral Tribunals are expected to adjudicate the claims results in discretion of the Tribunals to adopt a variety of legally justified outcomes.” This claim can be extended to other “arbitral Tribunals” such as the body charged with handling Ontario social assistance appeals; See also Graham, *supra* note 33 at 69 for the view that legislators will draft legislation more precisely and specifically to the extent that they want to reduce ideological manipulation and counterintuitive interpretations. See also Barak, *supra* note 33 at 194 who is of the view that “the author of a specific text, as opposed to a general text, can better describe the human

As for the composition of the Tribunal, the members who make decisions are laypersons who are not required to have a legal or specialist background in any area related to poverty or social assistance. Although the members are cabinet-appointed,¹¹² the Tribunal itself operates at arms-length from the Ministry when considering appeals.¹¹³ Hearings by the Tribunal are conducted in private and up until 2012 the decisions were not made publicly available.¹¹⁴ The Tribunal is not bound to follow its own decisions.¹¹⁵ To decide an appeal the Tribunal members are empowered to determine “the legal limitations on the actions of governmental officials, and ... the [limited] remedies which are available to anyone affected by transgression of their limits”.¹¹⁶ This requires coming to some understanding of what the law means. Tribunal members refer to the words in appellate-level legal decisions in their own reasons for decision.

In this thesis I am using discourse analysis to probe how assumptions embedded in articulations made in the judicial discourse can be conveyed into a discourse. This has the

behaviour he or she seeks to regulate; can anticipate future developments more accurately and provide for them; can more easily find precise language to describe the human behaviour that is subject to the text. The interpreter of a specific text is more justified in resorting to authorial intent as a source of information about the details of the arrangement”.

¹¹² They are provincial political appointees, approved by order of the provincial cabinet controlled by the party in power [OWA, *supra* note 25 at s. 61]. The members are appointed and paid by the Lieutenant Governor in Council who represents the executive branch of Ontario's government. The legitimacy issues that this may present related to being impartial and free of bias will not be dealt with in this paper.

¹¹³ On appeal the Tribunal has the power to deny, grant, grant in part, or refer the matter back to the Ministry to reassess. See OWA, *supra* note 25 at s. 31(1).

¹¹⁴ Note that as of January 2014 the Tribunal is to begin gradually introducing digital recording of hearings. Whether and how these recorded hearings may be accessed remains to be seen. See *Practice Direction 7*, online: The Social Benefits Tribunal <<http://www.sbt.gov.on.ca/AssetFactory.aspx?did=171>>. As of 2012 the Canadian Legal Information Institute free archive site (known as CanLII) has begun to post Tribunal decisions. See <<http://www.canlii.org/en/on/onsbt/>>.

¹¹⁵ See *Wedekind v. Director of Income Maintenance Branch of the Ministry of Community and Social Services* (1994), 21 O.R. (3d) 289 (CA) [*Wedekind*], leave to appeal refused (1995), 23 O.R. (3d) ii (SCC), where the previous tribunal decisions were held to not be precedent-setting.

See Benson, *supra* note 12 at 62, who points out that in administrative law, which constitutes the bulk of adjudication carried out by the legal system today, there is no pretense of *stare decisis*.

¹¹⁶ See Barsky, *supra* note 40.

potential to shape how the law is understood. As mentioned above, judicial actors (who are speakers and participants in the discourse) that make articulations in legal decisions are in a more influential or authoritative position over members of the Tribunal.¹¹⁷ If laypeople are trying to understand the meaning of legislation they presumably look to appellate-level decisions. However, they do not necessarily read them as someone trained in law. Thus, it is important to critically engage the assumptions that are made in the judicial discourse so as to raise awareness of how those articulations convey under-informed representations of the reality of lived-experience. In order to do this, I am suggesting the use of discourse analysis and specifically adopting the tool of “oppositional narrative” to formulate my own counter-articulations. In the next chapter I will set up the analysis. In chapter 4 I will do the analysis.

¹¹⁷ See especially section 1.4 and 1.8 of this thesis where I discuss authority and power from the perspective of a critical discourse analyst.

CHAPTER 3

3.1 Critical Discourse Analysis (CDA): Setting Up the Analysis

CDA is fuelled by a desire of the discourse researcher to change the way an issue is framed. To use the method effectively, a researcher must look past the words that convey meaning and become conscious of assumptions that are perceived to underlie their meaning. This method involves meticulous and repeated reading of text to discover or uncover assumptions made in a chosen discourse field.¹¹⁸ The discourse field of law is large. I limited my research by performing what is known as a “synchronic discourse analysis”. This is a mode of analysis that cuts through discourse at various points by using specific instances of discourse instead of doing a more comprehensive review of multiple discourse strands or even multiple fields of discourse.¹¹⁹ For this thesis, paring down the decisions to be reviewed was necessary because looking at all of the decisions that say anything about Ontario social assistance would be too much. In my view, the three decisions that I am analyzing have the potential to convey assumptions about individuals on social assistance. The decisions are prominent cases in the consideration of appeals made by those on Ontario Works and ODSP.

3.2 Arriving at the Data Set

The three decisions that will provide the foundation for this analysis are:

¹¹⁸ Clark D. Cunningham alludes to this method of research in his article entitled “Symposium - The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse”, *supra* note 13 at 1349 which mentions that one type of discourse analysis “is more qualitative, showing the influence of ethnography and ethno-methodology: a smaller set of recorded discourse, sometimes only one speech event is read closely and repeatedly to identify features apparently significant to the speakers rather than to a researcher's pre-existing theory”. My discourse analysis is based on a “small set of recorded discourse” in that sense of use.

¹¹⁹ See Jager & Maier, *supra* note 49 at 47.

1. *Gray v Ontario (Disability Support Program, Director)* (2002), 59 OR (3d) 364, 212 DLR (4th) 353 (CA) (QL); rev'g [2001] OJ No 5716 (Div Ct) (QL). [*Gray*]
2. *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513, rev'g (2004), 72 O.R. (3d) 457 (C.A.), which rev'd [2003] O.J. No. 1409 (QL) (Div. Ct.). [*Tranchemontagne, RI*
Ontario (Director, Disability Support Program) v. Tranchemontagne, [2010] O.J. No. 3812 (C.A.) (QL), aff'g *Ontario (Director, Disability Support Program) v. Tranchemontagne*, [2009] O.J. No. 1613 (QL) (Div. Ct.). [*Tranchemontagne, RII*]
3. *Surdivall v. Ontario (Director, Disability Support Program)*, [2014] O.J. No. 1505 (C.A.) (QL), rev'g [2012] O.J. No. 1675 (Div. Ct.) (QL), leave to appeal to S.C.C. requested, 35908 (May 27, 2014). [*Surdivall*]

Gray deals with the test to determine if a person is a “person with a disability” under the ODSPA. You will remember that applicants to ODSP are usually on Ontario Works by the time their ODSP application is assessed. Given the additional time it takes to have an appeal heard at the Tribunal, decision-makers are usually faced with deciding whether a person “qualifies” for ODSP or will remain on a lower level of income support provided through Ontario Works. *Tranchemontagne, RI and RII*, is about whether the Tribunal can apply provincial human rights legislation¹²⁰ when coming to decisions (specifically with regards to a provision that excluded certain substance addicted applicants from benefits under the ODSPA). This case is the only Supreme Court of Canada decision addressing both of Ontario's social assistance statutes.¹²¹ In the hierarchical structure of law it is quite influential. *Surdivall* is the most recent appellate-

¹²⁰ Note OWA, *supra* note 25, s. 67(2) clearly prohibits the Social Benefits Tribunal from considering the constitutional validity of laws and regulations. For further discussion see section 4.3.

¹²¹ Although the province has recently sought leave to appeal to the Supreme Court in *Ontario (Director, Disability Support Program) v Surdivall*, [2014] O.J. No. 1505 (C.A.) (QL), leave to appeal to S.C.C. requested, 35908 (May 27, 2014).

level decision about social assistance. It is about the scope of the Tribunal and Ministry's legislated power,¹²² specifically the ability to collect or altogether forgive overpayments.¹²³ Recipients on Ontario Works and the ODSP are both subject to overpayment assessments. Thus, Tribunal members are likely to consider this decision when trying to understand how to decide appeals challenging a recipient being assessed an overpayment. The decision also talks about how the elements of section 1 of the ODSPA are to work in relation to each other. I will use this decision to make a connection to the elements of section 1 of the OWA and how under-informed assumptions articulated into the discourse may have a profound effect on how the law is understood.

Though small, this sampling of appellate-level decisions is a rich research ground for an analyst who undertakes to use the participatory tools of a CDA researcher (i.e. the “oppositional narrative” approach). These decisions allow a sustained discourse analysis of the assumptions embedded in articulations and provide an opportunity for more general insight into potential meanings that may be taken-for-granted as representations about *things* that are acceptable in the judicial discourse.¹²⁴ Each decision contains examples of articulations that reveal assumptions that may be challenged by reframing the narrative based on lived-experiences of individuals who are supported by social assistance. The process I used to determine the data set was an attempt to provide an impartial foundation for the discourse analysis.

¹²² The Tribunal is not empowered to make a decision or order on appeal that the Minister (or his/her delegated authorities) cannot make. See OWA, *supra* note 25, s. 67(1) and ODSPA, *supra* note 26, s. 29(3). For further discussion see section 4.4.

¹²³ Under OWA, *supra* note 25 at s. 19(1). An overpayment is where an amount has been provided to a recipient in excess of the amount to which the recipient is limited each month. I will discuss this more in the next chapter.

¹²⁴ See Jager and Maier, *supra* note 49 at 39, who distinguish between text and discourse. Discourse is recurrent content, symbols and strategies. See also Barsky, *supra* note 40 who explains that “there emerge patterns, and facts which, through usage, become powerful social forces”

3.3 Data Selection Process

These three decisions were not randomly selected nor were they deliberately chosen according to some pre-existing research agenda. Instead, they were the result of a general process of paring down the decisions according to specific selection criteria. There are a limited number of appellate-level decisions about social assistance legislation. My process for selecting cases began with my desire to look at an authoritative source of meaning that might provide some informative insight to Tribunal operations. As mentioned above, a specific feature of the ever-expansive concept of discourse is that, in a given field, certain discourses have a particular claim to power.¹²⁵ I thought it obvious that appellate-level articulations made in the judicial discourse field would have an influence on how Tribunal members may understand the legislation.¹²⁶ However, doing a full analysis of all appellate-level decisions would involve too much material to do the kind of detailed work a discourse analysis requires.

I refined my scope by focussing on appellate-level decisions that talk about how to best attain the “object” or “purpose” of the OWA or ODSPA.¹²⁷ Given the insight

¹²⁵ There is often a discourse with a particular claim to power. See Hajer *supra* note 21 at 70. See my discussion in section 1.4 and 1.8.

¹²⁶ See *Wedekind, supra* note 115 where the Court of Appeal ruled that it was intended that the Divisional Court be the “apex of decision-making involving the interpretation of legislation concerning social assistance in the province”. The standard of review was correctness. Note that this decision was made regarding the former social assistance legislation in Ontario.

¹²⁷ Some decisions determine a certain interpretation without reference to either of these concepts. For example, in *Rea v. Simcoe (County Administrator, Social Services Department)* (2005), 79 O.R. (3d) 583 (Ont. C.A.) no explanation of the purpose or source to give meaning to the purpose was articulated. However, at para. 9 the Court states: “This requirement is central to the entire scheme of the statute and its purpose would be undermined if the appellant’s suggested interpretation of the Regulation were to be accepted.” The Court also was not relying on some articulation of the meaning of that purpose articulated in the Divisional Court decision. See *Rea v. Administrator, County of Simcoe Social Services Department* (17 September 2004), Court File No. 67497/03 (Ont. Div. Ct.).

provided by statutory interpretation scholars, I identified that these articulations may themselves be signals of fairly unconstrained meaning-making in progress.¹²⁸ To the extent that these decisions articulate “the object” or “the purpose” of social assistance legislation they purport to give meaning to the very thing that frames how the legislation is to be understood in future cases. As a result, such articulations are, in theory, the most important to examine for underlying assumptions about meaning.

Though the decisions are all about the ODSPA, the adjudicative regime is similar and the OWA and ODSPA have been recognized by the Supreme Court of Canada as “twin components of Ontario's social assistance regime”.¹²⁹ The *delivery* of the social assistance system is intertwined, even if the purpose of the *programs* are not identical. As a result of a variety of systemic reasons,¹³⁰ there are only a handful of appellate-level decisions that deal with the OWA¹³¹ and only one that has made it to the Ontario Court of Appeal.¹³² In practice, the majority of Tribunal decisions require making a distinction between who is eligible for ODSP and who is not. This, I think, could be informed by a

¹²⁸ See especially section 2.4 of this thesis for a discussion.

¹²⁹ *Tranchemontagne S.C.C. RI*, *supra* note 65 at para. 18.

¹³⁰ I would suggest this may be due to a combination of factors. For example:

the temporary nature of the program,

the lack of resource allotment by legal clinics,

less advocacy to pressure bringing test-case litigation forward on behalf of Ontario Works recipients, increased social isolation of Ontario Works recipients and less available/accessible education about their rights, the low amount of income security an Ontario Works recipients has (which as mentioned at *supra* note 48 can have a significant impact on other areas of their lives).

¹³¹ *Good v. Manitoulin-Sudbury (District) Administrator of Ontario Works*, 2006 CarswellOnt 6674 (Div. Ct.) (Carswell); *McNulty v. City of Toronto*, 2013 ONSC 7046 (Div. Ct.) (CanLII); *Désabrais c. Administrateur, Ontario au Travail Comtés-Unis de Prescott et Russell* [2011] O.J. No. 304 (Div. Ct.) (QL); *Volnyansky v. Peel (Regional Municipality)*, 2010 ONSC 6008 (Div. Ct.) (CanLII), leave to appeal to CA refused (18 February, 2011); *Rogers v Sudbury* (2001), 57 O.R. (3d) 460 (Sup. Ct.); *Guy v Ontario Works (Administrator)* (2001) 147 O.A.C. 261 (Div. Ct.); *Broomer*, *supra* note 55. Note that not all of these are appeals from the Tribunal nor are they all cases where the recipients or applicants were represented by legal counsel. Also, there are many more decisions in the context of social assistance recipients being charged criminally.

¹³² *Rea*, *supra* note 127.

better judicial discourse about individuals on social assistance when they talk about the purpose of the legislation. This better discourse could be developed by attending to the experiences of individuals as people in need of support and deserved of effective service. Focus on the individual as a reference point removes some of the assumption-based inferences made based on the text and articulated into the discourse.

3.4 Assumptions

The three decisions that I will use are well-known in poverty law. Few decisions make it to appellate-level courts, and the ones that I will be reviewing have made it to the Ontario Court of Appeal or Supreme Court of Canada. The decision rendered in each case also has important implications for the adjudicatory framework that the Tribunal works with (the decisions say things about how they are to do things that they regularly do). To me this means that these decisions are strong candidates for conveying meaning to the Tribunal. My analysis is designed to show how the three decisions demonstrate a pattern of discourse that may be detrimental to understanding of the law. My analysis will demonstrate how discourse analysis provides interesting insight into articulations about poverty that exhibit assumptions. These assumptions may influence the judicial discourse about social assistance legislation. This, in turn, can shape how the law is understood.

By adopting an oppositional narrative, I will show how these articulations are embedded with assumptions that establish and reinforce an unfair discourse about the OWA. I will draw on my own experiences working within the social assistance system and advocate to challenge the accuracy of assumptive information conveyed about

poverty. I will aim to identify how articulations made may convey assumptions that do not align with the individual lived-experience of social assistance applicants and recipients. It is this discourse that has real consequences for individuals who are expecting fair consideration under the law.

3.5 Research Design

Having laid out how I selected my data source, I will now give an overview of how the analysis was conducted. I adopted a four-stage model that proceeded after a general survey of all appellate-level decisions. The general survey was necessary to get a sense of the wider discourse patterns and trends. After establishing that I had a manageable data set for analysis, I set about applying the method. The first stage was exploratory. I reviewed the language of the three cases to get a sense of how the courts talked about the experiences of social assistance recipients. I made note of the language used when talking about social assistance recipients who were considered to be persons with a disability versus those who were not considered to be persons with a disability. This stage will be especially obvious in my discussion of *Gray* (to follow).¹³³

In the second stage of analysis, I focused on the articulations about the meaning of the social assistance legislation more generally. In this phase of analysis I attended to language that signalled the speaker was talking about the more-general object of the legislation and traced that to the source informing the articulation. For example, when an articulation revealed some meaning for “the purpose of the legislation” or “the object of the legislation”, I took note. Such articulations I considered as evidence of influential

¹³³ See section 4.2.

judicial meaning-making in progress. The second stage of analysis is especially evident in my discussion of the language used in *Tranchemontagne*. However, in the process of focussing the content of this thesis I have done away with most of that level of analysis.

In the third stage, I took a step back and reviewed how the discourse had changed over time as a result of the assumptions that I had identified. Because it is the most recent instance of the discourse, I found the *Surdivall* decision to be a helpful gauge of how the discourse has been shaped over time. While all the decisions contained articulations that exhibited assumed meanings with the potential to close down consideration of the lived-experiences of individuals supported by social assistance, *Surdivall* offers an opportunity to take a broader perspective and suggest how assumptions may shape how the OWA and ODSPA are understood. This is because that decision specifically articulates the meaning of the *things* set out in section 1 of the ODSPA. To the extent that section 1 of the OWA contains similar *things*, the importance of informed articulations can be illustrated.

The synchronic discourse analysis style, unfortunately, still means that no specific conclusions about cause and effect are possible.¹³⁴ It is not about taking some phenomena (e.g. differential treatment between different groups of people) and looking at why that treatment may be different. It is about looking at articulations to determine how groups are talked about and connecting this to patterns of communication that have the potential to convey messages about the differences between socially-constructed groups. In other words, discourse analysis (especially in the synchronic discourse analysis style that I am using it) does not seek to prove something. Instead, the researcher seeks to understand

¹³⁴ Howarth, *supra* note 11 at 28: Discourse analysis is concerned with understanding and interpreting socially produced meanings rather than searching for objective causal explanations. See section 1.6 and 1.7 where I touch on how this impacts on the research conclusions.

how the meaning of things are built up in a discourse. Insight and opposition can be offered by taking this approach.

In the final stage of my research, I augmented the assumptions made in the judicial discourse with my own experiences in order to formulate an oppositional narrative. This stage proved to be the most difficult. I have set this portion apart in chapter 4 by transcribing the narrative in italics. This sets the oppositional “voice” apart from other portions of the work. It was the most uncomfortable portion of the analysis because I was to lay bare my own perspective and assumptions about meaning. However, it is that perspective and assumptions that are the oppositional force against the judicial articulations. A discourse researcher takes a step back from the legal field in order to open up space to reframe the discourse. This also gives room to others who wish to challenge my perspectives and assumptions (which entails them using their own perspectives and assumptions). Taking the subject matter so personally has its own toll, but I suppose that is one of the unavoidable rigours of using discourse analysis.

CHAPTER 4: Discourse Analysis

4.1 Introduction

In chapters 1 and 2 of this thesis I set out the basic precepts of discourse theory and method and how it relates to meaning-making in law. In chapter 3 I explained how I came to the data set to which I will apply the discourse analysis. So far I have explained how the concept of discourse is like an interface between speakers' words and participants understanding of those words. To come to that, I defined articulations as conveyors of selective information about *things* with imprecise meaning. These articulations exhibit information about the discourse because the information selected is derived from a greater discourse structure. In order for communication to be successful between speakers and participants in a discourse field, speakers convey the select information and participants come to understand what the selected information “means” with reference to a general discourse structure. That discourse structure is shaped by articulations. In this way, articulations are the building blocks of discourse and the primary artifacts that a discourse researcher studies.

I have also introduced the source of articulations that I will be focussing on in this thesis, namely judicial decisions about social assistance law. I have selected three decisions based on insight gleaned from legal theories about statutory interpretation as it relates to discourse theories about meaning-making. The overall insight is that words are imprecise and do nothing to constrain the practice of statutory interpretation. That practice is meaning-making in law. This is what I endeavour to analyze. Finally, I have set out how I am going to engage in an analysis of judicial discourse about social assistance

in order to oppose potentially assumptive meanings that are conveyed into the judicial discourse. The method I am using is critical. Specifically, I will engage the assumptions through use of an oppositional narrative.

In this chapter I will perform the analysis. I will draw all of these pieces together by investigating the language in three judicial decisions about social assistance. In arguing that discourse method is a valuable way for researchers to study the law, I will attempt to raise consciousness about the assumptions that speakers convey into the judicial discourse. The words, I think, have the potential to close down possibilities for a better-informed understanding of the law.

4.2. Gray¹³⁵

The decision in *Gray* is well-known in social assistance law because it sheds light on the test for determining whether someone is medically eligible for ODSP income support. Under s. 4(1) of the ODSPA, an applicant can only qualify as a “person with a disability” if the applicant’s impairments and restrictions are substantial and expected to last a year or more.¹³⁶ The existence of impairments, restrictions and the duration must all be verified by a health care provider. However, determining whether those impairments and restrictions are “substantial”¹³⁷ is left open to decision-makers who assess whether an

¹³⁵ *Gray v. Ontario (Disability Support Program, Director)* (2002), 59 O.R. (3d) 364 (C.A.) [*Gray 2*], rev’g [2001] O.J. No. 5716 (QL) (Div. Ct.) [*Gray 1*].

¹³⁶ This is a prime example of what International Monetary Fund tribunal judge and member of the Anti-corruption tribunal of the Inter-American Development Bank Andrew Rigo Sureda says in his book *Investment Treaty Arbitration: Judging in Uncertainty*, *supra* note 111 at 3 about how “the vague nature of standards by which arbitral tribunals are expected to adjudicate the claims results in discretion of the tribunals to adopt a variety of legally justified outcomes.” Here those outcomes are constrained by reference to the purposes of the Act. These purposes are imprecise. From a discourse perspective, discourse constructs and constrains the meaning of imprecise words. This potentially has an effect on how people think, talk about, and act toward *things*.

¹³⁷ The word “substantial” makes the assessment done by the Tribunal member discretionary because there

individual is “medically eligible” under the legislation. The initial eligibility determination and subsequent internal review decision are made by government actors assessing the merit of a written application and any additional information submitted prior to an internal review decision. There is no requirement that these actors be medically trained. If an individual is still denied after the internal review, he or she may appeal to the Tribunal. At that stage, the assessment of “substantiality” is made by the Tribunal. The ODSPA expresses that the test for disability is:

4. (1) A person is a person with a disability for the purposes of this Part if,
 - (a) the person has a substantial physical or mental impairment that is continuous or recurrent and expected to last one year or more;
 - (b) the direct and cumulative effect of the impairment on the person's ability to attend to his or her personal care, function in the community and function in a workplace, results in a substantial restriction in one or more of these activities of daily living; and
 - (c) the impairment and its likely duration and the restriction in the person's activities of daily living have been verified by a person with the prescribed qualifications.

To a discourse analyst, the word “substantial” in reference to impairments and restrictions is an example of a conceptually imprecise *thing* that has no single meaning. A person assessing the merits of an application or appeal must determine if an individual's “impairments” and “restrictions” are “substantial” based on what those *things* are

is no precise way to determine what “substantial” is. Whether impairments or restrictions cause substantial impairment or restrictions is based on a verification by a health care professional that those impairments and restrictions exist, with certain indicators, but ultimately it is the Tribunal member that decides whether it is or is not “substantial”.

understood to mean. This (to a large extent) is based on assumptions about meaning that are shaped and moulded by the discourse. *Gray* is an appeal that frames how to understand whether an individual's impairments and restrictions are “substantial” under section 4(1) of the ODSPA.

4.2.a *Gray: Divisional Court*

At the time of application for ODSP Cassie Gray was a 36-year-old woman who was experiencing severe migraines, back pain, and neck pain. Based on her initial application, she was denied ODSP. That decision was confirmed after an internal review. Ms. Gray appealed to the Tribunal and the Ministry's denial was affirmed. The Tribunal determined Ms. Gray was neither precluded from functioning in the workplace nor substantially restricted in her daily activities, noting that she could “cope on a daily basis”. In the decision, the Tribunal had expressly found that (1) Ms. Gray was a credible witness when testifying about the substantiality of her impairments and restrictions but (2) the objective medical evidence did not support that substantiality. One of the significant issues in the appeal to the Divisional Court was that the Tribunal had not appropriately considered Ms. Gray's testimony about her own impairments and restrictions in its reasons.

The appeal from the Tribunal's decision that Ms. Gray was not a “person with a disability” was dismissed by the Divisional Court by a 2 – 1 split. Ms. Gray argued that the Tribunal had committed a reversible error by finding that she was credible yet not seeming to consider her evidence about the impact of her conditions. She also argued that

the Tribunal had committed a reversible error by emphasizing the requirement for objective medical evidence to prove that she was a “person with a disability”. These errors, she argued, constituted errors of law. Thus, the Tribunal's ultimate conclusion that the cumulative effect of her impairment did not “preclude her from functioning in the workplace” and did not result in a “substantial restriction on her daily activities”¹³⁸ should be overturned.

The majority opinion of the Divisional Court was that the Tribunal's findings were correct and Ms. Gray's appeal was dismissed. The majority inferred from the written content that the Tribunal had properly concluded that Ms. Gray's restrictions were not substantial. The majority held that once the Tribunal made that conclusion, the finding that Ms. Gray was not a “person with a disability” was the only correct finding. The majority inferred that the Tribunal's comments regarding the “objective evidence” was an indication that there was a lack of such evidence, not an indication that objective medical evidence is required. On this basis, the majority held that the Tribunal's reasons raised no question of law. The dissenting opinion of the Divisional Court reached the opposite conclusion and found that the Tribunal had made numerous errors of law, including applying the wrong legal test,¹³⁹ misunderstanding or ignoring relevant evidence,¹⁴⁰ and arriving at conclusions that could not reasonably be supported by the evidence.¹⁴¹ The opposite conclusions and difference in reasons at the Divisional Court are ripe for the application of a discourse analysis because they can illustrate how different frames of

¹³⁸ *Gray I*, *supra* note 135 at para. 31 (where the dissent transcribes the short Tribunal decision almost entirely).

¹³⁹ *Ibid.*, at para. 52

¹⁴⁰ *Ibid.*, at paras. 55, 62.

¹⁴¹ *Ibid.*, at para. 72.

reference can lead to differing outcomes. Here I insert myself into the analysis to challenge the discourse and reveal the assumptions embedded in certain articulations.

Majority Decision

The introductory paragraphs of the majority decision are used to set out the objective medical evidence that the Tribunal reviewed in its decision.¹⁴² After doing so, the majority then states that:

“In light of the medical evidence just referred to, the further extensive medical evidence, and the evidence of Cassie Gray, the Tribunal was at liberty to make a factual finding that Cassie Gray has back pain complaints¹⁴³ that only rigorous conditioning will alleviate but that the back pain complaints have only a minimal to moderate impact on her daily living activities. The Tribunal was also at liberty to find that her migraine headaches restrict her ability to function only one or two days a month.”¹⁴⁴

The issue here is with the use of the word complaint. While in some areas of law a proceeding is commenced via an initial “complaint” or “pleading”, this articulation is not a legal reference to Ms. Gray's “initial pleading”. It is connected to a finding. That finding seems to be that Ms. Gray has back pain “complaints”. The finding of fact is that Ms. Gray has “back pain complaints” and those “complaints” have only a minimal or moderate impact on daily living. My issue with the word “complaint” is that it can have

¹⁴² *Ibid.*, at paras. 3 – 9.

¹⁴³ Also see *ibid.*, at para. 15 where they use the term “complaint” again.

¹⁴⁴ *Ibid.*, at para. 10.

the effect of diminishing an experience of pain when it is taken as being used in this more common way.

In everyday language the term “complaint” can have the meaning of “disorder”.¹⁴⁵ This may be the intended meaning of the word as it is being used here. But, saying “back pain complaints” can have the effect of trivializing that which is being complained of¹⁴⁶ – namely, the back pain. The language may be exhibiting embedded assumptions that Ms. Gray is a “complainer”, not the more innocuous use of the language referring to Ms. Gray as a “complainant”. That exhibition is a representation that has been conveyed into the discourse. But, it does not adequately reflect the actuality of lived-experience.

There is a risk that the majority is to be understood as not talking precisely about findings related to back pain, but instead to findings related to Ms. Gray's complaints about the back pain she has testified that she experiences. Should her testimony be talked about as just a complaint? Query whether anyone would say that a man riddled with cancer has to go to his doctor about “cancer complaints”. “Complaint” is embedded with an evaluative connotation that the object of that “complaint” is merely a “gripe” or “quibble” from some (unknown) objective standpoint. The word diminishes Ms. Gray's pain through using the descriptor of “complaint.”

¹⁴⁵ For example see the Oxford English Dictionary. Of the entries listed under the word “complaint” definitions include a bodily ailment, indisposition, disorder. See *The Oxford English Dictionary*, Online ed., (Oxford: Oxford University Press, 2014) [OED] s.v. “complaint”, entry 6.

¹⁴⁶ For example, the Oxford English Dictionary Historical Reference Thesaurus (which provides a taxonomical classification of words over time) charts the evolution of synonyms for the word “complaint” from “yomering” [c1000] to “bitching” [1953]. See *Ibid.*, s.v. “complaint”, in the Historical Reference part.

The use of the word “complaint” is a direct reference to language that was originally used in the Tribunal decision.¹⁴⁷ That decision is the frame of reference for the articulation. By adopting that word, the majority of the Divisional Court is reinforcing that diminished portrayal of Ms. Gray's experience and conveying it into the judicial discourse.¹⁴⁸ That articulation may have effects on the discourse, namely how testimony is to be thought about. The language itself risks conveying that an individual's perspective on her own view of substantial pain can be understood as a mere complaint. It reinforces that Ms. Gray's experience of pain is something less-than actually disabling in the discourse. Should decision-makers start thinking of individual testimony as “complaints”, this would have the potential to shut down a better-informed application of the law to the individual.

This kind of approach evaluates Ms. Gray's subjective experience by framing it according to language used by the Tribunal. This has the effect of disassociating Ms. Gray's experience of pain from the pain itself. It conveys that Ms. Gray's pain is not her own as she has described it. That disassociating effect is present in other articulations that the majority makes which unreflectively adopt the words used by the Tribunal member to arrive at his reasons. For example, the majority refers to Ms. Gray's head pain as “the” headaches rather than “her” headaches in various places throughout the decision.¹⁴⁹ Using

¹⁴⁷ See *Gray I, supra* note 135 at para. 15 where the Court uses the term “complaint” and is not citing or recounting the Tribunal reasons. This is an example of how word use can have an insidious effect when accessing different discourse strands.

¹⁴⁸ While in the legal context every complainant brings a “complaint” (and they can be incredibly serious) in this context the majority is referring to her medical condition. In social assistance law the parties are referred to as “the applicant” or “the recipient” when talking about a person who is supported by social assistance and “the Ministry” or “the Director” when talking about the government. The generic terms “appellant” and “respondent” are also adopted. The word “complainant” is never used in the context of disability law.

¹⁴⁹ See for example *Gray I, supra* note 135 at para. 17 “I do not find in the reasons of the Tribunal cause to suspect that the migraine headaches were recurrent”; “It may well be of course had the migraine

“the” to modify what is actually “her” pain can have the effect of alienating Ms. Gray from the discussion which is about her experiences of pain.

Continuing on in the analysis, it becomes evident that the majority does talk about who Ms. Gray is beyond her conditions. From a discourse perspective, this has the potential to provide for a more inclusive understanding of the facts that the appeal is based on. By putting information about Ms. Gray into the reasons there is more potential to learn about the person to whom the law is being applied. This leads to a more inclusive understanding of the law (taking account of the individual). This frame has the potential to lead to better applications of the law in the process of meaning-making.

The language used to talk about a person matters. Here the language used comes laden with connotations that it is not Ms. Gray's pain that has led to her lack of employment. Instead, the words used open space to assume that Ms. Gray's unfortunate life history is the main reason for her lack of employment:

“She has a grade 10 education, became pregnant when a young girl and now has a son in his early 20's. She has always lived with her parents, never worked outside the home and has been supported on mother's allowance and public welfare. She is now seeking a disability pension that would raise her public support cheque to about \$935 a month, far larger than her public welfare cheque. She has no job skills and there is little in the evidence to suggest that but for her physical impairment she would be working now”.¹⁵⁰

headaches been more frequent the Tribunal would have reached a different conclusion”; “If she had a job she might miss something less than a day a month as some of the migraine headaches would happen on a Saturday or Sunday”.

¹⁵⁰ *Ibid.*

This language seems to insinuate that Ms. Gray's history is the “real” reason she is not working now. In the very first sentence it is articulated that she left school young and became pregnant and has an adult son. In the next sentence it is articulated that she is still dependent on her parents (to the extent that she lives with them at least), that she has been chronically unemployed, and has been supported on other forms of government assistance. In the next sentence it is articulated that Ms. Gray is now seeking more money. The language pattern conveys a limited perspective of Ms. Gray's life that in no way encapsulates the entirety of her life experience up to this point. Still, by selectively conveying these aspects of Ms. Gray's life, the narrative constructs an image of Ms. Gray as the author of her own misfortune. Using these articulations reinforces a discourse that people on social assistance do not deserve help if their economic position is understood (with reference to their “money-making potential”) to be their “fault”.

The words used also demonstrate assumptions that are common when people talk about those receiving different levels of social assistance. There is a different connotation between a “disability pension” (ODSP) and “welfare cheque” (Ontario Works). The assumptions embedded in the word “pension” connote an understanding that it is “earned” income provided on a long-term, secured basis. Contrast this with the word “cheque”, which suggests that the income is endorsed by someone to someone else. The endorser has all the power over the money. Taken together with the ultimate decision that Ms. Gray is not a person with a disability, the language has the potential to close down consideration of other Ontario Works recipients with similar life experiences to Ms. Gray (insofar as the majority has articulated those experiences) as “deserving” or “having earned” ODSP. Note that the articulation is made with reference to her personal history,

not with reference to the merits of her application. The insinuation is that she would receive more than she does from her “cheque”, she is in this “position” because of her life history, and thus she does not warrant a more secure form of income support. It also assumes people on ODSP have earned the support simply by virtue of the finding that they are disabled.

The majority continues by articulating a potentially latent difference between Ms. Gray simply not having work and Ms. Gray's claim that she is unable to work due to disability:

“The fact [Ms. Gray] is prevented by migraine headaches from pursuing her activities of daily living (which would include work if she had a job) one or two days a month...” and “... If [Ms. Gray] had a job she might miss something less than a day a month as some of the migraine headaches would happen on a Saturday or Sunday...”¹⁵¹ [*Emphasis added*].

The assumption embedded in this language is that if Ms. Gray had a job she could work. But, Ms. Gray is claiming that if she could work she would have a job. Rather than considering Ms. Gray's own testimony about her own experiences and how that has limited her ability to work, the majority refers to a calendar and a calculator. It seems to me that this reference is an incredibly limited way to consider an individual's experience of pain and its impact on the particular person experiencing it. By its very nature, an assessment of pain should refer to the locus of that pain. But, the possibility of that consideration is increasingly closed off by the language which continues to disassociate Ms. Gray from her pain.

¹⁵¹ *Ibid.*

The majority of the Court continues:

“I mention again the medical evidence does not support the inference that this 40-year-old woman has never worked outside the home because of her physical impairment.”¹⁵²

What these articulations close off is the potential to consider that Ms. Gray's life history suggests something more than objective medical evidence is likely to portray. Yet, the majority fractures the woman by separating her from her pain and disregarding what she has said about her pain. They then make a connection between (a) the woman and the amount of monetary support she stands to gain and (b) the woman and the employment she has “failed” to obtain. Ms. Gray has never left her parent's home, she has some psychological issues (as I will show later in the dissenting reasons) and also she has other pain conditions that are scarcely mentioned in the majority's decision. The language closes down the possibility for considering how these experiences may contribute to an assessment of her appeal by selectively articulating only limited aspects of her experiences. The language is based on the Tribunal decision and the words are a basis for confirming the Tribunal's decision that she is not a person with a disability. This closes down the potential for a more inclusive consideration of the individual.

Different sources come laden with assumptions about meaning. Articulations that reinforce the language of another strand of discourse enable the assumptions made therein to impact the frame of the immediate discourse strand.¹⁵³ Here the majority has selectively reinforced assumptions made in the Tribunal decision. This has imported specific

¹⁵² *Ibid.*

¹⁵³ See section 1.4 where I begin to discuss this.

assumptive language wholesale into the current discourse field. But, that frame closes down the opportunity to address latent assumptions made in that source and, to that extent, conveys the articulations as appropriate representations of meaning in the appellate-level discourse field. This seems to me to be an unfair way for developing a discourse frame that, by necessity, references something internal to an individual. Ms. Gray is disassociated from her pain. Without factoring in her testimony, the majority's articulations exhibit an unreflective reinforcement of unfair assumptions made by a Tribunal adjudicator.

Although this process is in line with the emphasis in the majority decision on the fact that the legislature chose to leave the task of deciding whether a person meets the test of substantial disability to the Tribunal,¹⁵⁴ I am not convinced that it is the best way of approaching something as imprecise as the concept of a “substantial” impairment and restriction. The majority simply reinforces assumptions that the Tribunal made to find that Ms. Gray is not a “person with a disability”.

To me it seems that this strong deference to the Tribunal's frame of reference (whatever that may have been) has the potential to establish the unfair assumptions about meaning in the more influential field of appellate-level discourse.¹⁵⁵ Ultimately, the implicit language of the appellate-decision has the potential to reinforce and convey embedded assumptions about Ms. Gray and her experiences. Her testimony based on lived-experience is rendered less-valuable to consider (by determining that the Tribunal

¹⁵⁴ *Gray I*, *supra* note 135 at para. 12.

¹⁵⁵ Considerations about whether or not courts “ought” to defer to decisions of the Tribunal are outside the scope of my analysis. I understand that deference to Tribunals may be legally required. What I am discussing is the impact that this deference has the potential to have on the discourse based on the observations I have made.

was not wrong to make an inference based solely on an apparent lack of objective medical evidence).

Without framing their analysis with heightened consciousness that the Tribunal may have made assumptions when writing their decision, consciousness potentially raised by considering Ms. Gray's testimony, the majority of the Divisional Court misses the opportunity to construct a different kind of discourse about those in poverty. To a discourse analyst, these words matter in the wider frame of discourse because the way language is used to describe imprecise concepts in a legal field can have a profound influence on how the law is understood. Simply adopting assumptive-based language shuts down the possibility of considering a whole person when trying to understand how the law should be applied. While appellate-level courts must defer to a Tribunal's findings of fact, there is nothing to prevent a court from endeavouring to identify and expunge articulations that make disconnected assumptions about a person from their own discourse. The best tactic to do this is focus on articulations made by the person that has appealed the decision.

Ultimately the Ontario Court of Appeal rejects the approach of the majority to elevate objective medical evidence as the most important information when determining whether a person is a "person with a disability". Instead, the Court of Appeal favours an approach that takes account of the whole person by attending to his or her own testimony. This is in line with how the dissent at the Divisional Court approached the issue. Before analyzing the Court of Appeal decision, it is interesting to contrast the majority's language with that of the dissent at the Divisional Court. As I will show, those reasons are framed less by deference to the Tribunal decision-maker. As such, the reasoning provides a

different frame. As will be shown in the next section, this can lead to altogether different outcomes.

Dissenting Opinion

The dissenting opinion is structured differently than the majority decision. The decision begins by setting out the facts and history of the appeal in thirteen paragraphs.¹⁵⁶ In the body of reasons the dissent articulates that, in addition to the “chronic migraines” that were the focus of the majority decision, Ms. Gray also provided evidence of:

“[S]evere migraine headaches three to four times per month, lower back pain and neck pain”.¹⁵⁷ Those migraines, it is noted, required her to be hospitalized (at times),¹⁵⁸ and she was “regularly medicated” for her conditions.¹⁵⁹

These additional pain considerations were not articulated in the majority decision. It is also articulated that Ms. Gray has mild depressive symptoms (although her doctor did put a question mark after he checked that off on the form),¹⁶⁰ and also abdominal pain that her doctor describes as being fairly continuous and uncooperative.¹⁶¹ Given that those facts were on her initial application for ODSP but not articulated in the Tribunal's decision, important information about her experiences is not conveyed. Had there been no dissenting opinion in this decision, those factual elements of her application could have been altogether absent from any further consideration about what it does or does not mean

¹⁵⁶ Contrast this to the majority decision which launches right into a review of the medical evidence.

¹⁵⁷ *Gray I*, *supra* note 135 at para. 21.

¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*, at para. 26.

¹⁶¹ *Ibid.*, at paras. 23-24: note that the doctor uses the word “recalcitrant” instead of “uncooperative”.

to make the finding that Ms. Gray is not “substantially” impaired. I will show how consideration of these additional elements allows for a more inclusive analysis of Ms. Gray's claim.

The structure of the dissenting opinion provides a much more inclusive frame for considering Ms. Gray. The legal decision is framed by making Ms. Gray the central reference point for its reasons (in that it is her life and testimony that is first considered). In the dissenting opinion Ms. Gray's testimony (that was provided in the Tribunal appeal) is more fully reviewed, as is the full list of conditions that both she and her doctor identified. More importantly there is a palpable change in assumptions exhibited in articulations.

To begin, a much broader consideration of the range of her experiences as a person informs the reasons that are articulated. Indeed, the dissent actually introduces Ms. Gray to the discourse as a person directly connected to the appeal rather than a person disassociated with her pain. This is clear when the dissent articulates that:

“It must be confusing to Ms. Gray to read in two places in the Tribunal's reasons that the Tribunal found her testimony to be credible, when at the same time the Tribunal did not appear to accept her evidence...”¹⁶²

She is not merely referred to as the subject of the appeal; the dissent considers how she might have been affected by the Tribunal's reasons after the legal decision was made. This, I think, is a much more inclusive approach opened up by the different frame the dissent uses. As such, a more inclusive approach is conveyed into the discourse.

Instead of deferring to the Tribunal and thereby conveying the assumptions made in the

¹⁶² *Ibid.*, at para. 75.

Tribunal decision into the judicial discourse, the dissent considers Ms. Gray and her role in the proceedings. Further to this, the dissenting opinion is expressly critical of the particular Tribunal adjudicator that made the original decision (he is identified by name)¹⁶³ and the composition of the Tribunal.

“Tribunal members are lay people without any necessary medical training or expertise. They are not in a position to assess on their own the significance of any particular medical test being within “normal limits”. They must rely on a medical opinion to put that piece of information into context and perspective...”¹⁶⁴

By adopting this realistic view of the Tribunal, which acknowledges the inherent weaknesses of those members who compose it, the dissent successfully dislodges the assumptive language used by the Tribunal and does not make that language a part of the judicial discourse. *The Tribunal is not some unified institutional organism. References to*

¹⁶³ *Ibid.*, at para. 30.

¹⁶⁴ *Ibid.*, at para. 72. Here the dissent is referring to the Tribunal taking into account the significance that various medical tests were within “normal” limits. In the Tribunal decision it was noted that the objective medical evidence did not support Ms. Gray’s testimony and then (in the following sentence) explains “An eurolgist [*sic*] and a neurosurgeon indicated that all her tests were “within normal limits”. One of those tests was an E.E.G conducted in 1993 and one was an ultrasound of the uterus in 1997 (which predated subsequent surgery). The E.E.G note was made in a medical report that ultimately concluded that Ms. Gray did suffer from migraine headaches. The dissent concluded that the Tribunal finding that the 1993 E.E.G note that migraine headaches were “within normal limits” as supportive of the finding that Ms. Gray was not restricted in her activities due to headache pain was a misinterpretation of the evidence.

Further, Ministry counsel appearing before the divisional court had taken the position that the various references to Ms. Gray’s “common migraines” were indicative of those headaches being “regular” and therefore not meeting the “disability” threshold. According to the dissent, this too constituted a misinterpretation of the evidence. The dissent points out that, while the Tribunal is tasked to interpret and apply the legislation, that process is fraught with dangers. To guard against this, the dissent is of the opinion that meaning-making must be contextualized with reference to sources of meaning. On that basis, determinations of meaning according to medial evidence requires Tribunal members to take care to not assign their own meanings to the words. On that reading, the medical evidence supported that Ms. Gray had migraines and due consideration of her testimony would have better contextualized the meaning of the objective medical evidence.

*the Tribunal as a unified body ignore the individual human element of its organization.*¹⁶⁵

*The wording of the dissenting decision emphasizes that the Tribunal is comprised of individual (lay) people and should be understood as such. The component parts of the Tribunal (the people) are not perfect abstractions of a well-functioning institution. Thus, the role of the Courts is to review the decisions that the decision-maker makes.*¹⁶⁶

Essentially the dissent's decision says to the Tribunal member: contextualize the meanings you derive from that which you are presented. The Tribunal is there to make a discretionary assessment of the substantiality of impairments and restrictions. By framing the considerations as they have, the dissenting reasons make space for consideration of individual experiences so that the Tribunal may contextualize their meaning-making with reference to the testimony that is provided to them.

Indeed, the dissent found the Ministry's argument that conclusions about the meaning of “common migraines” was doubly alarming¹⁶⁷ because the Ministry

“May be involved in the training of Tribunal members regarding the legislative framework for their decision-making ... [this] exemplifies the dangers inherent in a layperson going beyond the opinion offered in a medical report and attempting to assign meaning on his or her own to medical terminology or laboratory results referred to in the report.”¹⁶⁸

¹⁶⁵ I realize I have done this here when referring to the judicial-level decisions. However, this is to facilitate an easier discussion and is not meant to make an institutional value-judgement about different bodies. Further consideration of this issue is beyond the scope of my thesis. By laying-bare my own assumptions I am deliberately opening up the field to challenge the assumptions I have displayed in my research.

¹⁶⁶ Here I am raising a flag about deference, but wish to avoid further consideration about the degree of legal legitimacy such deference does or should satisfy.

¹⁶⁷ *Gray I*, *supra* note 135 at para. 73.

¹⁶⁸ *Ibid.*, at para. 73. Again the issue is with requiring meaning-making to be contextualized with reference to well-informed articulations.

This articulation draws attention to the dangers of a layperson attempting to assign uninformed meaning to words he or she may not completely understand. In this thesis, that is an important point. In this context, the dissent is emphasizing that meaning-making in law can be dangerous when not framed (or constrained) by information emanating from the evidence. For the majority, a frame of unreflective deference precluded direct confrontation of the assumptions being made about meaning at the Tribunal level. In the dissenting opinion, the frame expands to emphasize that a more inclusive approach to meaning-making is necessary. As I will show, this frame also leaves space open for the dissent to get away from reinforcing the Tribunal's assumptions about Ms. Gray by emphasizing that consideration of her testimony is warranted. This conveys that her testimony is a valuable source to inform understanding of whether she is a person with a substantial disability.

Having pointed out the Tribunal's shortcomings and rejected the need to unreflectively defer to the member's articulations, the dissent adopts an approach to the appeal that is based on the express words of the legislative text. The focus is on the imprecise meaning of the word “substantial” as it appears in clause 4(1)(a) and 4(1)(b) of the ODSPA:

A person is a person with a disability for the purpose of this Part if,

- (a) the person has a substantial physical or mental impairment that is continuous or recurrent and is 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; ...

The dissent says that the meaning of the word “substantial” is to be understood by “its ordinary meaning in the context of the phrase [in the legislation].”¹⁶⁹ This meaning is informed by other case law.¹⁷⁰ As was discussed in section 2.3 and 2.4 of this thesis, the concept of “ordinary meaning” does not do much to constrain the practice of judicial (or, by extension Tribunal), meaning-making. As already mentioned, articulations that adopt the language of another strand of discourse reinforce whatever assumptions were made in that discourse.¹⁷¹ Different sources come laden with assumptions about meaning. By referencing language already made in judicial discourse, the dissent is at least abiding by legal principles of judicial authority without reinforcing possible assumptions in external sources.

The dissent expressly articulates that “substantiality” is to be determined by taking account of the appellant's age, education and work history¹⁷² “in a manner consistent with the purposes of the Act, set out in s. 1.”¹⁷³ It is also emphasized that the imprecision of language is ultimately to be understood according to “[the] remedial nature of the statute”. This, they say, means that the statute's language should be “given such fair, large

¹⁶⁹ *Ibid.*, at para. 39, 42.

¹⁷⁰ Specifically it is informed by the decision in *Meyer v. Bright* (1993), 15 O.R. (3d) 129 (C.A.) where the Ontario Court of Appeal had to consider the term “serious impairment of an important bodily function” in s. 266(1)(b) of the *Insurance Act*, R.S.O. 1990, c. I.8. The Court noted that the legislature had not chosen to express itself in difficult or technical terms, but instead had used words which are common and in everyday use. It considered it undesirable to seek hidden meanings for such common and ordinary words as “serious” and “important”. (at 136) As well, it considered it inappropriate to search for a synonym to each word as a key to understanding what the legislature had meant by the word. [*Gray I*, *supra* note 135 at para. 39].

¹⁷¹ See *supra* note 153.

¹⁷² *Gray I*, *supra* note 135 at para. 34 of the decision citing from 4(1).

¹⁷³ *Ibid.*

and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its intent, meaning and spirit".¹⁷⁴ A proper assessment of whether a person meets the imprecise threshold for “disability” established in the legislative text (substantial impairment and restrictions) requires (a) taking account of the person's lived-experiences as provided for on their application to ODSP and in their testimony on appeal, (b) taking account of the purposes of the Act set out in section 1 (here, the talk is about the ODSPA),¹⁷⁵ and (c) understanding the law as remedial. In this case, the principle was articulated that imprecise words are to be given a fair, large and liberal interpretation to ensure the Act's intent, meaning and spirit are obtained.

While deference to the Tribunal is an important principle to guide decisions, that deference can be approached differently. By drawing articulations from judicial authority and engaging in statutory interpretation, the dissent frames the approach for the Tribunal to “make meaning” out of the word “substantial” without illegitimately constraining the flexibility required for the Tribunal to perform its separate decision-making function. This decision emphasizes that it is important for the Tribunal to consider meaning with reference to the information it has been provided. My analysis also reveals how the more the Tribunal connects what they say to the information from the medical reports and Ms.

¹⁷⁴ *Interpretation Act*, R.S.O. 1990, c. I.11, s. 10. Note that the wording of this Act has been changed in the new *Legislation Act, 2006*, *supra* note 2 to “An Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures the attainment of its objects.” (Consistent with the current federal interpretation legislation. See *infra* note 194.) Note that this legislative provision deems all legislation remedial, not just legislation of a certain nature (e.g. “benefits-conferring” legislation). Thus, the rule mandates all legislation be given this form of interpretation.

¹⁷⁵ ODSPA, *supra* note 26 at s. 1

The purpose of this Act is to establish a program that,

- (a) provides income and employment supports to eligible persons with disabilities;
- (b) recognizes that government, communities, families and individuals share responsibility for providing such supports;
- (c) effectively serves persons with disabilities who need assistance; and
- (d) is accountable to the taxpayers of Ontario.

Gray's own testimony the less latent assumptions they unwittingly exhibit.

The words of the text accommodate a “whole person” assessment that requires taking account of lived-experience and the object and purpose of the legislation as valuable sources of information when making meaning of the imprecise words. The test for “disability” is to be approached by accounting for the experiences of the whole person, as a whole person, and then making an assessment of whether he or she is substantially impaired and restricted. The broad frame accommodates attentiveness to experiences and the decision is given legitimacy by being anchored to the text. It focuses articulations on lived experiences and balances against considerations under the purpose section of the Act. In essence, the approach to the law is recognized as necessitating the consideration of individual experiences when the Tribunal determines whether an ODSP applicant is eligible for ODSP or will remain on Ontario Works.¹⁷⁶

Without discourse research, it is tougher to actually show how experiences are a helpful source for informing the law. The words are in reference to someone. It is also harder to talk about why consideration of lived-experiences matters in legal decisions. They can balance the discourse or force open new conditions of possibility for understanding *things*. The references to a person, while not “legally-binding principles”, have the potential to convey biased and under-informed assumptions about people who receive social assistance into the judicial discourse. This closes down the potential for an unbiased understanding of the law. In the next section I will turn to the Court of Appeal

¹⁷⁶ Note that I am not talking about whether or not the Tribunal made a substantively right or wrong decision about Ms. Gray's application for ODSP. What I am indicating is that the language of the majority decision was indicative of assumptions about meaning that worked against Ms. Gray. Such articulations have the potential to shape the judicial discourse in a way that makes it harder to impartially understand the experiences of applicants that appear before the Tribunal.

decision to attempt to make clearer how focus on experiences can raise consciousness so as to oppose bias and assumptions. This I will do by using the tool of oppositional narrative. In this way I hope to illustrate how taking account of lived-experience is a version of this tool that could be used in the practice of judicial meaning-making to dissuade under-informed bias from colonizing the discourse.

4.2.b *Gray: Court of Appeal*

The Court of Appeal unanimously endorsed the dissenting approach from the Divisional Court's decision.¹⁷⁷ Ultimately the Court of Appeal makes two important conclusions. First, it concludes that the Tribunal failed to comply with its statutory requirement to give adequate reasons. Second, it concludes that the Tribunal had failed to ask itself the proper question when considering the test for disability. Given that these two findings constituted errors of law, the Court of Appeal holds that the Tribunal was not entitled to deference. The appeal is allowed and sent back to the Tribunal for reconsideration with the explicit direction that the Court is satisfied that Cassie Gray is a person with a disability. These conclusions are important because they are an authoritative source of recognition of the importance of making a fully-informed assessment of a person. The decision confirms that the test for disability is to be approached by accounting for the experiences of the whole person, as a whole person, and then making an assessment of whether he or she is “substantially” impaired and restricted.

¹⁷⁷ *Gray 2*, *supra* note 135 at para. 7. For this reason, I will also provide a less thorough discourse analysis.

The Court of Appeal decision begins by setting out the text of section 4 of the ODSPA which is the relevant provision for the test for disability.¹⁷⁸ The Court then reproduces almost the entire text of the Tribunal decision (which is quite brief).¹⁷⁹ In so doing, the Court conveys that Ms. Gray's own testimony (as conveyed by the Tribunal) is a part of their consideration. The Court also recognizes that the dissent's use of Ms. Gray's testimony is a “more accurate description in relation to the nature of the health problems”.¹⁸⁰ In particular, the Court expresses agreement with the importance of considering an applicant to ODSP in the context of his or her own situation.¹⁸¹ This gives further support to the important point that personal experiences such as an individual's pain are a vital source of information when making an assessment of that experience.

The Court of Appeal follows up on these considerations by articulating the constraining features on the actual determination of whether a person is “substantially” “disabled”.¹⁸² The Court endorses that the approach requires the Tribunal to take account of (a) the elements of the Act set out in section 1 with a mind to (b) the nature of the legislation to the effect that (c) the statutory construction resolves by imprecise words being given a fair, large and liberal interpretation to ensure the Act's intent, meaning and

¹⁷⁸ ODSPA, *supra* note 26 at s. 4(1) A person is a person with a disability for the purposes of this Part if,
 (a) the person has a substantial physical or mental impairment that is continuous or recurrent and expected to last one year or more;
 (b) the direct and cumulative effect of the impairment on the person's ability to attend to his or her personal care, function in the community and function in a workplace, results in a substantial restriction in one or more of these activities of daily living; and
 (c) the impairment and its likely duration and the restriction in the person's activities of daily living have been verified by a person with the prescribed qualifications.

¹⁷⁹ Note that this brevity is not exceptional as far as Tribunal determinations of whether a person qualifies as a “person with a disability” go.

¹⁸⁰ *Gray 2*, *supra* note 135 at para. 7 and see “and I repeat the Tribunal emphasized she was a credible witness” *Gray 2*, *supra* note 135 at para. 25.

¹⁸¹ *Ibid.*, at para. 8.

¹⁸² I noted at section 2.3 and 2.4 of this thesis how “constraints” (such as those that purport to proscribe the practice of statutory interpretation) are never stable and cannot lead to a specific outcome due to the natural imprecision of language.

spirit are respected. Harkening back to discourse theory, this raises questions such as:

What *are* the “elements of the Act” the “nature of the legislation” and “a large and liberal interpretation”? Yes, this references the words in the text, but what do those *things* mean?

For a discourse theorist, what these *things* mean is based on what people say and what others accept those things to mean. In other words, “meaning” is constructed from (and constrained by) a discourse.¹⁸³ I shall continue to look at the discourse for this reason. The Court articulates that:

“As remedial legislation the ODSPA should be interpreted broadly and liberally and in accordance with its purpose of 'providing support to persons with disabilities'. Section 10 of the *Interpretation Act, R.S.O.*

1990, c. 1.11 provides:

Every Act shall be deemed to be remedial ... and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit.”¹⁸⁴

It is my view that as social welfare legislation, any ambiguity in the interpretation of the ODSPA should be resolved in the claimant's favour.”

The Court of Appeal makes it more explicit that social welfare legislation, by virtue of its “social welfare” nature, should be interpreted in a manner that resolves

¹⁸³ As I mentioned in section 1.3 of this thesis when taking a step back to look at how most *things* written or talked about in law seem conceptually ambiguous. The basic tenet of discourse theory is that meaning is imprecise and constructed and understood through the interface of discourse. See section 1.5 especially *supra* note 47.

¹⁸⁴ Contrast to present day “an Act shall be interpreted as being remedial and shall be given such fair, large and liberal interpretation as best attains its objects”. This change of wording was effected in 2007 (S.O. 2006, c. 21, Sched. F, s. 64, in force July 25, 2007 (O. Gaz. 2007 p. 2307).

ambiguities of words in favour of the claimant.¹⁸⁵ This articulation is informed by other judicial case law. Specifically the Court of Appeal uses a Supreme Court decision that articulates an important principle about other “benefits-conferring” legislation:

“Since the overall purpose of the Act is to make benefits available to the unemployed, I would favour a liberal interpretation. ... I think any doubt arising from the difficulties of the language should be resolved in favour of the claimant.”¹⁸⁶

The wording of a different Supreme Court of Canada decision is also used:

“[W]ith regard to the scheme of the legislation, since the [*Employment Standards Act*, R.S.O. 1980, c. 137] is a mechanism for providing minimum benefits and standards to protect the interests of employees, it can be characterized as benefits-conferring legislation. As such, according to several decisions of this Court, it ought to be interpreted in a broad and generous manner. Any doubt arising from difficulties of language should be resolved in favour of the claimant.”¹⁸⁷

Finally, the Court of Appeal uses a different Court of Appeal decision about social assistance legislation, expressing:

“[T]he principle of construction ... applicable to social welfare legislation ... is, where there is ambiguity in the meaning of a statute, the ambiguity should be resolved in favour of the applicant seeking benefits

¹⁸⁵ *Gray 2*, *supra* note 135 at para. 9 – 10.

¹⁸⁶ *Ibid.*, at para. 11 citing from *Abrahams v. Canada (Attorney General)*, [1983] 1 S.C.R. 2 at 10, Wilson J. writing with respect to the *Unemployment Insurance Act*:

¹⁸⁷ *Ibid.*, at para. 11; *Rizzo*, *supra* note 78 at para. 36.

under the legislation.”¹⁸⁸

Again, these articulations emanate from the judicial discourse. To the extent they contain assumptions, they are at least assumptions more familiar to the legal actors that speak and understand them. In the result of *Gray*, the Court of Appeal disagrees with the Tribunal and the majority decision of the Divisional Court and articulates that it is “satisfied that [Ms. Gray] is a person with a disability within s. 4(1) of the ODSPA”.¹⁸⁹ The matter was referred back to the Tribunal. No appeal was sought by the Ministry.

In the result the meaning of “substantial” is left broad (it is “less than severe”).¹⁹⁰ The “flexible meaning related to the [individual's circumstances]” is constrained by the direction that it must be “consistent with the purposes of the Act”.¹⁹¹ The wording confirms that the proper approach to determining whether a disability is “substantial” is to take a broad view of meaning, but one that is limited by certain considerations. In my view, it is these considerations that can act as constraints in the Tribunal decision-making process.¹⁹² The individual's circumstances and the purpose of the Act are themselves imprecise, as is nearly all concepts that must be articulated in the process of

¹⁸⁸ *Gray 2*, *supra* note 135 at para. 10: citing from *Wedekind*, *supra* note 115 at 296-297, this court stated: “[T]he principle of construction ... applicable to social welfare legislation ... is, where there is ambiguity in the meaning of a statute, the ambiguity should be resolved in favour of the applicant seeking benefits under the legislation.”

¹⁸⁹ *Gray 2*, *supra* note 135 at para. 27.

¹⁹⁰ To be eligible for Canada Pension Plan Disability Benefits a person must have a severe and prolonged medical condition. The test for disability under the ODSPA has a lower threshold. The Ontario Court of Appeal decision talks about the ODSPA test being more flexible and related to the varying circumstances of the case (at para. 16; also see para. 8 where the Court of Appeal expresses particular agreement with a decisions standing for the principle that the Tribunal is entitled to consider an applicant in their own situation). The test under ODSPA is also described by the Ontario Court of Appeal as “more generous” than the previous FBA (at para. 13).

¹⁹¹ *Gray 2*, *supra* note 135 at para. 10.

¹⁹² As I mentioned in section 2.3 and 2.4 of this thesis, “constraints” (such as articulated “rules”) are themselves imprecise and never govern the outcome. However, from a discourse perspective, articulating that something was considered conveys that something can be considered. This understanding is encouraged and constrained by the interface of discourse. It shapes “appropriateness”.

communication. Thus, the concern of the discourse theorist is what those *things* mean, based on what people say and what others accept those things to mean because that “meaning” is the interface of discourse.¹⁹³

In applying the discourse analysis to the Court of Appeal decision, I am illustrating why informed meaning-making is important in the judicial discourse about social assistance legislation. The Court of Appeal decision confirms that the imprecision of words provide (important) flexibility in the Tribunal's application of the law. However, it is also recognized that the practice of Tribunal meaning-making (which is a requisite practice *because* of the imprecision of the words) must be constrained through consideration of the information provided. As remedial,¹⁹⁴ benefits-conferring legislation, the interpretive approach underscores the value of using lived-experience as a source of information when framing how to apply the law.¹⁹⁵

I am not going so far as to try and make an assertion here that, based on the unifying feature of discourse theory that “all words are imprecise” that every resolution (or articulation) of ambiguous meaning in social assistance legislation should be favourable to the claimant. I am using this discourse analysis to argue for the value in articulating the lived-experience of individuals when deciding their claims to balance against assumptions being made about their relative position. Such consideration should

¹⁹³ As I mentioned in section 1.3 of this thesis most *things* that are written about or talked about in law seem conceptually ambiguous.

¹⁹⁴ It should be mentioned that all legislation is technically “remedial” in nature. See for example *Legislation Act, 2006*, *supra* note 2; *Interpretation Act*, *supra* note 174 at s. 12.

¹⁹⁵ While the purpose of the ODSPA is described in *Gray* as providing support to persons with disabilities, it should be remembered that Ms. Gray has not technically been found to be a person with a disability. Still, taking account of her experiences was valued as an important aspect for determining whether she experienced “substantial” impairments and restrictions because of the purpose of the Act (to provide support) and the object of the Act (benefits-conferring), notwithstanding that at this point she had not been determined to be a “person with a disability” according to the ODSPA.

be exhibited in the Tribunal's reasons when a decision is rendered. It should be adequately conveyed through appellate-level decisions.

In my experiences practicing poverty law, the factors that affect Ms. Gray: low education, lack of job skills, lack of local employment, lack of access to rehabilitation services/care, lack of access to training as well as the unmentioned lack of jobs suitable to accommodate her impairments and restrictions, lack of reliability because of pain or mental illness, lack of transportation, lack of technological experience (having not grown up with computers and an inability to purchase and learn how to use one) blur the line between disability and poverty.¹⁹⁶ These conditions of poverty can often reduce the likelihood persons supported by social assistance are able to work and participate in their communities.¹⁹⁷

This is why words matter. It is clear that there are many assumptions that threaten to colonize the discourse about social assistance legislation. As the assumptions are established and reinforced in the discourse they could impact how the meaning of

¹⁹⁶ Many Northern Ontarians have been steadily employed for a number of years in the lumber industry. Now, with a decrease in demand for lumber and a gradual deterioration on physical health brought on through working that job many people find themselves out of work and under-equipped to overcome the challenges of the modern work-world. People do not have computers; some do not even have phones. People have not developed the coping skills required to sit at a desk in an office all day even if there was suitable work. In rural Ontario, there are limited jobs of the kind typically pictured when an urban person thinks of 'work'. Employers do not want to hire a 40 or 50 year old ex-lumber worker, with low education and no relevant skills, where the ex-lumber worker is in a deteriorated physical condition that often makes him or her uncomfortable, unreliable, or even quick to anger. Under the previous legislation such persons may have qualified under the “permanently unemployable” category.

¹⁹⁷ In December 2004, Deb Matthews, Parliamentary Secretary to the Minister of Community and Social Services, released her *Review of Employment Assistance Programs in Ontario Works and Ontario Disability Support Program*, online:
<http://www.mcsc.gov.on.ca/documents/en/mcsc/social/publications/EmploymentAssistanceProgram_Matthews_eng1.pdf>. This Report comments on the issue of eligibility under the ODSPA:

“A significant number of [Ontario Works] clients should, in fact, be ODSP clients and indeed would have been prior to 1998. I argue that these people, while they have much to contribute to society in general, are highly unlikely to ever maintain permanent, full-time employment due to multiple barriers.”

imprecise “things” are understood. The unfair assumptions about meaning that are revealed in the decision about Ms. Gray serve to emphasize that word-use matters. Discourse analysis aims to expose and challenge latent assumptions in words that are used. The best way to guard against unfair assumptions of language is to make lived-experience a critical component of the discourse.

This decision raises a key question. If the broad approach to the interpretation of a meaning is to be limited by considering an individual with reference to the purpose and object of the Act, what do those things *mean*? In other words, how have concepts related to the individual's circumstance and the purpose of the Acts been portrayed in the discourse. The OWA and ODSPA are both benefits-conferring legislation that have been described as “twin components of the Ontario government's scheme for delivering social assistance to deserving applicants”.¹⁹⁸ The important point is not that the programs are different, it is that they are part of an interconnected system of social support offered to individuals in need. Most people who appear before the Tribunal on appeals about denial of ODSP eligibility are on Ontario Works. If the “test” for disability requires taking account of the individual with a mind to the purpose of “providing support for persons with disabilities”, I am curious as to how subsequent discourse may construct (and constrain) those concepts. The next stage of this discourse analysis will look at how the discourse constructs *division* between those who are considered “disabled” and those who are not. Again I will use the tool of oppositional narrative.

¹⁹⁸ *Tranchemontagne S.C.C. RI, supra* note 65 at para. 18.

4.3 Tranchemontagne¹⁹⁹

In this section, I will show how assumptions embedded in political articulations have been reinforced in judicial discourse. In attempting to differentiate the purpose and object of the ODSPA and OWA the Supreme Court of Canada has reinforced uninformed assumptions about the deserving and undeserving poor. *Tranchemontagne* has a complicated case history. It is an appeal from a decision denying ODSP benefits to two applicants on the basis of a provision in the ODSPA that rendered people with restrictions solely resulting from alcohol and drug addiction/dependency ineligible for the program.²⁰⁰ Robert Tranchemontagne and Norman Werbeski were the applicants who had been denied ODSP under that provision. At the Tribunal-level, they had both argued unsuccessfully that the provision in the ODSPA upon which the ineligibility decisions had been based was contrary to the anti-discrimination provisions of the Ontario *Human Rights Code* (the Code).²⁰¹ Ultimately, the Tribunal had declined to assert the paramountcy of the Code

¹⁹⁹ *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513 [Tranchemontagne S.C.C. RI], rev'g (2004), 72 O.R. (3d) 457 (C.A.) [Tranchemontagne C.A. RI], which rev'd [2003] O.J. No. 1409 (QL) (Div. Ct.) (*sub nom. Werbeski v. Ontario (Director, Disability Support)*) [Tranchemontagne Div. Ct. RI]; *Ontario (Director, Disability Support Program) v. Tranchemontagne*, [2010] O.J. No. 3812 (C.A.) (QL) [Tranchemontagne C.A. RII], aff'g *Ontario (Director, Disability Support Program) v. Tranchemontagne*, [2009] O.J. No. 1613 (QL) (Div. Ct.) [Tranchemontagne Div. Ct. RII].

²⁰⁰ Specifically ODSPA s. 5(2) expresses that:

A person is not eligible for income support if,

- (a) the person is dependent on or addicted to alcohol, a drug or some other chemically active substance;
- (b) the alcohol, drug or other substance has not been authorized by prescription as provided for in the regulations; and
- (c) the only substantial restriction in activities of daily living is attributable to the use or cessation of use of the alcohol, drug or other substance at the time of determining or reviewing eligibility

²⁰¹ See *The Code*, RSO 1990, c H.19 [the Code] at s.1: "Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability."

Mr. Werbeski and Mr. Tranchemontagne argued that the Tribunal was required to give effect to the Code under section 47(2) of the Code which expresses:

over section 5(2) of the ODSPA.

In the first round of appeals, the issue was whether the Tribunal had jurisdiction to consider and apply the Code under its enacting legislation. It was questionable whether the Tribunal had the power to declare a provision in its own legislation inoperable under the Code. In the second round of appeals, the issue was whether the ODSPA provision that denied eligibility based on alcohol and drug addiction/dependency itself contravened the Code and was therefore inoperable.

4.3.a Round One, Tranchemontagne: Divisional Court

After arguing their cases separately at the Tribunal, Mr. Tranchemontagne and Mr. Werbeski's appeals were merged at the Divisional Court. In a short oral judgment the Divisional Court affirmed the Tribunal decision that it did not have jurisdiction to consider Code arguments. The Divisional Court found that although the Tribunal could use the Code to interpret its enabling legislation, it could not "ignore its enabling legislation".²⁰² The Court noted that the Tribunal did not have expertise in addressing human rights issues nor did its procedures appear appropriate for resolving such questions.²⁰³ They concluded that the Code conflict should be determined by a court or other tribunal with jurisdiction, expertise and procedures "sufficient to develop a full record and analysis to adequately address [Code arguments]".²⁰⁴

That decision was appealed by Mr. Tranchemontagne and Mr. Werbeski to the

(2)Where a provision in an Act or regulation purports to require or authorize conduct that is a contravention of Part I, this Act applies and prevails unless the Act or regulation specifically provides that it is to apply despite this Act.

²⁰² *Tranchemontagne Div. Ct. RI, supra* note 199 at para. 3.

²⁰³ *Ibid.*, at para. 4.

²⁰⁴ *Ibid.*, at para. 6.

Court of Appeal. The Tribunal intervened in that appeal.

4.3.b Round One, Tranchemontagne: Court of Appeal

The Court of Appeal decision begins by setting out the evolution of the legislation with reference to the differences between the previous legislation and the present legislation. It distinguishes the previous *General Welfare Assistance Act* (GWA) and the *Family Benefits Act* (FBA) from the current OWA and ODSPA. In order to do this, the decision makes reference to a government document entitled Blueprint: Mike Harris' Plan to Keep Ontario on the Right Track²⁰⁵ and comments made by the Minister of Community and Social Services, Janet Ecker, when she told the Legislative Assembly “that reliance on general welfare is inappropriate for persons with disabilities...”²⁰⁶

The Court continues to reference Minister Ecker's statements:

“... For many years, people with disabilities in Ontario have said that their needs were not being met through the welfare system. They said that it was time for governments to focus on the supports that they required to participate fully in Ontario society. Our government agreed...”²⁰⁷

“This new program removes people with disabilities from the welfare

²⁰⁵ *Tranchemontagne C.A. RI, supra* note 199 at para. 9: “The provincial government described its welfare reform initiatives, and indicated that it had consciously moved persons with disabilities from the general work-for-welfare scheme and into a more generous support program tailored for their needs...” While “moving people to a more generous support program tailored for their needs” may have been the reason that the government reformed the system, this is not a fundamental difference between the two statutes. As I will show, the Supreme Court in *Tranchemontagne* articulates that the ODSPA and OWA are “twin components of the Ontario government's scheme for delivering social assistance to deserving applicants” (see *Tranchemontagne S.C.C. RI, supra* note 199 at para. 18). My concern is that this articulation – notably, one made by a political actor/speaker – that the disability program is a “more generous support program” has the potential to become reinforced in the discourse as related to the purpose of the legislation.

²⁰⁶ *Tranchemontagne C.A. RI, supra* note 199 at para. 9- 10.

²⁰⁷ *Ibid.*, at para. 10, citing from Minister Ecker in Hansard.

system, where they should never have been in the first place, and it creates for them an entirely separate system of income support...”²⁰⁸

*What is need? Whether the welfare system meets needs or not depends on how the concept of “need” is framed. While some groups may be able to raise a collective voice that they need support, others cannot. It is notoriously difficult to organize the poor so that their needs may be conveyed to others.*²⁰⁹

The language in these political statements have not been the subject of legislative review. Further, the articulations are embedded with assumptions that the welfare system (Ontario Works) is awful and the government needed to step in to rescue certain people from it. This is reinforced through judicial articulation into the legal field. This language could close down the opportunity for participants in the discourse (e.g. Tribunal decision-makers) to understand individual recipients of Ontario Works and ODSP as equally worthy of social respect and support when appealing a decision.

By conveying the political articulation that ODSP is an “entirely different” social support system into the judicial discourse, the judiciary strays from their own discourse strand and conveys that there are actually two social assistance systems in Ontario. This, I think, is wrong. The programs have two separate purposes, and those differences require reference to the text (not political talk articulated after the legislation was proclaimed).

²⁰⁸ *Ibid.*

²⁰⁹ See Norman Fairclough, “Critical Discourse Analysis in trans-disciplinary research on social change: transition, re-scaling, poverty and social inclusion”, (28 April 2008) *Lodz Papers in Pragmatics* 1 at 51: Extreme poverty tends to become chronically established in marginalization and social exclusion, so that possibilities for escaping from a situation of poverty become insignificant. See also Eardley, *supra* note 58 “despite growth in the poverty lobby since the 1980s it is regarded as relatively weak and fragmented with little ability to mobilize the poor”.

Sticking with the Minister's comments, the Court continues:

“... ODSP [S]upports [t]o [E]mployment²¹⁰ focus solely on the needs of people with disabilities who want to prepare for employment, find work and keep a job. These supports provide people with disabilities with real help in overcoming barriers to seeking, obtaining and keeping employment...”

“... The proclamation of the Ontario [D]isability [S]upport [P]rogram marks the start of a new era of fairer treatment and more opportunity for people with disabilities. ...' Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 019A (2 June 1998) at 970-71 (Hon. Janet Ecker).”²¹¹

In the first instance the language may close off understanding that people receiving Ontario Works also need “real help” in order to overcome barriers to employment. This has the potential to reinforce assumptions that people on Ontario Works are lazy and unemployed by choice. The workfare requirements (education, job training, experiential learning) are meant to provide support to non-disabled persons to prepare for employment, find work, and keep a job too.

The language also risks conveying that social assistance recipients who receive Ontario Works do not warrant equally fair treatment (note the use of the word “fairer”) or more opportunity. While the word may have been used to convey that the legislation is

²¹⁰ This is an employment support program for those eligible for ODSP.

²¹¹ *Tranchemontagne C.A. RI, supra* note 199 at para. 9- 10.

designed to provide different supports to ODSP recipients based on their needs, the use of the word “fairer” might be problematic in the everyday decisions made at the Tribunal. For example, when the word “fairer” is used to value conduct, actions, methods, arguments, etc., the meaning is “free from bias, fraud, or injustice; equitable; legitimate, valid, sound”.²¹² When the word is used to describe conditions, circumstances, etc., the meaning is “providing an equal chance of success to all; not unduly favourable or adverse to anyone.”²¹³ This need not be an element of a legal understanding of the legislation, especially when the programs are so intertwined.

I query whether this description of difference is helpful in developing a judicial discourse about social assistance legislation. The risk is that political language (used by a political actor after the legislation passed) will be anchored to partisan ideas which are embedded with assumptions about impoverished individuals who are “deserving” of fairer treatment and more opportunity versus impoverished individuals that are “undeserving” of fairer treatment or more opportunity. By unreflectively referencing this language and conveying it into the discourse, there is a risk that these ideas will shape the judicial discourse. When this articulation is made in the context of talking about the differences between the OW and ODSP it may reinforce an understanding that persons supported by OW do not require the same level of unbiased, equitable treatment or that they should have an equal claim to social assistance support. This would be a problematic understanding of the law at the Tribunal-level, where applicants to and recipients of both OW and ODSP appeal decisions about eligibility and income that are

²¹² OED, *supra* note 145, s.v. “fairer”.

²¹³ *Ibid.*

made by the government.

The result of the Court of Appeal decision was a finding that the Tribunal had jurisdiction to hear Code matters (the Divisional Court had made an opposite finding). However, given the host of reasons that the Divisional Court had also noted as the basis for their finding (e.g. the non-binding effect of decisions, the lack of a proper record, the private nature of hearings, the lack of transparency in the decision-making process, and there being a lack of expertise in that Tribunal which would undermine the ability of it to achieve the “speedy administration of justice”),²¹⁴ the Court of Appeal found that the Tribunal was not the appropriate forum to deal with Code violations. This decision was appealed to the Supreme Court of Canada.

4.3.c Round One, Tranchemontagne: The Supreme Court

The Supreme Court of Canada split by 4 – 3 on the issue. The majority agreed with the Court of Appeal that the Tribunal has concurrent jurisdiction to apply the Code. However, they found that this does not give rise to a question about appropriate forum.

Majority Decision

The majority decision begins with a statement that:

“It is clear that the ODSPA and 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

²¹⁴ *Tranchemontagne S.C.C. RI, supra* note 199 at para. 41.

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).”²¹⁵

This articulation, you will note, conveys that the programs serve very different goals. It does not convey that there are two entirely separate social assistance systems in Ontario and that the individuals are to be treated very differently. This articulation is conveyed with reference to the purpose (as stated in the legislative text), not some external policy material talking about reforming certain aspects of the social assistance system (namely, improving the support to those who are found by the Tribunal to be “disabled”). By sticking to the legislative text as the source of meaning, the majority of the Court ensures that articulations made in the political discourse (which may convey misunderstandings about the system and the program) are not conveyed into the judicial discourse.

The majority continues talking about the separate purposes of the legislation by using Minister Ecker's statement that:

“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 and came into force:

'The 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*

²¹⁵ *Ibid.*, at para. 3.

Debates, No. 19A, June 2, 1998, at p. 971).”²¹⁶

You will note that the majority previously recognized that some policy difference can be gleaned from the text. The above articulation conveys that the ODSPA and OWA having operationalized two entirely separate systems of support. This creates a discursive need to articulate the ways the systems are different, which means the similarities of the test (needs and service) can be undermined through a process of differentiation. As noted previously in section 2.2, the programs are deeply intertwined. As was also noted above,²¹⁷ the language used by Minister Ecker when referencing the social assistance system may reinforce assumption-based considerations that elevate people with disabilities at the expense of those who are “able bodied”. That could be problematic for a Tribunal member's understanding of how to apply the OWA or ODSPA in an individual appeal,²¹⁸ especially is conceiving of the two programs as two completely “different” systems.

The systems are not different. The majority recognizes that:

“The ODSPA and OWA are twin components of the Ontario government's scheme for delivering social assistance to deserving applicants. ODSPA deals with disabled applicants, while the OWA provides assistance for eligible applicants who are not disabled. Reference can be made to the opening sections of each statute in order to discern the policy differences

²¹⁶ *Ibid.*

²¹⁷ See section 4.3.b of this thesis.

²¹⁸ This matters when interpreting and applying the imprecise language of the legislation to individual circumstances. For example, you will recall from *Gray* that the test to qualify for ODSP is to be understood broadly but limited according to the purposes of the Act. The language dividing the purpose of the legislation above may change how the person-centered approach is understood. To really understand social assistance legislation it is critical that individual lived-experience be accounted for. by express consideration

between the two.”²¹⁹

Here the majority uses the language of having to “deal with disabled applicants”. While this may be a common phrase used in the legal field, it matters who or what is said to be “dealt with”. For example, you might understand me as making two different kinds of articulations depending on whether I say “I am dealing with poverty” versus “I deal with the poor”. In my experience, the thought that individuals on social assistance are a “problem” to be “dealt with” is quite common.²²⁰ The articulation has the potential to reinforce that thinking. As I will show, the dissent gets around this by making reference to the Tribunal's creation in order to “hear appeals” in order to “deal with the system”.

Dissenting Opinion

The dissent in the Supreme Court emphasized that the legislature had expressly precluded the Tribunal from having *Charter* jurisdiction to determine the constitutional validity of an ODSPA provision.²²¹ In their opinion that meant that the legislature intended to remove the Tribunal's power to make legislation of no effect, period. In this portion of the decision, the political material is not referenced as a source of meaning at all. Instead, the dissent's reasons frame the approach to the issue as one of statutory interpretation (thereby exclusively referencing the text).

²¹⁹ *Ibid.*, at para. 18.

²²⁰ Note the column recently published in the Windsor Star entitled “Don't Encourage Street Pests” about people who have turned to asking for money on the streets in order to make ends meet. The title of the article itself draws on assumptions that people living in poverty are a problem. See Chris Vander Doelen, “Don't Encourage Street Pests” *The Windsor Star* (9 April 2014) online: <<http://blogs.windsorstar.com/opinion/columnists/dont-encourage-street-pests>>.

²²¹ OWA, *supra* note 25 at s. 67(1): The Tribunal shall not make a decision in an appeal under this Act that the administrator would not have authority to make.

- (2) The Tribunal shall not inquire into or make a decision concerning,
 - (a) the constitutional validity of a provision of an Act or a regulation; or
 - (b) the legislative authority for a regulation made under an Act.

“This case is not about access, about the applicability of human rights legislation, or about whether the government is entitled to refuse to provide disability benefits to individuals whose only substantial impairment is an alcohol or drug dependency. It is about statutory interpretation. Specifically, it is about the scope of the legislature’s intention when it enacted a statutory provision...”²²²

This frame avoids direct reference to the political language which has the potential to convey unwarranted assumptions about the social system and individuals into the judicial discourse. The dissent also avoids use of the language of having to “deal” with individuals receiving social assistance by articulating the idea that the Tribunal has been created to *hear appeals* in order to *deal* with the *system*:

“[The Tribunal] was created to hear appeals dealing with Ontario's general social assistance regime under the OWA, and Ontario's special income support program for persons with disabilities under the ODSPA”.²²³

However, when the dissent does refer to the relationship between the Tribunal, there is an issue. The dissent notes that

“[I]mposing Code compliance hearings on the [Tribunal] will similarly and inevitably impact its ability to assist the disabled community it was established to benefit in a timely way.”²²⁴

Appeals from decisions under both the OWA and ODSPA are considered by the

²²² *Tranchemontagne S.C.C. RI, supra* note 199 at para. 56: “This case is not about access, about the applicability of human rights legislation, or about whether the government is entitled to refuse to provide disability benefits to individuals whose only substantial impairment is an alcohol or drug dependency. It is about statutory interpretation.”

²²³ *Tranchemontagne S.C.C. RI, supra* note 199 at para. 57.

²²⁴ *Tranchemontagne Div. Ct. RII, supra* note 199 at para. 91.

same Tribunal. If the Tribunal is said to be “established for assisting or benefiting the disabled community”, what does this convey to Tribunal adjudicators about their role when determining appeals under Ontario's other social assistance legislation? While Tranchemontagne deals with a provision of the ODSPA, it is regularly cited in decisions pertaining to both the OWA and ODSPA because it comes from the highest court and talks about the purpose of both statutes.

A discourse researcher is attentive to the ways that the discourse may construct and constrain understanding. Potentially such articulations may affect how Tribunal decision-makers understand their role when “hearing” appeals. The word use could close down consideration that Ontario Works recipients are equally worthy of the remedial power that the Tribunal decision-makers have when deciding appeals.

4.3.d Round Two, Tranchemontagne: Divisional Court

The matter was sent back to the Tribunal to rule on whether the offending provision of the ODSPA was contrary to the Code (and therefore inoperable). As a reminder, section 5(2) expresses that an individual is not eligible for income support if his or her only substantial restriction is attributable to dependency on an unprescribed alcohol or drug.²²⁵ The Tribunal determined the provision was discriminatory and therefore violated the Code.²²⁶ The Ministry appealed on the basis that the Tribunal had erred in law for many reasons, including that it had applied the wrong test for discrimination under the Code. The Divisional Court considered whether the Tribunal had applied the proper test.

²²⁵ ODSPA, *supra* note 26, s. 5(2).

²²⁶ *Tranchemontagne Div. Ct. RII, supra* note 199 at para. 66.

The first section of the Divisional Court's decision in this second round of appeals is entitled “The Ontario Disability Support Program Act versus the Ontario Works Act”.²²⁷

In that section it is articulated that:

“[Ontario Works] is considered a transitional program of last resort designed to get people back into the workforce. [Ontario Works] recipients are required to participate in 'employment assistance activities' to remain eligible for benefits.”

The language that Ontario Works recipients are “required to participate in employment assistance activities” is embedded with assumptions that people on Ontario Works must be mandated to work. Linking this to talk about how an individual remains eligible reinforces ideas that people on Ontario Works must be mandated to do work. The legislative text says that a recipient “may be required” to participate in employment assistance activities.²²⁸ Participation in workfare may be required under an individual's “participation agreement”.²²⁹ The non-disabled poor do not have to be mandated to work. Also, in my experience working with people receiving income support under the OWA, many actually do have jobs. The language ignores the reality of the existence of

²²⁷ *Ibid.*, at para. 3.

²²⁸ *Interpretation Act*, *supra* note 174 at s. 11 says “may” is to be taken as a permissive construction in statutes. There is no parallel reference in Ontario's *Legislation Act, 2006* (see *supra* note 2 for reference). According to OWA, *supra* note 25 at s. 74 a recipient and any dependant (which includes non-disabled dependants who are a dependants of someone who receives ODSP) “may be required to: satisfy community participation requirements, participate in employment assistance activities, training, treatment for addiction; and accept and maintain employment.” This is so even when that employment is not suitable, fair, secure or well-paying. Pursuant to OWA, *supra* note 25 at s. 14 recipients or dependants who do not comply with these requirements may have their assistance cut off.

²²⁹ Under such agreements they are required to take part in employment measures such as job searches, volunteer placements, job placements, and workshops. They are also required to accept job offers. I have often wondered how this kind of vassalage is unremarked in modern society. Non-disabled adults in receiving Ontario Works or ODSP are also subject to constant monitoring of employment efforts (among other things).

“the working poor”.²³⁰ *There are a number of jobs that keep the hours, wages, benefits, and employment security at a low enough level that people who work those jobs still qualify for Ontario Works assistance.*²³¹ The articulation does not accurately portray the program. Further, it has the potential to reinforce undervaluation of the non-disabled poor.

The Divisional Court goes on to talk about the significant difference in the amount of support between the ODSP and Ontario Works:

“The ODSP provides support on a potentially life-long basis whereas [Ontario Works] provides only temporary assistance while the individual tries to become self-sufficient”.²³²

My concern is with the use of the word “sufficient”. This language of “trying to

²³⁰ The term “working poor” is more often used to refer to people not on assistance but still living in poverty. So, somewhere between those who receive social assistance and do not work (for a number of reasons) and those who receive low wages but do not qualify for social assistance are those on social assistance who also have jobs. As a result of their not fitting neatly into either social position their condition is often ignored in the discourse altogether. Note that while academic discussion about the working poor diverge over how to define who is and is not considered working poor, the reality that people who work still do not make enough income to support their needs is undeniable. For some insightful works on this issue see: John Stapleton, et. al., “The Working Poor in the Toronto Region: Who They Are, Where They Live, and How Trends are Changing” (Toronto: Metcalfe Foundation Books, 2012); and See Social Planning Counsel of Ottawa, Report: “The Working Poor of Ottawa” (December 2005), online: SPC Research List <<http://www.spcottawa.on.ca/publications>>; and See Chantal Collin and Hilary Jensen of the Parliamentary Information and Research Service Library of Parliament, Report: “A Statistical profile of Poverty in Canada” (28 September 29), online <<http://www.parl.gc.ca/content/lop/researchpublications/prb0917-e.pdf>> especially at 25 - 26.

For general research related to income inequality trends in Toronto and other Canadian cities see <<http://www.NeighbourhoodChange.ca/>>. Also, note there is a general movement toward implementing a 'living wage' which is an adequate income based on social and geographic factors instead of on a political determination (See <<http://http://www.livingwagecanada.ca/>>). In an email correspondence with Trish Hennessey, Director of the Canadian Centre for Policy Alternative Ontario, (15 April 2014) I was provided a “rough calculation” by their economist Hugh Mackenzie that the living wage for a single adult in Toronto would be \$16.80 an hour. In an average (4 week) month, based on a 35 hour work-week, that monthly income would be approximately \$2352.

²³¹ The current rate for Ontario Works is \$626 a month (set to rise to \$656 a month in the Fall of 2014). Unfortunately, many people who have employment income still qualify for Ontario Works support due to abysmally low wages and hours. I note this again in an attempt to dislodge any assumption that everyone on Ontario Works is (solely) “reliant” on the program and to point out that in many instances (e.g. in cities where the cost of living is higher than \$626 a month) people are effectively unable to (solely) “rely” on Ontario Works income.

²³² *Tranchemontagne Div. Ct. RII, supra* note 199 at para. 5.

become self-sufficient” is embedded with assumptions about the individual Ontario Works recipient having failed in some way by not being “self-sufficient”. It is also embedded with the assumption that a person who never transitions off of government support will never be sufficient. Sufficiency has the potential to be taken as an evaluation of worth.²³³ The legislative text uses the term “self-reliant” (which is also embedded with similar evaluative assumptions about those on social assistance income not being self-reliant in other aspects of their lives). Just because a person does not make an adequate income does not mean that he or she does not rely on himself or herself to get through the day. However, I think that the word “self-sufficiency” is worse because I see the potential for it to convey an evaluation about the “sufficiency” of an individual’s “self”. “Self” is a deeply personal concept. To say that “self” is “insufficient” (when receiving social assistance) conveys a negative assumption about people on social assistance. Personal sufficiency need not be solely determined by income level.

Ultimately, the Divisional Court denied the appeal and affirmed the Tribunal's decision. This means that the provision of the ODSPA that rendered an individual ineligible on the basis that his or her substantial restrictions were only attributable to dependency on an (unprescribed) alcohol or drug²³⁴ was held to be a violation of the Code. The Ministry appealed to the Court of Appeal.

²³³ While being “self-sufficient” may refer to the sufficiency of that “self” to satisfy its needs, the wording of the passage suggests that the individual's receipt of social assistance is connected to that individual's sufficiency. This may convey that an individual receiving benefits is “insufficient” or “deficient”. See OED, *supra* note 145 s.v. “insufficient” where one of the definitions for that word is “an unfit or incompetent person.”

²³⁴ ODSPA, *supra* note 26 at s. 5(2).

4.3.e Round Two, Tranchemontagne: Court of Appeal

By the time the appeal had reached this level of court, Mr. Tranchemontagne is now receiving ODSP benefits. Mr. Werbeski is dead.

The Court of Appeal rendered a unanimous decision. The legislation was held to be discriminatory. As the Director had never technically challenged that Mr. Tranchemontagne or Mr. Werbeski were disabled, the men were found to be eligible for ODSP. The Court of Appeal acknowledged that the effect of the denial of ODSP “was to relegate the respondents to applying for welfare under the Ontario Works Act”.²³⁵ *When someone is “relegated” to something the words convey that the individual is being downgraded.*²³⁶ *Regardless of whether the statement is right or wrong, from a discourse perspective the talk about “relegating” impoverished individuals to a program has the potential to reinforce understanding that Ontario Works is designed to “serve” less-deserving individuals. This reinforces the discourse pattern I had identified so far.*

It has been reported that:

“A significant number of OW clients should, in fact, be ODSP clients and indeed would have been prior to 1998. I argue that these people, while they have much to contribute to society in general, are highly unlikely to ever maintain permanent, full-time employment due to multiple barriers. However, MCSS spends considerable amounts of money ‘training’ these people, diverting resources from those who would really benefit from enhanced employment supports. We need to

²³⁵ *Tranchemontagne C.A. RII, supra* note 199 at para. 3.

²³⁶ OED, *supra* note 145 s.v. “Relegate: To send (a person) into exile, to banish to a particular place.”

*provide increased financial support, social supports and opportunities for clients to contribute in ways other than through the competitive employment market.*²³⁷

²³⁷ Matthews, *supra* note 197.

4.4 Surdivall²³⁸

Recently, the Ontario Court of Appeal has rendered a decision in a significant case for social assistance recipients. The issue in *Surdivall* was whether the Tribunal had jurisdiction to recover or forgive an overpayment.²³⁹ The appeal focused on what kind of power the legislature intended by using the wording that a decision-maker “may” recover an overpayment.²⁴⁰ An overpayment occurs when a recipient is deemed to have been paid too much in a month (i.e. over the amount of income assistance that they would otherwise have been eligible for).

Overpayments relate to ideas that those receiving social assistance abuse or defraud the system.²⁴¹ However, overpayments often accrue due to far less nefarious reasons, such as when there is a government computer glitch or an administrative error, or as a result of an innocent mistake made by a recipient trying to satisfy the multitude of program requirements. Recall the Kafkaesque nature of the program. Overpayments are also deemed to occur when there is an innocent failure to report changes in personal situations or by operation of law where a recipient receives income from a different source that is retroactively applied.

²³⁸ *Surdivall v. Ontario (Director, Disability Support Program)*, [2014] O.J. No. 1505 (C.A.) (QL) [*Surdivall 2*], rev’g [2012] O.J. No. 1675 (Div. Ct.) (QL) [*Surdivall 1*], leave to appeal to S.C.C. requested, 35908 (May 27, 2014).

²³⁹ ODSPA, *supra* note 26 at s. 15, 18 and OWA, *supra* note 25 at s. 19, 20.

²⁴⁰ ODSPA, *supra* note 26 at s. 14(4). The same wording is used in section OWA, *supra* note 25 at s. 19(4).

²⁴¹ Again, there is a lack of clarity over how fraud is defined so there is no clear statistic to support this. For general support of the argument that numbers of welfare fraud are generally overstated see Janet Mosher and Joe Hermer, “Welfare Fraud: The Constitution of Social Assistance as Crime” (March 2005) Report for the Law Commission of Ontario, online: <[https://apps.osgoode.yorku.ca/osgmedia.nsf/0/271AE1B3D9D286D38525709A00521FBC/\\$FILE/Welfare%20Fraud%20Report.pdf](https://apps.osgoode.yorku.ca/osgmedia.nsf/0/271AE1B3D9D286D38525709A00521FBC/$FILE/Welfare%20Fraud%20Report.pdf)> especially beginning at 33. The Minister is limited in the amount that can be recovered from a recipient each month (see ODSPR, *supra* note 95 at s. 51).

A commonly experienced example of this is when a recipient of ODSP wins an appeal of a federal government decision denying her or him Canada Pension Plan disability benefits. In that situation, the entire amount won at the pension appeal may have to be paid to the Ministry in order to reimburse it for the previous ODSP support received. This is because the Canada Pension Plan benefits are deducted dollar-for-dollar from any ODSP income support received for the same time period. Regardless of the reason for an overpayment, the government has the right to recover the amount.²⁴²

In Glynn Surdivall's case, he had been assessed an overpayment of \$3,050 as a recipient of ODSP (by the time the Tribunal heard his appeal he had turned 65 and was no longer receiving ODSP).²⁴³ The overpayment was assessed on the basis that Mr. Surdivall had failed to report reduced housing costs for a period where he had obtained subsidized housing at a lower rent but had continued to also pay rent for more expensive housing in order to assist a friend.²⁴⁴

At the Tribunal, the adjudicator concluded that the Ministry's determination of Glynn Surdivall's overpayment was correct. However, because Mr. Surdivall suffered from obvious financial hardship, the Ministry was ordered to forgive half the

²⁴² Overpayments have serious implications for all people that require support from social assistance. In my experience, recipients tend to assume that the amount they are given each month is correct, regardless of whether it is adjusted up or down. Indeed, the monthly income support amount is not a consistent figure. So, money that is 'over-paid' has usually been spent on basic needs without the recipient knowing that they received what is deemed to be "too much". Spending the money received is not a consciously fraudulent act, it is often an unknowing response born of necessity.

²⁴³ Note that, although some judicial articulations do convey that ODSP benefits are "potentially life-long" (see for example, *Tranchemontagne Div. Ct. RII, supra* note 196 at para. 5), when a recipient turns 65 he or she qualifies for Old Age Security payments. Also many initial denial decisions that are reversed by the Tribunal are limited in that they set a date in the future whereby the Ministry may review an individual's medical eligibility.

²⁴⁴ Applicants to subsidized housing go on a wait-list, in Ontario almost every wait-list for subsidized housing is longer than a year. So, Mr. Surdivall either had to move to the subsidized housing and break his rental arrangement, give up his subsidized housing unit, or be assessed the overpayment.

overpayment and collect the overpayment at a reduced rate. Mr. Surdivall was no longer receiving ODSP but was still on a fixed, old-age income. The Ministry appealed on the basis that the legislation did not confer on either the government or the Tribunal the power to forgive a Crown debt. Thus, the Tribunal had exceeded its remedial decision-making powers.

4.4.a *Surdivall: Divisional Court*

In considering the statutory framework, the Divisional Court referred to the text of section 1 (the purpose section) of the ODSPA to articulate “that the Act’s purpose is to establish a program that provides income support to eligible persons with disabilities”. However, the “accountability to taxpayer” element was also emphasized.²⁴⁵ The Divisional Court framed their decision on the latter provision to find that the Director did not have the discretionary power to reduce or forgive the overpayment (as it was a debt due to the Crown). This means the Tribunal also did not have the discretion to compromise on the Crown debt. You will remember that the meaning of the purpose section is an element of consideration when the tribunal interprets the imprecise language of its legislation. In this decision, those elements of section 1 are subjected to appellate-level meaning-making.

In the end, the Divisional Court held that the Director and/or the Tribunal were limited to the power to only postpone collection of debts. The overpayment could not be forgiven outright. Mr. Surdivall appealed to the Court of Appeal.

²⁴⁵ *Surdivall 1*, *supra* note 238 at para. 8.

4.4.b *Surdivall: Court of Appeal*

The Court of Appeal frames their analysis as one of statutory interpretation. They focus on section 14(4) of the ODSPA which expresses that “an overpayment may be recovered by one or more of” reduction of income support, notice, or a proceeding. This, the Court said, sets out three ways that an overpayment “may” be collected.²⁴⁶ Given that the use of the word “may” confers discretion on the decision maker,²⁴⁷ the primary question on appeal was the extent of that discretion. In this sense *Surdivall* provides more information on how the practice of statutory interpretation is formulated in the context of social assistance law and also demonstrates how discretionary decision-making may be shaped through discourse.

The Court of Appeal examined the legislative language and found that the legislature used the word “may” to give the Director and Ministry flexibility in determining and collecting overpayments. This extends their remedial powers. However, that discretion is to be constrained by reference to the (conceptually-ambiguous) direction provided by Driedger's modern approach.²⁴⁸ The Court of Appeal found that the Director has authority to forego recovery of part or all of an overpayment of income support to a disabled recipient and the Tribunal has authority to restrict the Director's recovery of an overpayment and order that part or all of an overpayment not be recovered.

In its reasoning the Court articulates that:

²⁴⁶ *Surdivall 2*, *supra* note 238 at para. 27.

²⁴⁷ *Ibid.*, at para 29.

²⁴⁸ *Ibid.*, at para 34: “As is apparent from Driedger's rule, these words must be considered in the context, having regard to the scheme and objects of the ODSPA and the legislature's intent”. The modern approach is formulated by some approximation of the words:

The object is to seek the intent of Parliament by reading the words of the provision in their entire context and according to their grammatical and ordinary sense, harmoniously with the scheme and object of the Act and the intention of Parliament. *Supra* note 80.

“[The ODSP] program provides monthly support to eligible persons with disabilities. The program serves some of the province’s most vulnerable individuals. The support they receive is intended to help them live as independently as possible.”²⁴⁹

The Court goes on to say that:

“Section 1 states that the purpose of the Act is to establish a program that has four objectives”. The Court of Appeal is critical that “[o]f these four objectives, the Divisional Court relied only on the last one – to be accountable to the taxpayers of Ontario”.²⁵⁰

Also new in the language of this decision is the acceptance that the basic rule for interpreting the statute is the modern approach:

“The basic rule of statutory interpretation in Canada remains the rule formulated over 30 years ago by Elmer Driedger in the second edition of his book, *Construction of Statutes* (Toronto: Butterworths, 1983):

The words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”²⁵¹

Notwithstanding that the Court does articulate that “the ODSPA is social welfare legislation, serving some of the province’s most impoverished and vulnerable residents”²⁵² the approach to articulation is not framed by reference to the benefits-conferring nature of

²⁴⁹ *Ibid.*, at para. 8.

²⁵⁰ *Ibid.*, at para. 23.

²⁵¹ *Ibid.*, at para. 31.

²⁵² *Ibid.*, at para. 35.

the statute as it was in *Gray*.²⁵³ In *Surdivall* the approach to articulation is framed by the modern principle of interpretation. The articulation emphasizes that the Tribunal is allowed more interpretive freedom. However, the Tribunal is constrained by consideration of the purpose of the legislation (as opposed to consideration of the individual or statutory construction issues being resolved to favour the applicant/recipient).²⁵⁴

The Court continues by talking about each paragraph in section 1. You will remember that section 1 of the OWA and ODSPA are both rife with conceptual *things* that have no inherent meaning. While the following passage is long, it is important because it shows how the *meaning* of the purpose section is conveyed into the discourse. The text of section 1 gives no precise indication of how to weigh or measure these divergent interests. Here the Court articulates the meaning:

“The objectives of the program under the ODSPA support giving the Director broad discretion ... I again list the four objectives, which are found in section 1 of the Act:

1. The purpose of this Act is to establish a program that,
 - (a) provides income and employment supports to eligible persons with disabilities;
 - (b) recognizes that government, communities, families and individuals share responsibility for providing such supports;

²⁵³ My discourse analysis of *Gray* can be found in section 4.2 of this thesis. This pattern has been identified in other fields of law. Income Tax interpretation, for example, was traditionally characterized by a “pro-taxpayer” approach and criminal cases traditionally relied on interpretation constructed in favour of the accused. Under such a construction, matters such as “purpose”, “intent” and “context” are largely ignored in favour of rules to the taxpayer's advantage. Support for the strict approach for interpreting tax and criminal statutes has diminished. See Graham, *supra* note 12 at 189 – 200.

²⁵⁴ *Surdivall 2*, *supra* note 238 at para. 35: The statutory scheme inevitably requires flexibility, as the Tribunal held in this case, so that the Director can deal with overpayments in a “rational, reasonable and cost effective way”. Driedger's “rule” governs the extent of the discretion. *Ibid.*, at para. 34.

- (c) effectively serves persons with disabilities who need assistance;
- and
- (d) is accountable to the taxpayers of Ontario.

Nothing can be gleaned about the extent of the Director's discretion from the first objective. It is merely descriptive. The second objective, however, does require a broad discretion. [Emphasis Added] This objective recognizes that government together with communities, families and individuals shares responsibility for providing support. To meet this objective flexibility in collection is needed. Especially when overpayments result from innocent mistakes, demanding recovery may impose an enormous hardship on persons already living well below the poverty line. In such cases it is entirely appropriate, as the Tribunal recognized in Surdivall's appeal, that government shares the responsibility for the overpayment.

The second objective referred to above is not present in the OWA. The second objective of the OWA is to provide “temporary financial assistance to those most in need while they satisfy obligations to become and stay employed”. This language has already been marred by under-informed assumptions about individuals on Ontario Works. By articulating that this particular objective of the ODSPA is the locus of an adjudicator's flexible “discretionary fairness” in applying the legislation, the discourse constructed may shut down an equally flexible understanding of “discretionary fairness” when applying the section 1 elements of the OWA. This element has potential to recognize the

value of an individual and encourage an application of social assistance legislation with its beneficial purpose in mind. However, the discursive differentiation that has been conveyed into the discourse renders this valuation and application only accessible as a frame for approaching appeals made by disabled recipients. An Ontario Works recipient may not be understood as warranting the same level of discretionary fairness if using the discursive interface that reinforces undervaluing the worth of Ontario Works recipients. That has the potential to affect how the law is applied.

The Court continues:

The third objective -- "to effectively serve persons with disabilities who need assistance" -- is especially significant. This objective cannot be met unless the Director has the flexibility not to recover overpayments in appropriate cases...

*Relying on the objective of “effectively serving people with disabilities” as an “especially significant” reason to not recover overpayments undermines the recognition by the Supreme Court that both statutes are “twin components of the Ontario government's scheme for delivering social assistance to deserving applicants”.*²⁵⁵ *It also has the potential to undermine how a Tribunal decision-maker approaches individuals on Ontario Works versus those on ODSP who appear before them. Again, this understanding may be reinforced by the previous judicial articulations conveying the Tribunal's role as being to “benefit people with disabilities”.*²⁵⁶

The Court deals with the last paragraph in section 1 of the ODSPA:

²⁵⁵ *Tranchemontagne S.C.C.*, *RI*, *supra* note 199 at para. 18.

²⁵⁶ Here I am making reference to the *Tranchemontagne* decision, specifically at *supra* note 224.

The final objective of the program and the one objective of the ODSP relied on by the Divisional Court and by the respondent is that of being accountable to the taxpayers of Ontario. According to the Divisional Court, "it would be virtually inconceivable given the requirements of accountability and transparency" that the Director would have discretion to forego recovery of overpayments...²⁵⁷

"In my view, the ODSP will be accountable to the taxpayers of Ontario if public funds are spent fairly, honestly and reasonably. The Director's discretion over the recovery of overpayments is not open-ended. It must be exercised reasonably taking account of a disabled recipient's individual circumstances."²⁵⁸

...We have seen how the articulations about social assistance recipients are embedded with assumptions that devalue the needs of the non-disabled poor. Embedded in articulations are assumptions based on an under-informed notion that individuals on Ontario Works are (by virtue of the form of assistance they receive) less deserving individuals. If the taxpayer and disabled recipients are known or assumed to be two sides of a balanced scale, what of the recipients who have been consistently undervalued in the discourse?

In *Surdivall*, the Court of Appeal concluded that both the Ministry, and by extension the Tribunal, had flexible discretion to decide whether or not to collect a debt in this case. Their remedial powers were extended from what the Divisional Court had found

²⁵⁷ *Surdivall 2*, *supra* note 238 at para. 42.

²⁵⁸ *Ibid.*, at para. 44.

them to be. The Court of Appeal allowed the appeal and the original Tribunal order was reinstated. The Ministry has recently sought leave to appeal to the Supreme Court of Canada.²⁵⁹

²⁵⁹ *Ontario (Director, Disability Support Program v Surdivall*, [2014] OJ No 1505 (CA)(QL), leave to appeal to SCC requested, 35908 (May 27, 2014).

CHAPTER 5: Conclusion

5.1 Introduction

As mentioned in sections 1.7 and 3.5 of this thesis, the synchronic discourse analysis style does not lend itself to specific conclusions about cause and effect. Discourse analysis is concerned with illustrating and confronting socially produced meanings rather than searching for objective causal explanations.²⁶⁰ While it is difficult to depart from a basic theoretical presumption where the object of study (the *things* that are articulated) can never lead to a concise conclusion, the approach can be used to achieve a valuable goal.²⁶¹ The goal of this thesis was to reveal and oppose the hidden assumptions that may be found in judicial talk about impoverished individuals. In the conclusion, I wish to found the abstract oppositions enabled by discourse tools in preliminary practical recommendations for the field.

From a discourse perspective, the words I have drawn attention to have the potential to construct and constrain how others understand what those *things* mean. I have provided examples where articulations may convey assumptions about those things. In so doing, my oppositional narrative was an attempt to reorganize those representations made in the decisions I reviewed. I offered an alternative perspective on the words used in order to try and open up space for thinking about how things are talked about in a different way. I wish to get others thinking about the discourse surrounding social assistance in Ontario.²⁶² Given that the discourse has the power to shape understanding and be shaped

²⁶⁰ Howarth, *supra* note 11 at 28: Discourse analysis is concerned with understanding and interpreting socially produced meanings rather than searching for objective causal explanations.

²⁶¹ In so doing the researcher is open to challenges of her own assumptions in presenting this oppositional narrative of meaning.

²⁶² I allude to these goals in sections 1.1 and 1.7 of this thesis.

by articulations, my recommendations proceed from these two points.

The discourse analysis in this thesis reveals how judicial articulations made about social assistance recipients can exhibit the presence of unwarranted assumptions about poverty and the poor. Many of the articulations I opposed were embedded with assumptions that do not align with the experiences of impoverished individuals who receive government income support. Those assumptions convey under-informed information in order to distinguish between recipients of each social assistance program. Perhaps the words are legally “legitimate”,²⁶³ but they may lead to a skewed understanding of how the law applies to individuals. I have attempted to draw attention to possible assumptions conveyed into the discourse in an effort to oppose the potential of those words to construct and constrain how the law is understood. If you relate this back to my discussion in chapters 1, 2 and 3 of this thesis, you can hopefully see how articulations can be taken-for-granted as representations of “the” meaning of some *thing*. If the assumptions that underlie those meanings are not challenged, the assumptions embedded in words have a greater potential to continue to inform how those *things* are understood. In this way, the assumptions that were exhibited in chapter 4 may establish and reinforce misunderstandings about individuals living in poverty.

I believe that underlying assumptions latent in the judicial discourse must be brought to consciousness. According to apparent assumptions, disabled recipients of social assistance are more “deserving” of support. The “less deserving”²⁶⁴ are the able-bodied poor who are undervalued according to under-informed presuppositions and

²⁶³ Linked as they are to the text of the legislation.

²⁶⁴ This, of course, is based on an understanding of what that means.

generalizations. In the previous chapter I used an oppositional narrative to oppose the words that are conveyed into the discourse. Without this kind of opposition, assumptions that underlie such a dominant and influential discourse field may remain latent. If the assumption-laden discourse continues, this could close down potential for a more inclusive discourse to develop around how the law can work to benefit those on social assistance.

It seems to me that under-informed assumptions about *things* can have a negative impact on arguments about how legal powers can be advanced to help those who are in need of support. Imprecise concepts in the legal field can have a profound influence on how the law is understood.²⁶⁵ It follows that defining imprecise concepts based on assumed ideas can also have a profound influence on how the law is understood. This is the reason I have emphasized taking an “inclusive approach” to meaning-making throughout this paper. In any field where meaning-making can have a profound effect on individuals, it is important that those who make meaning are conscious of what they say. This, I think, can be done by writing about, speaking about, and talking about all social assistance recipients as equally worthy of consideration. It does not require discourse methods be applied. It can be practiced every day.

If decisions were framed with reference to the individual who has brought the appeal, there could be less emphasis on trying to decide social assistance cases according

²⁶⁵ As the realists point out, statutory construction is a result of ideological manipulation. See *supra* note 76. See generally Eskridge, *supra* note 3; Graham, *supra* note 35 (where professor Graham discusses the realist vision). In many ways this thesis has taken a different path (methodologically) and arrived at the same destination as legal realists. Realists maintain that law is always a creation of some lawmaker (and it usually reflects that “lawmakers” ideological perspective). Discourse theorists view the law as a construction articulated by some lawmaker whose experiences and imagination, or their ideas, are shaped by the discourse. The two positions are not so far apart. Perhaps discourse analysis tactics can be deployed by others in the shared research field.

to personal beliefs about “who deserves what and for what reasons”. Instead, the frame could be based on what the individual “needs” according to the legislation. Given that how the law is understood affects how it is applied, I believe that conveying under-informed assumptions about individuals into the discourse seriously limits an individual's chance for a fair application of the law. Articulations about individuals framed by lived-experience may help guard against assumptions made about people. It makes for more conscious decision-making when applying the law to an individual.

If decision-makers at the Tribunal level came into each appeal as an adjudicatory *tabula rasa*, that would be one thing. But, when the discourse constructs and constrains understanding, the potential to identify and avoid reinforcing latent assumptions is reduced. Regardless of where bias comes from, when such assumptions are found in articulations it means there is a potential that they may influence how decision-makers who participate in that discourse *think about* a person.²⁶⁶ When a Tribunal member is to decide an appeal, he or she is given a file with all of the applications and decisions and evidence that have passed between the government and the appellant.²⁶⁷ There is potential for under-informed assumptions to inform a biased impression of the person. The discourse might reinforce this perspective of things.

The law has recognized the precarious line that a Tribunal decision-maker walks when assessing which social assistance program a person is eligible for. In *Gray*, for example, the Court of Appeal conveyed that Tribunal members needed flexibility in

²⁶⁶ For example, if there is a notion that some social recipients deserve fairer treatment and better support, the likelihood that an adjudicator take an unbiased approach to Ontario Works and ODSP individuals who appeal the same legal issue (e.g. an overpayment). This, I think, would be a derogation of justice and a denigration of the justice system.

²⁶⁷ For that specific appeal (i.e. they are not supposed to receive previous applications or decisions in the file).

assessing whether an individual is “substantially” impaired by leaving that word “substantial” deliberately imprecise.²⁶⁸ Still, the Court also constrained the discretionary task of meaning-making by emphasizing that the decision-maker also needs to take account of the individual in his or her own circumstances. This resulted in an interpretive approach where meaning was to be construed in favour of an individual.

From a discourse perspective, framing the Tribunal's approach to meaning-making as requiring conscious reference to an individual and accounting for his or her own testimony of what that experience is, is a constraint akin to the “oppositional narrative” I have used in my analysis. To understand that an important component of the law is to “resolve ambiguities in favour of the claimant” is to understand that an important element in correctly applying the law is to actually consider what would *be* in favour of the claimant. While I make no claims that the “rule” in *Gray* does any better job at constraining judicial meaning-making or leading to any specific outcome than any other interpretive “rule”,²⁶⁹ it at least formulates the approach by necessitating the individual's worth as a person is to be articulated and conveyed into the discourse (through recognizing his or her own testimony as an important part of the decision making process). The recipient remains a discourse participant in this (albeit removed) way.

From a discourse perspective, a more inclusive approach to decision-making has many benefits. I have shown how the discourse has been shaped according to assumed notions about individuals receiving social assistance. Uninformed biases, manifested at

²⁶⁸ Section 4.2 of this thesis.

²⁶⁹ See sections 2.3 and 2.4 of this thesis where I talk about the imprecision of rules and the flexibility of meaning-construction in the practice of statutory interpretation. Statutory interpretation scholars have convincingly argued that the practice of statutory interpretation is unavoidably based on inferences because of the inherent imprecision of language. Discourse researchers view meaning-making as enabled and constrained by the discourse.

both the individual and the systemic levels, as well as the tendency to ignore the very existence of non-disabled “others” on social assistance are a barrier to understanding the system. I have tried to draw attention to how important it is to leave space open to consider all individuals equally. Individual equality in assessment may be an important step to achieve the access to justice so integral to the legal system. To achieve this, we have to find a way to expose and challenge the under-informed assumptions that have the power to colonize how the law is understood.

5.2 The Need for Reframing: Preliminary Suggestions

The position of social assistance recipients is marred by stigmatization.²⁷⁰ The legislative text is founded on a number of social constructs. Focussing on the “legislative intent” rather than the circumstances of the individual uses a reference point that is fraught with conceptual ambiguity. For better or worse, this is how the courts administer their duty. Still, something has to be done to constrain assumptive articulations that are born of giving meaning to conceptually ambiguous *things*. The assumptions can influence the general shape of judicial discourse.²⁷¹ What I have attempted to demonstrate is that assumptions do exist in the judicial discourse about social assistance legislation. Where divisions are articulated, they are at least partially supported by talk that may reinforce under-informed ideas about the “deserving” and “undeserving” poor. In the legal field, this may affect how the social assistance legislation is understood and applied. A

²⁷⁰ *Gwinner v. Alberta (Human Resources and Employment)*, [2002] A.J. No. 1045 (Q.B.) (QL) at para. 108.

²⁷¹ While articulations may (at best) be evidence of personal ideology or more widely-accepted understanding of appropriate representations of meaning, such a finding is not facilitated by the level of my analysis. I have tried to expose assumptions that confront me in the discourse so as to argue that they are not fair to certain people.

venerable goal for adjudicative bodies that wish to convey attitudes of fairness and elevate conceptions of justice when rendering decisions would be to eradicate the assumptions from their discourse. To do so, judicial actors must speak from a position of informed understanding. The value of lived-experience must be the foundation of articulations.²⁷² The presence of the human participant and their story must be conveyed when rendering legal decisions.

If judicial articulations remained anchored to their own discourse (judicial decisions, legislative text) there would also be more opportunity to establish and reinforce a more “inclusive” approach in judicial decisions. The legal field should strive to consider the common ground between similar pieces of legislation. For example, section 1 of both the OWA and ODSPA state that one of the purposes of those programs is to “effectively serve people ... needing assistance”.²⁷³ Emphasizing these similarities could be a much more inclusive frame when considering what ambiguous *things* mean in legislation. In this case, where both pieces of legislation do have similar beneficent purposes, it would be prudent to reflect on what articulations may convey about difference. More importantly, how those articulations may detract from the beneficent purposes of the law must be considered.

5.3 Preserving a Distinct Judicial Discourse

I do not think every source of information should be unreflectively referred to as part of meaning-making in the judicial discourse. While the modern approach to statutory

²⁷² Obviously actual lived-experience of decision-makers would make for a better analysis of individuals exposed to those experiences.

²⁷³ OWA, *supra* note 25 at s. 1(c), ODSPA, *supra* note 26 at s. 1 (c).

interpretation certainly warrants flexibility and consideration of numerous sources in order to inform a construction of meaning,²⁷⁴ approaches can be constrained by emphasizing values to be taken into account. Even if this “constraint” does not lead to any specific outcome, it at least gives leverage to the considerations that are and are not taken into account. Individuals should be taken into account. Articulations generated by political actors outside of the legislative context (i.e. partisan “position statements” made after the legislation has been passed) should not be unreflectively conveyed into the judicial discourse about the meaning of that legislation. Diligence must be paid to assumptions embedded in information if the words are being conveyed into the discourse.

Such diligence is especially important in the field of social assistance law. In that field the judicial discourse has to be separate from the decision-making powers of the government because the court is there to review those powers and their effect on an individual citizen. In the social assistance regime, the Tribunal is the first judicial setting where the power of the government to make decisions that affect individual applicants or recipients is reviewed.²⁷⁵ You will remember that in the process of “meaning making”, the opportunity for probing the underlying assumptions that founded the original ideas are closed down.²⁷⁶ Lay Tribunal members may not query how political talk should inform their understanding of the law. Instead, because it is conveyed by more-influential judicial speakers, the information gleaned from that source has the potential to shape how the text

²⁷⁴ Usually about the “meaning” of the object or purpose of the legislation.

²⁷⁵ I discussed this in section 2.6 of this thesis where I noted that administrative law deals “with the legal limitations on the actions of governmental officials, and on the remedies which are available to anyone affected by transgression of their limits.” Barsky, *supra* note 40 at 102 quoting from Jones and de Villars.

²⁷⁶ Note that here I am using the term “assumptions” simply to mean underlying cognitions about things. They need not be negative or false. Teun A. van Dijk, ed., “Discourse Studies” in Sage Benchmarks in Discourse Studies, (London, Sage Publications: 2007) online: <<http://www.discourses.org/OldArticles/The%20study%20of%20discourse.pdf>>.

is understood. The assumptions embedded in articulations made by the executive after the law has passed can therefore come to colonize the judicial field. This allows for political actors to extend their decision-making powers into an independent branch of government (the judicial branch) without having to subject those claims to the scrutiny of the legislature (or the public). From a discourse perspective, judicial reference to post-legislative, partisan claims is a workaround of due legal process in this case.²⁷⁷

In the adjudicatory framework, the executive decision-making influence must remain separate from the legal field. The judicial field must remain at arms-length from the executive branch of government because the government is a party in every appeal. To introduce partisan claims into appellate-level decisions means that the state has an influence greater than the text itself. Had those claims been made during the legislative process, the legislation may have been altered to explicitly accept or reject those claims. But, they were not. Even if the partisan claims have some sort of policy role to play in the judicial discourse, the judiciary must take pains to first probe the assumptions in the sources they use to inform the law.²⁷⁸ My view is that the role of the court is to establish a separate discourse from political ideas but one connected to the legislature by way of the legislative text. This does the best job of guarding against bringing under-informed assumptions from an external discourse into the judicial sphere.

The legislature enacts a statute and the judiciary has the authority to interpret and apply the statute to a case before it. The government has an influence over how the law

²⁷⁷ Which is not a sweeping condemnation of this source of information being used to inform the meaning of other legislative provisions. However, the information being conveyed must be weighed through consideration as to how appropriate it is as a representation of that “thing” in the legal field.

²⁷⁸ By probing assumptions articulations can more clearly convey what weight the political articulation is given in practice of meaning-making in the legal field.

applies at the very first instance when a bureaucrat makes the assessment based on an individual's application.²⁷⁹ After that, there has to be a boundary. An individual appeals the government decision to an adjudicative tribunal. Those decisions are reviewed by appellate-level courts. All of these domains have an opportunity to develop separate (but related) discourse strands. The degree of separation depends on how the words are used.

Space is important for perspective. A separate discourse allows a chance for reflection on the language used by others (in a different sphere) rather than just reinforcing that language. The unreflective reinforcement of political notions through conveyance of those notions into the judicial discourse is not a necessary piece in solving a problem of imprecise meaning.²⁸⁰ Instead, the judicial discourse could remain focused on the text of the legislation. In order to construct a more inclusive approach to meaning-making in that discourse strand (I have suggested this be based on individual need), that would require focussing on the legislation (section 1 of both the OWA and ODSPA²⁸¹ makes use of the concept of providing for those in need). This approach has the potential to change the shape of the social discourse about poverty. The consideration of the individual provides conscious leverage against ideas that may otherwise remain unconscious.

²⁷⁹ Through Policy Directives. See section 2.6 where I talk about the social assistance administrative regime.

²⁸⁰ The discourse analysis I have provided has shown instances where the speaker uses a discourse apart from the political sphere. This, I think, is important to establish in a field where the government has appropriately applied the law to an individual. This has been accomplished in instances where the legislation is referenced (not the words emanating from some other individual as a speaker on behalf of an institutional body). See the analysis in *Gray* (section 4.2.a – the dissent, and section 4.2.b) and *Tranchemontagne* (section 4.3.c – the dissent).

²⁸¹ See OWA, *supra* note 25 at s. 1(c): “effectively serve people **needing** assistance”. ODSPA, *supra* note 25 at s. 1(c) “effectively serve persons with disabilities who **need** assistance”.

5.4 Conclusion

In interpreting and applying social assistance legislation, I believe that the courts must be cautious to ensure that decisions are not simply an instrument for better situating some individuals at the expense of others, especially when the social assistance adjudicatory system is so closely aligned. In effect, my arguments are my conclusion. The judiciary could endorse taking a more person-centred approach to convey the desire to eradicate under-informed assumptions from the discourse. It is not the role of the courts to unreflectively apply policy, nor is it a goal of the courts to unreflectively reinforce assumptions about people. Talk about the experiences of people can raise consciousness when it reflects actual experience. It is time to change the discourse. I believe there is potential for a better discourse about social assistance to take shape. This should begin in the judicial discourse as it has influence over how meaning is understood in the wider adjudicative field.

A discourse analysis is meant to be performed to open up space in an attempt to change the discourse. This analysis uses discourse theory and method to challenge how “things” are being talked about. It is my hope to use this thesis to challenge how things are thought about. If I can find no other support for what I have said herein, I hope my use of this different kind of qualitative methodology for analyzing assumptions about meaning in the language of law has been interesting. If so, then I have accomplished an important aspiration of a discourse analyst. You will have thought about the things I am saying. It is my hope that I have given you a tool to think about some *things* differently.

BIBLIOGRAPHY

LEGISLATION

Family Benefits Act, R.S.O. 1990, c. F.2 as rep. by *Social Assistance Reform Act, 1997*,

S.O. 1997, c. 25.

General, O. Reg. 134/98.

General, O. Reg. 222/98.

General Welfare Assistance Act, R.S.O. 1990, c. G.6 as rep. by *Social Assistance Reform Act, 1997*, S.O. 1997, c. 25.

Human Rights Code, R.S.O. 1990, c. H.19.

Interpretation Act, R.S.C., 1985, c. I-21.

Interpretation Act, R.S.O. 1990, c. I.11, as rep. by S.O. 2006, c. 21, Sch. F, ss. 134, 143 (1).

Legislation Act, 2006, S.O. 2006, c. 21, Sch. F.

Ontario Disability Support Program Act, 1997, S.O. 1997, c. 25, Sch. B.

Ontario Works Act, 1997, S.O. 1997, c. 25, Sch A.

Prescribed Policy Statements, O. Reg. 562/05.

Prescribed Policy Statements, O. Reg. 564/05.

Social Assistance Reform Act, 1997, S.O. 1997, c. 25.

JURISPRUDENCE

Abrahams v. Canada (Attorney General), [1983] 1 S.C.R. 2.

Broomer v. Ontario (Attorney General), [2002] O.J. No. 2196 (Sup. Ct.) (QL).

Bell ExpressVu Limited Partnership v. R., [2002] 2 S.C.R. 559.

Fournier v. Ontario (Ministry of Community & Social Services, Director), [2013] O.J. No. 2761 (Div. Ct.) (QL).

Gray v. Ontario (Disability Support Program, Director) (2002), 59 O.R. (3d) 364 (C.A.), rev'g [2001] O.J. No. 5716 (QL) (Div. Ct.).

Gwinner v. Alberta (Human Resources and Employment), [2002] A.J. No. 1045 (Q.B.) (QL).

Kerr v. Metropolitan Toronto (1991), 4 O.R. (3d) 430 (Div. Ct.).

Masse v. Ontario (Ministry of Community and Social Services) (1996), 89 O.A.C. 81, 40 Admin L.R. (2d) 87 (Div. Ct.), leave to appeal to C.A. refused [1996] O.J. No. 1526 (QL), leave to appeal to S.C.C. refused [1996] S.C.C.A. No. 373 (QL).

Ontario (Director, Disability Support Program) v. Tranchemontagne, [2010] O.J. No. 3812 (C.A.) (QL), aff'g *Ontario (Director, Disability Support Program) v. Tranchemontagne*, [2009] O.J. No. 1613 (QL) (Div. Ct.).

Pavon v. Ontario (Disability Support Program), 2013 ONSC 4309 (Div. Ct.) available online: [IncomeSecurity.org](http://www.incomesecurity.org)
<<http://www.incomesecurity.org/challenges/documents/Pavon-DivisionalCourtDecision.pdf>>.

R. v. Maldonado, [1998] O.J. No. 3209 (Ct. J. (Prov. Div.)).

R. v. Morgentaler, [1993] 3 S.C.R. 463.

Rea v. Administrator, County of Simcoe Social Services Department (17 September 2004), Court File No. 67497/03 (Ont. Div. Ct.).

Rea v. Simcoe (County Administrator, Social Services Department) (2005), 79 O.R. (3d)

583 (C.A.).

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27.

Surdivall v. Ontario (Director, Disability Support Program), [2014] O.J. No. 1505 (C.A.)

(QL), rev'g [2012] O.J. No. 1675 (Div. Ct.) (QL), leave to appeal to S.C.C.

requested, 35908 (May 27, 2014).

Tranchemontagne v. Ontario (Director, Disability Support Program), [2006] 1 S.C.R.

513, rev'g (2004), 72 O.R. (3d) 457 (C.A.), which rev'd [2003] O.J. No. 1409 (QL)

(Div. Ct.) (*sub nom. Werbeski v. Ontario (Director, Disability Support Program)*).

Wedekind v. Director of Income Maintenance Branch of the Ministry of Community and

Social Services (1993), 62 O.A.C. 70 (Div. Ct.), aff'd (1994), 21 O.R. (3d) 289

(C.A.), leave to appeal refused (1995), 23 O.R. (3d) ii (S.C.C.).

OTHER PRIMARY MATERIALS

Ontario. Legislative Assembly, *Official Report of Debates (Hansard)*, sess. 36:1 (12 June 1997).

———. Legislative Assembly, *Official Report of Debates (Hansard)*, sess. 36:1 (19 August 1997).

———. Legislative Assembly, *Official Report of Debates (Hansard)*, sess. 36:1 (28 August 1997)

———. Legislative Assembly, *Official Report of Debates (Hansard)*, sess. 36:1 (04 September 1997).

Social Benefits Tribunal. “Practice Direction 7 - Recording Proceedings”, online: The

Social Benefits Tribunal <<http://www.sbt.gov.on.ca/AssetFactory.aspx?did=171>>.

SECONDARY MATERIALS: MONOGRAPHS AND BOOKS

- Barak, Aharon. *Purposive Interpretation in Law*, trans. by Sari Bashi (New Jersey: Princeton University Press, 2005).
- Barsky, Robert F. *Constructing a Productive Other: Discourse theory and the Convention refugee hearing* (Amsterdam: John Benjamins Publishing Company, 1994).
- Benson, Robert. *The Interpretation Game: How Judges and Lawyers Make the Law* (Durham, N.C.: Carolina Academic Press, 2008).
- Brown, Ronald Benton. *Statutory Interpretation: The Search for Legislative Intent*, 2d ed. (Boulder, Colorado: National Institute for Trial Advocacy, 2011).
- Côté, Pierre-André. *The Interpretation of Legislation in Canada*, 2d ed. (Cowansville, Québec: Yvon Blais, 1992).
- Dickerson, Reed. *The Interpretation and Application of Statutes* (Boston, Massachusetts: Little, Brown & Co., 1975).
- Dobelstein, Andrew W. *Social Welfare Policy and Analysis* (Chicago: Nelson Hall Publishers, 1990).
- Driedger, Elmer A. *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983).
- Elliott, David C. *Legal Drafting: Language and the Law* (Ottawa: Canadian Institute for the Administration of Justice, 1990).
- Eskridge, William. *Dynamic Statutory Interpretation* (Cambridge, MA: Harvard University Press, 1994).
- Evans, Jim. *Statutory Interpretation: Problems of Communication* (Oxford: Oxford University Press, 1988).
- Fairclough, Norman. *Language and Power* (London: Longman, 1989).

- Finch, Jennie & Ann Killion. *Throw Like a Girl: How to Dream Big & Believe in Yourself* (Chicago: Triumph Books, 2011).
- Graham, Randal N.M., *Statutory Interpretation: Theory and Practice*, (Toronto: E. Montgomery Publications, 2001).
- . *Statutory Interpretation: Cases, Text and Materials* (Toronto: Emond Montgomery Publications Ltd., 2002).
- Gray, Christopher Berry, ed. *Discourse Theory The Philosophy of Law: An Encyclopedia*, vol. 1 (London: Garland Publishing Inc., 1999).
- Hunt, Alan & Gary Wickham. *Foucault and Law: Towards a Sociology of Law as Governance* (Boulder, Colorado: Pluto Press, 1994).
- Levitas, Ruth. *The Inclusive Society?: Social Exclusion and New Labour*, (New York: Palgrave Macmillan, 2005).
- Mikkonen, Juha & Dennis Raphael, *Social Determinants of Health: The Canadian Facts*, (Toronto: York University School of Health Policy and Management, 2010).
- Mitchell, Andrew, ed. *Welfare Cuts in Ontario, Punishing the Poor*, vol. 14 (Ontario: Social Planning Council of Metropolitan Toronto Social Infopac., September 1995).
- Morton, Peter. *An Institutional Theory of Law* (New York: Clarendon Press, 1998).
- Pennycook, Alistair. *Critical Applied Linguistics: A critical introduction* (London, UK: Lawrence Erlbaum Associates, 2001).
- Sullivan, Ruth. *Statutory Interpretation*, 2d ed. (Toronto: Irwin Law Inc, 2007).
- Sureda, Andrew Rigo. *Investment Treaty Arbitration: Judging in Uncertainty* (New York: Cambridge University Press, 2012).

Vago, Steven & Adie Nelson. *Law and Society* (Toronto: Pearson Education Canada, 2004).

van Dijk, Teun A., ed. *Handbook of Discourse Analysis Volume 1: Disciplines of Discourse* (London: Academic Press Ltd., 1985).

Wodak, Ruth & Paul Chilton, eds. *A New Agenda in (Critical) Discourse Analysis: Discourse Approaches to Politics, Society and Culture* (Amsterdam: John Benjamins Publishing Company, 2005).

Wodak, Ruth & Michel Meyer, eds., *Methods of Critical Discourse Analysis*, 2d ed., (Thousand Oaks, California: Sage Publications, 2009).

SECONDARY MATERIALS: ARTICLES & BOOK CHAPTERS

Alexy, Robert. "A Discourse-Theoretical Conception of Practical Reason" (1992) 5 *Ratio Juris* 231.

———. "Of Necessary Relation Between Law and Morality" (1989) 2 *Ratio Juris* 167.

Beaulac, Stéphane & Pierre-André Côté. "Driedger's 'Modern Principle' at the Supreme Court of Canada: Interpretation, Justification, Legitimization" (2006) 40 *R.J.T.* 131.

Carabine, Joan. "Unmarried motherhood 1830-1990: A genealogical analysis" in Margaret Wetherell, Stephanie Taylor & Simeon J. Yates, eds., *Discourse as Data: A Guide for Analysis* (London: Sage Publications Ltd., 2001) 267.

Cunningham, Clark D. "Symposium - The Lawyer as Translator, Representation as Text: Towards an Ethnography of Legal Discourse" (1992) 77 *Cornell L. Rev.* 1298.

Fairclough, Norman. "The Discourse of New Labour: Critical Discourse Analysis" in

- Margaret Wetherell, Stephanie Taylor & Simeon J. Yates, eds., *Discourse as Data: A Guide for Analysis* (London: Sage Publications Ltd., 2001) 232.
- Graham, Randall, "What Judges Want: Judicial Self-Interest and Statutory Interpretation" (2009) Stat. L. Rev. 38.
- Haier, Maarten A. "Doing discourse analysis: coalitions, practices, meaning" in Margo van den Brink & Tamara Metze, Eds., *Words Matter in Policy and Planning: Discourse Theory and Method in the Social Sciences* (Utrecht, the Netherlands: Labor Grafimedia, 2006) 65.
- Howarth, David. "The method of articulation" in Margo van den Brink & Tamara Metze, eds., *Words Matter in Policy and Planning: Discourse Theory and Method in the Social Sciences* (Utrecht, the Netherlands: Labor Grafimedia, 2006) 23.
- Jager, Siegfried and Florentine Maier. "Theoretical and Methodological Aspects of Foucauldian Critical Discourse Analysis and Dispositive Analysis" in Ruth Wodak & Michel Meyer, eds., *Methods of Critical Discourse Analysis*, 2d ed., (Thousand Oaks, California: Sage Publications, 2009) 34.
- King, Michael. "Child Welfare Within Law: The Emergence of a Hybrid Discourse" (1991) 18 J.L. & Soc'y 3.
- Pijpers, Roos. "Exposing fears of mass migration in the Netherlands: a narrative approach to discourse analysis" in Margo van den Brink & Tamara Metze, eds., *Words Matter in Policy and Planning: Discourse Theory and Method in the Social Sciences* (Utrecht, the Netherlands: Labor Grafimedia, 2006) 133.
- Pishchikova, Kateryna. "Civil society assistance discourse: a case of USAID in Ukraine" in Margo van den Brink & Tamara Metze, eds., *Words Matter in Policy and*

Planning: Discourse Theory and Method in the Social Sciences (Utrecht, the Netherlands: Labor Grafimedia, 2006) 91.

Edward L Rubin, "The New Legal Process: the Synthesis of Discourse and the Microanalysis of Institutions" (1996) 109 *Harvard L.R.* 6.

Rubin, Edward L. "The Practice and Discourse of Legal Scholarship" (1988) 86 *Mich. L. Rev.* 1835.

Taylor, Stephanie. "Locating and Conducting Discourse Analytic Research" in Margaret Wetherell, Stephanie Taylor & Simeon J Yates, eds., *Discourse as Data: A Guide for Analysis* (London: Sage Publications Ltd., 2001) 5.

van den Brink, Margo & Tamara Metze. "Words matter in policy and planning" in Margo van den Brink & Tamara Metze, eds., *Words Matter in Policy and Planning: Discourse Theory and Method in the Social Sciences* (Utrecht, the Netherlands: Labor Grafimedia, 2006) 13.

van Dijk, Teun A. "Discourse Studies and Education January" (1981) II(1) *Discourse Studies* 1.

———. "Critical Discourse Studies: A Sociocognitive Approach" in Ruth Wodak & Michel Meyer, eds., *Methods of Critical Discourse Analysis*, 2d ed., (Thousand Oaks, California: Sage Publications, 2009) 62.

Willis, John. "Statutory Interpretation in a Nutshell" (1938) *Can. Bar. Rev.* 1.

OTHER SECONDARY MATERIALS

Vander Doelen, Chris. "Don't Encourage Street Pests" *The Windsor Star* (9 April 2014), online: <<http://blogs.windsorstar.com/opinion/columnists/dont-encourage-street-pests>>.

- Collin, Chantal & Hilary Jensen. "A Statistical profile of Poverty in Canada"
Parliamentary Information and Research Service Library of Parliament (28
September 2009), online:
<<http://www.parl.gc.ca/content/lop/researchpublications/prb0917-e.pdf>>.
- Eardley, Tony *et al.* *Social Assistance in OECD Countries*, vol. 2, "Country Reports: A
Study Carried Out on Behalf of the Department of Social Security and the OECD
by the Social Policy Research Unit Department of Social Security Research",
Report No. 47, (London, UK: HSMO Crown Copyright, 1996).
- Ferguson, Rob. "Hydro One billing mistakes still haunt utility, ombudsman says" *Toronto
Star* (23 June 2014) online:
<http://www.thestar.com/news/canada/2014/06/23/ontario_government_mistake_shortchned_hundreds_of_families_ombud_says.html>.
- Fraser, John, et al. "Denial by Design: The Ontario Disability Support Program" (Toronto:
Income Security Advocacy Centre, 2003) online:
<<http://www.incomesecurity.org/documents/DenialByDesignfinal.pdf>>.
- Hennessey, Trish. Email from Trish Hennessey, Director, Canadian Centre for Policy
Alternatives Ontario (15 April 2014) in response to my request for
information regarding information about the living wage calculation their
economist has calculated for Toronto.
- Income Security Advocacy Centre. "Ontario Election 2014: Where do the Parties Stand in
Income security?", online:
<<http://www.incomesecurity.org/documents/OntarioElection2014-PartyResponsesonIncomeSecurity.pdf>>.

Matthews, Deb. “Review of Employment Assistance Programs in Ontario Works and Ontario Disability Support Program”, Ministry of Community and Social Services (December 2004) online:

<http://www.mcscs.gov.on.ca/documents/en/mcscs/social/publications/EmploymentAssistanceProgram_Matthews_eng1.pdf>.

McLachlin, Right Honourable Beverley, P.C., Chief Justice of Canada. “Administrative Tribunals and the Courts: An Evolutionary Relationship” *Judges of the Court, Speeches*, the Supreme Court of Canada (27 May 2013) online: <<http://www.scc-csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2013-05-27-eng.aspx>>.

Mosher, Janet and Joe Hermer, “Welfare Fraud: The Constitution of Social Assistance as Crime” Report for the Law Commission of Ontario (March 2005), online:

<[https://apps.osgoode.yorku.ca/osgmedia.nsf/0/271AE1B3D9D286D38525709A00521FBC/\\$FILE/Welfare%20Fraud%20Report.pdf](https://apps.osgoode.yorku.ca/osgmedia.nsf/0/271AE1B3D9D286D38525709A00521FBC/$FILE/Welfare%20Fraud%20Report.pdf)>.

Ontario Coalition Against Poverty. “The Straight up Truth about Applying for ODSP” (15 October 2008), online: <<http://www.ocap.ca/node/18>>.

The Oxford English Dictionary, Online ed., (Oxford: Oxford University Press, 2014).

Schneider, Florian. “Setting Up a Discourse Analysis” *Politics EastAsia* (6 May 2013), online:

<<http://www.politicseastasia.com/studying/setting-up-a-discourse-analysis-of-political-texts-from-east-asia/>>.

Social Planning Council of Ottawa. “The Working Poor of Ottawa” (December 2005), online: SPC Research List <<http://www.spcottawa.on.ca/publications>>.

Stapleton, John, et al. "The Working Poor in the Toronto Region: Who They Are, Where They Live, and How Trends are Changing" (Toronto: Metcalf Foundation Books, 2012).

Sullivan, Ruth. "The Plain Meaning Rule and Other Ways to Cheat at Statutory Interpretation", online: Legal Drafting
<<http://aix1.uottawa.ca/~resulliv/legdr/pmr.html>>.

van Dijk, Teun A., ed., "Discourse Studies" in Sage Benchmarks in Discourse Studies, (London: Sage Publications, 2007), online:
<<http://www.discourses.org/OldArticles/The%20study%20of%20discourse.pdf>>.

VITA

Name: Teri Muszak

Post Secondary Education and Degrees: University of Western Ontario,
London, Ontario, Canada
2013 – 2014 LL.M.

University of Western Ontario,
London, Ontario, Canada
2009 – 2012 J.D.

University of Waterloo,
Waterloo, Ontario, Canada
2004 – 2008 B.A.

Honours and Awards: Call to the Ontario Bar.
2013

Torkin Manes Cohen Arbus LLP Academic
Excellence and Community Service Award,
University of Western Ontario, Law.
2012

Gretta J. Grant Prize in Community Legal
Service, University of Western Ontario, Law.
2012

Related Work Experience: Lawyer/Articling Student
Community Advocacy and Legal Centre
2012 – 2013

Legal Student
Community Legal Services
2012

Legal Student
Neighbourhood Legal Services
2011 – 2012