

# Disability-Related Income Tax Provisions

by Harry Beatty<sup>1</sup> and Heidi Lazar-Meyn<sup>2</sup>

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*"When there is an income tax, the just man will pay more and the unjust less on the same amount of income . . . ."*

- Plato (*"The Republic"*)

*"There are certain things--as, a spider, a ghost,  
The income-tax, gout, an umbrella for three--  
That I hate . . . ."*

- Lewis Carroll (*"A Sea Dirge"*)

*"The hardest thing in the world to understand is income tax."*

- Albert Einstein

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<http://www.archdisabilitylaw.ca/publications/index.asp>

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## Introduction: Purpose and Outline of the Paper

Practitioners serving clients with disabilities, and clients who have dependants with disabilities, may utilize information concerning disability-related income tax provisions in providing advice regarding eligibility for these claims. Even if practitioners' practices do not include tax issues directly, it is helpful to them and their clients to be aware of these provisions. The tax treatment of disability-related income, and the deductions and credits available to persons with disabilities and their families, is important background to providing advice to these clients in areas such as employment law, personal injury law, insurance law, family law and the law related to estate and incapacity planning.<sup>3</sup>

<sup>3</sup> For some implications in the estate and incapacity planning area, see Harry Beatty's articles "Estate Planning for Beneficiaries with Disabilities in Ontario: Inheritances, Trusts and the Ontario Disability Support Program" and "Advising the Ontario Disability Support Program Recipient or Applicant who has received an Inheritance or Insurance Proceeds", on the ARCH website at:

This paper will highlight federal and Ontario tax provisions related to disability, with an emphasis on the disability-related aspects of those provisions.<sup>4</sup> While an attempt will be made to be comprehensive with respect to disability issues, some technical details of these provisions will not be covered. For example, we will not generally discuss the implications of marriage and common-law partnership breakdown in detail, nor all rules relating to the payment of spousal and child support.

### **A. Preliminary Administrative and Technical Issues**

In Section A, there will be a discussion of some preliminary administrative and technical issues that are useful to a practitioner providing services to a person with a disability, or to a person who has dependants with disabilities. The learning objective is to provide the practitioner with a practical orientation to these matters. The administrative issues discussed will include:

- 1) sources of tax information related to disability
- 2) changes to disability-related tax provisions for the 2005 taxation year, and Canada Revenue Agency (CRA) references to "proposed legislation"
- 3) forms that are used in making disability-related tax claims
- 4) tax information from the CRA in accessible formats, sources and locations
- 5) the importance of filing a return to a person who pays or owes no tax
- 6) circumstances in which it is necessary to use the T1 General Return, rather than a Special Return
- 7) filing a return on behalf of a taxpayer with limited capacity
- 8) the meaning of key terms in interpreting eligibility for disability-related claims:
  - a) "Support"
  - b) "Dependant" and "Dependent"
  - c) "Wholly Dependent"

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[www.archdisabilitylaw.ca/publications/disorders/A73\\_2003\\_002616/12\\_estatePlanning/index.asp](http://www.archdisabilitylaw.ca/publications/disorders/A73_2003_002616/12_estatePlanning/index.asp)

and

[www.archdisabilitylaw.ca/publications/disorders/A73\\_2003\\_002616/13\\_odspRecipient/index.asp](http://www.archdisabilitylaw.ca/publications/disorders/A73_2003_002616/13_odspRecipient/index.asp)

<sup>4</sup> In this article, we will use the short form "*ITA*" to refer to the federal *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), as amended. The *ITA* is available on the Department of Justice web site at:

<http://laws.justice.gc.ca/en/l-3.3/>

The Ontario *Income Tax Act*, R.S.O. 1990, c. I-2, as amended, is available on the Government of Ontario's "E-Laws" web site at:

[http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90i02\\_e.htm](http://www.e-laws.gov.on.ca/DBLaws/Statutes/English/90i02_e.htm)

However, as the Ontario *Act* typically refers to the federal *Act* with respect to eligibility conditions for claims and other rules, we will not include references to it, except when discussing provisions unique to Ontario. We will refer to it using the short form "*OITA*".

- d) "Supporting Person"
- e) "Child"
- f) "Parent"
- g) "Spouse" and "Common-Law Partner"
- h) "Brother", "Sister", "Grandparent", "Aunt", "Uncle", "Great-Aunt", "Great-Uncle", "Niece", "Nephew"
- i) "Related" and "Blood Relationship"
- j) "Mental" or "Physical" "Infirmity"
- k) "Net Income" and "Taxable Income"
- l) "Self-Contained Domestic Establishment"
- m) "Age 18 or older", "Under 18", and "Age 65 or Older" and "Under 65"
- n) "Deduction", "Credit", "Refundable Credit", "Non-Refundable Credit" and "Amount"

## **B. Overview of Income Tax Provisions Related to Disability**

In Section B, there will be presented a summary of the provisions available in the income tax system related to disability. The learning objective is to make the practitioner aware of the tax provisions that taxpayers with disabilities, and taxpayers who have dependants with disabilities, can make. For each provision, the following information will be provided if relevant:

- the name of the tax provision and a brief description of its effect
- where the provision is located in the *ITA* or Regulations
- where a claim based on the provision is made on the income tax return, and whether a Schedule or Form must be used
- additional sources of information about the provision, such as Interpretation Bulletins or information sheets
- whether the provision is an inclusion in or exemption of a payment from taxation, a deduction, a non-refundable credit, a refundable credit, or a benefit paid outside the tax system which requires completion of a tax return as a condition of applying
- whether the provision requires a disability which meets the Disability Tax Credit<sup>5</sup> (DTC) criteria of "severe" and "prolonged", whether the provision can be made on the basis that the person is "infirm", or whether the provision can be made based on incurring a type of expense typical to persons with disabilities
- whether the provision requires certification or documentation by a medical or health practitioner, and which practitioners are qualified to certify or document eligibility
- whether application for the provision can be made only by a person who has a disability himself or herself, or can be made by a relative providing support to a person with a disability as well

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<sup>5</sup> CRA often refers to the DTC as the "disability amount". In practice, the two terms "disability tax credit" and "disability amount" are interchangeable. Similarly, for other claims, the terms "credit" and "amount" are used interchangeably. See Part A(8)(n) of this paper.

- whether application for the provision can be made by an employer or a business providing services to persons with disabilities
- the value of the provision to a tax filer, and what the provision covers
- whether the provision is indexed to inflation, either fully or partially
- financial conditions on eligibility for the provision, including conditions related to the income of the person with a disability
- non-financial conditions on eligibility for the provision, including conditions related to the residence of the person with a disability
- calculations which may be required in determining the application and impact of the provision

The provisions covered in this section are:

- (1) Taxable and Non-Taxable Disability Income and Related Payments
  - (a) Social Assistance (Ontario Disability Support Program)
  - (b) Workers' Compensation (Workplace Safety and Insurance Board payments)
  - (c) Canada Pension Plan (CPP) Disability Benefits
  - (d) Long-Term Disability (LTD) Payments
  - (e) Personal Injury Awards and Settlements
  - (f) Other Tax-Exempt Payments
- (2) Tax Treatment of Retroactive Lump-Sum Disability Income Payments
- (3) Amount for an Eligible Dependant (AED)
- (4) Infirm Dependant Credit (IDC) (Amount for Infirm Dependents Age 18 or Older)
- (5) Caregiver Credit
- (6) Disability Tax Credit (DTC/Disability Amount)
- (7) DTC Supplement for Children
- (8) Child Disability Benefit
- (9) Ontario Tax Reduction for Taxpayers with Dependents who are Disabled or Infirm
- (10) Medical Expense Tax Credit (METC) (for Disability-Related Expenses)
- (11) Refundable Medical Expense Supplement (RMES)
- (12) Disability Supports Deduction (DSD)
- (13) Tax-Exempt Status of Disability-Related Employment Benefits or Allowances to Employees
- (14) Tax Treatment of Accessibility-Related Expenditures by Employers and Businesses
- (15) Increased Child Care Expenses Deduction (CCED) Where the Child has a Disability or Infirmary
- (16) Increased Availability of the CCED Where One Parent has a Disability
- (17) Full Education Amount Claim for Part-Time Study
- (18) Extended Registered Education Savings Plan (RESP) Rules for Students with Disabilities
- (19) Accessing the Lifelong Learning Plan (LLP) for Part-Time Study
- (20) Extended Home Buyers' Plan for Persons Who Qualify for the DTC
- (21) Contributions to an RRSP from CPP Disability Benefits

- (22) RRSP/RRIF Rollovers for an Infirm Child or Grandchild (Including Adult Sons, Daughters, and Grandchildren)
- (23) Preferred Beneficiary Election Under a Trust

### **C. *Disputes Involving Disability-Related Tax Claims***

In Section C, we will discuss disputes involving tax claims related to disability. Most such disputes involve eligibility for the Disability Tax Credit (DTC) or Medical Expense Tax Credit ("METC") claims. We will discuss disputes concerning other disability-related claims as well. The learning objective will be to make the practitioner aware of some of the leading cases involving eligibility for the DTC and METC, and of strategies that may be employed in resolving this type of dispute. The topics covered will include:

- 1) leading cases on the DTC;
- 2) leading cases on the METC;
- 3) travel expenses to obtain medical services;
- 4) cases on other tax provisions related to disability;
- 5) the process of appealing a DTC, METC or other disability-related tax case – strategic considerations.

### **D. *An Update: Current Status of the Recommendations of the Technical Advisory Committee on Tax Measures for Persons with Disabilities (TAC)***

In this Part of the paper, we set out the 25 recommendations of the TAC, made in its Report *Disability Tax Fairness*<sup>6</sup> in December 2004, and comment on their implementation or current status.

## **A. Preliminary Administrative and Technical Issues**

### **(1) Sources of Tax Information Related to Disability**

The Canada Revenue Agency (CRA) maintains a web page with links to disability-related tax information, provisions and services:

<http://www.cra-arc.gc.ca/tax/individuals/segments/disabilities/menu-e.html>

There is a useful booklet format guide produced by CRA, entitled "Information Concerning People with Disabilities" (RC4064), which contains an overview of the most important disability-related tax provisions and services:

<http://www.CRA-adrc.gc.ca/E/pub/tg/rc4064/README.html>

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<sup>6</sup> Technical Advisory Committee on Tax Measures for Persons with Disabilities (Ottawa: Department of Finance Canada, 2004), available on the web site of the TAC at:

<http://www.disabilitytax.ca/report.html>

More detailed information regarding disability-related tax provisions is found in the Interpretation Bulletin "Medical Expense and Disability Tax Credits and Attendant Care Expense Deduction" (IT-519R2 [Consolidated]): As of the date of writing this paper, this Bulletin is being revised. The most recent version is at:

<http://www.CRA-adrc.gc.ca/E/pub/tp/it519r2-consolid/README.html>

Information as to when a taxpayer may make a claim with respect to a dependant with a disability is found in the Interpretation Bulletin "Personal Tax Credits" (IT-513R):

<http://www.CRA-adrc.gc.ca/E/pub/tp/it513r/README.html>

There are many other forms, guides and Interpretation Bulletins that will be referred to in conjunction with specific provisions.

## **(2) Changes to Disability-Related Tax Provisions for the 2005 Taxation Year, and Canada Revenue Agency (CRA) References to "Proposed Legislation"**

In the 2005 Federal Budget, significant changes to disability-related income tax provisions were announced by the Minister of Finance. The most significant changes included the following actions by the Government of Canada:

- Extend eligibility for the disability tax credit (DTC) to individuals who face multiple restrictions that together have a substantial impact on their everyday lives.
- Amend the DTC to ensure that more individuals requiring extensive life-sustaining therapy on an ongoing basis are eligible.
- Clarify other parts of the DTC eligibility criteria, including the provisions dealing with impairments in mental function.
- Add physiotherapists to the list of health professionals who can certify eligibility for the DTC.
- Expand the list of expenses eligible for the disability supports deduction (DSD), introduced in Budget 2004, to include costs such as job coaches, deaf-blind interveners and Braille note-takers.
- Increase the maximum amount of the refundable medical expense supplement (RMES) to \$750 from \$571 per year.
- Extend, for DTC-eligible students, the contribution period for individual registered education savings plans (RESPs) to 25 years from 21 years and the lifetime limit of individual RESPs to 30 years from 25 years.

- Increase the maximum annual Child Disability Benefit (CDB) to \$2,000 from \$1,681 per child beginning in July 2005.<sup>7</sup>

We will discuss each of these changes in detail in the appropriate section of Part B of this paper. In the present section, we will limit our attention to the process by which these announced changes were brought into law, or planned to be brought into law, and the status of these changes as of the date of writing this article.

Some of the changes to the *ITA* announced in the 2005 Federal Budget were enacted into law through a Bill introduced shortly after the Budget was presented.<sup>8</sup>

But many of the most important disability-related changes, including improvements to the DTC (disability amount) and to the DSD, and clarifications to the METC, were left to be introduced at a later time, following further consideration by the Government and further consultation with the community. The Department of Finance released Legislative Proposals and Explanatory Notes related to these legislative proposals on 15 August 2005.<sup>9</sup> Comments on the proposals were requested by 30 September 2005, and after that time, the Government's intent was to introduce the proposals in Parliament. On 17 November 2005, the Minister of Finance at that time, the Honourable Ralph Goodale, tabled a Ways and Means motion in the House of Commons to introduce a second *Budget Implementation Act, 2005*.<sup>10</sup>

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<sup>7</sup> *2005 Budget Plan* (Ottawa: Department of Finance, 23 February 2005), Chapter 3, "Securing Canada's Social Foundations", on the Department of Finance web site at:

<http://www.fin.gc.ca/budget05/bp/bpc3e.htm>

<sup>8</sup> Bill C-43, "An Act to implement certain provisions of the budget tabled in Parliament on February 23, 2005", on the Parliament of Canada web site at:

[http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-43/C-43\\_4/C-43\\_cover-E.html](http://www.parl.gc.ca/38/1/parlbus/chambus/house/bills/government/C-43/C-43_4/C-43_cover-E.html)

The changes enacted by the *Budget Implementation Act, 2005*, included the following actions:

- Increasing the maximum amount of the RMES to \$750 from \$571 per year.
- Extending, for DTC-eligible students, the contribution period for individual RESPs to 25 years from 21 years and the lifetime limit of individual RESPs to 30 years from 25 years.
- Increasing the maximum annual CDB to \$2,000 from \$1,681 per child beginning in July 2005.

<sup>9</sup> The Legislative Proposals and Explanatory Notes were released with News Release 2005-053, on the Department of Finance web site at:

<http://www.fin.gc.ca/news05/05-053e.html>

This web page contains links to the Legislative Proposals and to the Explanatory Notes.

<sup>10</sup> The Notice of the Ways and Means Motion is on the Department of Finance web site at:

[http://www.fin.gc.ca/drleg/wmmNov05\\_2e.html](http://www.fin.gc.ca/drleg/wmmNov05_2e.html)

However, the Government of the day was defeated before these proposals were actually introduced in a Bill before Parliament. Accordingly, many of the disability-related changes announced in the 2005 Federal Budget have not been enacted into law, as of the date of writing this article (April 2006).<sup>11</sup>

As in the past, the Canada Revenue Agency has included references in the 2005 “General Income Tax and Benefit Guide” (Guide), and in other publications, to anticipated changes to the *ITA* which have not yet been enacted into legislation. These references are placed in a text box and introduced by the phrase “under proposed legislation”. The implication of these references is that the CRA expects they will be enacted into law eventually, to be applicable as of the 2005 taxation year.<sup>12</sup> The CRA also has changed the DTC form (T2201), and the DSD form (T929) for the 2005 taxation year to be consistent with the proposed changes. So taxpayers should complete their returns as if these provisions already had become law.

However, at the beginning of 2006 a new Government was elected, which may have a different position with respect to some tax provisions than the previous Government. As well, the new Government (like the former Government) is a minority Government, which requires some support of other parties to pass any new law through Parliament. So, while it still is reasonable to expect that the new disability-related tax provisions discussed in this article will become law, there is also a possibility that they will not. Past experience would indicate, however, that it would be very unusual for a newly-elected government to retroactively amend tax legislation applicable to a taxation year for which CRA had already published its returns, forms, and guides.

### **(3) Forms that Are Used in Making Disability-Related Tax Claims**

The form of most importance to persons with disabilities is the Disability Tax Credit certificate (DTC certificate), which is used to claim the DTC. The DTC certificate is Form T2201. The form has been revised significantly in recent years and it is essential to use the current version. Form T2201 is available on the CRA web site at:

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<sup>11</sup> At two points in this article [Part A(8)(g), when we consider the amended definition of “Common-Law Partner” and Part B(2), when we consider the deductibility of legal fees used to obtain disability insurance settlements and judgments] we also will discuss proposed amendments that resulted from the 2004 Federal Budget, but which have not yet been enacted into law. They are found at: Department of Finance, *Draft Technical Amendments to the Income Tax Act* (27 February 2004) (*Draft Technical Amendments*), s. 118(1), on the Department of Finance web site at:

<http://www.fin.gc.ca/toce/2004/ita04-introe.html>

<sup>12</sup> The CRA was placed in a somewhat difficult position with respect to the 2005 taxation year, as its normal schedule required it to publish tax information for this taxation year during a Federal election campaign.

<http://www.CRA-adrc.gc.ca/E/pbg/tf/t2201/README.html>

The only other income tax form specific to disability<sup>13</sup> is the Disability Supports Deduction (DSD) Form T929. This form is used for specified disability supports expenses that are incurred by the taxpayer himself or herself in connection with employment, a research contract, or education. The T929 form for the 2005 taxation year is found on the CRA website at:

<http://www.CRA-adrc.gc.ca/E/pbg/tf/t929/README.html>

Some tax forms which are not limited to persons with disabilities and their family members nevertheless have sections of particular importance in connection with disability. Part 3 of the "Education Amount Certificate" (Form T2202) allows certification by a health professional that a part-time student is not able to pursue full-time studies because of a disability. As we shall see when we discuss this credit in Part B(17) of this paper, the effect is that a claim may be made by or with respect to such a part-time student as if she or he were a full-time student. (We also shall see that there are alternative CRA forms to the T2202 form which do not have a place for a health professional to make this certification, although the *ITA* would permit the same certification to be made on behalf of students with disabilities who receive these alternative forms. In this case, the health professional can complete a separate letter to the same effect.) The T2202 form is found on the CRA web site at:

<http://www.CRA-adrc.gc.ca/E/pbg/tf/t2202/README.html>

Part B of the "Child Care Expenses Deduction" form (T778) has questions relating to the disability of the children cared for. Part C has questions relating to the inability of a supporting person (parent or caregiver) to care for children due to "mental or physical infirmity". When we discuss child care claims in more detail in Parts B(15) and B(16) of this paper, we will see that either the disability of a child or the disability of a parent or other supporting person may, in certain circumstances, be used to justify a higher claim for child care expenses or a claim that would not otherwise be available at all. The T778 form is found on the CRA web site at:

<http://www.CRA-adrc.gc.ca/E/pbg/tf/t778/README.html>

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<sup>13</sup> There is also a GST form to be used by persons with disabilities or family members who purchase a modified vehicle, the "GST/HST Specially Equipped Motor Vehicle Rebate Application" (GST518):

<http://www.CRA-adrc.gc.ca/E/pbg/gf/gst518/README.html>

and an "Application for Refund of Federal Excise Tax on Gasoline" (XE8) for people unable to use public transportation because of a mobility disability, and organizations providing services to such persons:

<http://www.CRA-adrc.gc.ca/E/pbg/ef/xe8/README.html>

The Child Disability Benefit (CDB) is a supplement for parents of children under 18 who qualify for both the DTC and the Canada Child Tax Benefit (CCTB), also known as the "National Child Benefit" (NCB).<sup>14</sup> We will discuss the CDB in more detail in Part B(8) of this paper. Low-income and moderate-income parents of children with severe disabilities can apply using either the DTC form (T2201) or the "Canada Child Tax Benefit Application" (RC66).<sup>15</sup> The RC66 form is on the CRA website at:

<http://www.CRA-adrc.gc.ca/E/pbg/tf/rc66/README.html>

On the Ontario Tax form (ON 428) at Line 6097 of Step 4, the calculation of the "Ontario tax reduction", there is a specific reduction for taxpayers who have dependants who are disabled or infirm. When we discuss this claim in more detail in Section B(9) of this paper, we will see that it is not available to taxpayers who have disabilities themselves. The Ontario Tax Form is on the CRA web site at:

<http://www.CRA-adrc.gc.ca/E/pbg/tf/5006-c/README.html>

#### **(4) Tax Information from CRA in Accessible Formats, Sources and Locations**

CRA makes available a range of accessibility arrangements for clients and practitioners with accommodation needs. These include:

- the Community Volunteer Income Tax Program for low-income persons who do not have complex tax problems. The toll-free number is 1.800.959.8281. A number of community and professional organizations also offer free tax clinics.
- provision of sign language interpreters for meetings if 48 hours' notice is given
- a bilingual TTY (teletypewriter) enquiry service for persons who are Deaf and other TTY users. The toll-free number is 1.800.665.0354.
- alternate format materials in Braille and large print, E-text (3¼ inch computer diskette or CD), and on audiocassette and audio MP3. Early requests for alternate format materials are suggested. The toll-free number to request these materials is 1.800.959.2221. They also can be requested on the CRA web site at:

[www.cra.gc.ca/alternate](http://www.cra.gc.ca/alternate)

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<sup>14</sup> The CDB is also available to an agency caring for a child who qualifies for the DTC, as a supplement to the "Children's Special Allowance" (CSA) received by the agency with respect to the child. Further information on the CSA is on the CRA web site at:

[http://www.CRA-adrc.gc.ca/benefits/children\\_special\\_allowances-e.html](http://www.CRA-adrc.gc.ca/benefits/children_special_allowances-e.html)

<sup>15</sup> If parents already have applied successfully for the DTC with respect to a child, they need not apply again. Similarly, if parents are already receiving the CCTB with respect to a child, they need not apply again. Further information about the CCTB is on the CRA web site at:

<http://www.cra-arc.gc.ca/benefits/cctb/menu-e.html>

- By calling 1.800.959.8281 alternate format users also can make a one-time request to receive their personal correspondence from CRA in alternate format, or to be added to a mailing list for ongoing alternate format information.
- Internet access to forms and publications at:

[www.cra.gc.ca/forms](http://www.cra.gc.ca/forms)

- building modifications and office design to make CRA premises more barrier-free.
- TELEFILE is a CRA interactive computer program that allows eligible individuals to electronically file their tax return for free using a touch-tone telephone. For persons who cannot use a touch-tone telephone pad because of disability, CRA provides assistance through a toll-free number, 1.800.714.7257. However, it is important to remember that there are a number of tax claims that cannot be made using TELEFILE. The TELEFILE service is made available to CRA clients who have received a T1 Special, T1S-A, or T1S-C (wage earners, students, seniors, and credit and benefit filers) income tax package. The TELEFILE service is also made available to clients who receive the tax package for computer software users and who would otherwise receive T1 Special, T1S-A, or T1S-C packages. However, as discussed in Part A(6) of this paper, it is possible to miss legitimate tax claims using a T1 Special form, and it is similarly possible to miss legitimate claims using TELEFILE. When CRA determines that a tax filer is eligible to use a T1 Special form or TELEFILE, this is based on the previous year's tax return, and may not take into account changes in the person's tax situation which apply to the most recent taxation year (2005).<sup>16</sup>

For details, consult the CRA guide "Information Concerning People with Disabilities" (RC4064).<sup>17</sup>

## **(5) The Importance of Filing a Return to a Person Who Pays or Owes No Tax**

Many persons with disabilities receive Ontario Disability Support Program<sup>18</sup> (ODSP) benefits or Workplace Safety and Insurance Board<sup>19</sup> (WSIB) payments, neither of which

<sup>16</sup> More information regarding TELEFILE is on the CRA web site at:

<http://www.cra-arc.gc.ca/eservices/tax/individuals/telefile/about-e.html>

<sup>17</sup> See Section A(1) *supra*.

<sup>18</sup> The ODSP is Ontario's social assistance program for persons with disabilities. The enacting legislation is the *Ontario Disability Support Program Act, 1997*, S. O. 1997, c. 25, Schedule B. For detailed information on the ODSP, see the Ontario Ministry of Community and Social Services web site at:

<http://www.cfcs.gov.on.ca/CFCS/en/programs/IES/OntarioDisabilitySupportProgram/default.htm>

<sup>19</sup> The WSIB is Ontario's workers' compensation plan. The enacting legislation is the *Workplace Safety and Insurance Act, 1997*, S.O. 1997, c. 16, Schedule A. For detailed information on the WSIB, see the WSIB web site at:

is taxable. The question then arises as to whether it is important for them to file income tax returns.

There are a number of reasons why it may be important to a person with a disability, or who has a dependant with a disability, to file an income tax return<sup>20</sup>, even if he or she pays or owes no income tax for the year in question:

- to claim a refund of tax deducted from employment or investment income
- to claim the GST credit
- to apply for or continue to receive the Canada Child Tax Benefit (“CCTB”), including the Child Disability Benefit (“CDB”)<sup>21</sup>
- to support the application of a spouse or common-law partner for the CCTB
- to document the basis on which a relative providing support may make dependent claims with respect to an adult with a disability and to calculate these claims
- to carry forward the unused portion of tuition and education amounts
- to claim Ontario sales tax and property tax credits
- to document an application to the Trillium Drug Program, delivered by the Ontario Ministry of Health and Long-Term Care, to persons or families whose drug costs are relatively high in comparison with their incomes<sup>22</sup>
- to document an application to the Assistance for Children with Severe Disabilities (ACSD) program of the Ontario Ministry of Children and Youth Services, for low-income and moderate-income parents of children with severe disabilities who have significant disability-related expenses<sup>23</sup>

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[http://www.wsib.on.ca/wsib/wsibsite.nsf/public/home\\_e](http://www.wsib.on.ca/wsib/wsibsite.nsf/public/home_e)

<sup>20</sup> CRA now identifies the importance of the general return to people who do not pay or owe tax by referring to it as the "Income Tax **and Benefit** Return" (emphasis added).

<sup>21</sup> See Part B(8) of this paper.

<sup>22</sup> An information sheet on the Trillium Drug Program is available on the web site of the Ontario Ministry of Health and Long-Term Care:

<http://www.health.gov.on.ca/english/public/pub/drugs/trillium.html>

<sup>23</sup> The ACSD program was formerly known as the Handicapped Children's Benefit program. It is under the legislative authority of the *Ontario Disability Support Program Act, 1997*, S. O. 1997, c. 25, Schedule B, s. 49 and the Regulations made pursuant to the Act, although it is an income-tested program rather than a social assistance program, and parents of modest incomes who are above social assistance levels may qualify partially or totally. An information sheet on ACSD is on the Ontario Ministry of Children and Youth Services web site at:

[www.children.gov.on.ca/CS/en/programs/SpecialNeeds/assistanceforChildrenwithSevereDisabilities.htm](http://www.children.gov.on.ca/CS/en/programs/SpecialNeeds/assistanceforChildrenwithSevereDisabilities.htm)

- to document financial eligibility for the Guaranteed Income Supplement (GIS) for seniors<sup>24</sup>
- to document financial eligibility for other benefits and services related to disability and low income (such as rent-geared-to-income housing)
- to contribute to the CPP (required for persons with earnings of more than \$3,500 for the year).<sup>25</sup>

It is to the benefit of virtually every low-income person with a disability to have an income tax return filed, for one or more of the reasons listed above.

## **(6) Circumstances in which It Is Necessary to Use the T1 General Return, Rather than a Special Return**

CRA produces several simplified returns:

- the T1S-A return containing the income, deduction, and credit amounts common to seniors;
- the T1S-C return for low-income individuals who only need to file [a return] to continue receiving GST/HST credit and [...] CCTB payments; and
- the T1 Special for individuals whose situations are not complex enough to need the General return, but who cannot use the T1S-A or T1S-C return.<sup>26</sup>

CRA has ensured in recent years that most disability-related tax claims can be made on these simplified returns, but there are still significant disability-related tax claims which cannot be made using the T1 Special returns, in particular the DSD, the Infirm Dependant Credit (IDC), and a DTC (disability amount) claim for a supported

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<sup>24</sup> The GIS is provided for by Part II, s. 10-18, of the *Old Age Security Act*, (R.S. 1985, c. O-9). Information about the GIS is on the web site of Social Development Canada (which is in the process of becoming part of Human Resources and Social Development Canada) at:

<http://www.sdc.gc.ca/asp/gateway.asp?hr=en/isp/pub/oas/gismain.shtml&hs=ozs#a>

<sup>25</sup> *Canada Pension Plan* (R.S. 1985, c. C-8), ss. 20(2) fixes the Year's Basic Exemption at \$3,500. It may be advantageous to a person with a disability to contribute to the CPP for a year, as this will make it a "contributory year" under the CPP rules for purposes of qualifying for the CPP disability benefit, should the person subsequently apply. However, ss. 44(2)(a) of the *Canada Pension Plan*, in force as of 1 January 1998, provides that the minimum level of contributions for purposes of eligibility for CPP Disability Benefits rises with inflation. By 2005, it had risen to \$4,100. So a person earning between \$3,500 and \$4,099 during 2005 would not have her or his CPP contributions returned, but would still have 2005 counted as a "non-contributory" year for purposes of calculating eligibility for CPP Disability Benefits. For more information on CPP Disability Benefits, see the (Human Resources and) Social Development Canada web site at:

<http://www.sdc.gc.ca/en/isp/cpp/disaben.shtml>

<sup>26</sup> These descriptions are taken from the CRA "Tax – Individuals - Frequently Asked Questions" web page at:

<http://www.CRA-adrc.gc.ca/tax/individuals/faq/taxreturn-e.html#3>

dependant. As these claims cannot be made using the T1 Special returns, they cannot be made using the CRA's TELEFILE services either, as previously discussed in Part A(4) of this paper.

When CRA initially determines that a tax filer is eligible to use a T1 Special return or TELEFILE, this determination is based on the person's previous tax return, and may not take into account changes in the person's tax situation during the most recent taxation year (2005). Accordingly, the safest approach is to use the T1 General return to ensure that all claims for which the tax filer is eligible are included.

## **(7) Filing a Return on Behalf of a Taxpayer with Limited Capacity**

Subsection 150(1)(d)(i) of the *ITA* provides that "if the person is unable for any reason to file the return, [the return shall be filed] by the person's guardian, committee or other legal representative".

"Legal representative" is defined in s. 248(1) of the *ITA* as follows:

"legal representative" of a taxpayer means a trustee in bankruptcy, an assignee, a liquidator, a curator, a receiver of any kind, a trustee, an heir, an administrator, an executor, a liquidator of a succession, a committee, or any other like person, administering, winding up, controlling or otherwise dealing in a representative or fiduciary capacity with the property that belongs or belonged to, or that is or was held for the benefit of, the taxpayer or the taxpayer's estate[.]

Where an adult is unable to file a return by reason of disability, but has not had a guardian of property appointed and has not given a valid power of attorney for property under the *Substitute Decisions Act, 1992*<sup>27</sup>, it might appear, given the generality of this definition of "legal representative", that the adult's next-of-kin could still act as his or her "legal representative" and file a return on his or her behalf.<sup>28</sup> But the matter is not free of doubt, and it is unfortunately problematic for anyone to file a return on behalf of such a person, especially if she or he does not have any involved next-of-kin. As well, while s. 150(1)(d) imposes an obligation on the legal representative to file a return, the *ITA*

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<sup>27</sup> S.O. 1992, c. 30, as amended.

<sup>28</sup> Author Harry Beatty has received a response to a Technical Interpretation Request from CRA, regarding a hypothetical situation in which an ODSP recipient, who did not have assets or income other than ODSP, was incapable of filing his or her own return, but did not have a legal guardian appointed under the *Substitute Decisions Act*, and had not executed a Power of Attorney for Property. However, another person had been appointed to act for the person with respect to the ODSP income support pursuant to s. 12(1) of the *ODSP Act*. In these circumstances, CRA's opinion was that the person appointed to act would qualify as the "legal representative" within the meaning of s. 150(1)(d)(i) of the *ITA*, and could file the return. If the ODSP recipient also had non-ODSP income which had to be reported for income tax purposes, however, it is not clear that the opinion would be the same. The Technical Interpretation Request is numbered 2003-004780 and is headed Subparagraph 150(1)(d)(i) of the *Income Tax Act* ("Act") – "legal representative".

does not have provisions dealing specifically with the filing of returns on behalf of people to obtain benefits for them, rather than to pay taxes on their behalf.<sup>29</sup>

## (8) The Meaning of Key Terms in Interpreting Eligibility for Disability-Related Claims

Most of the key terms that we will focus on are important in relation to determining when a taxpayer may make a claim based on having a dependant with a disability. Some of these terms are defined in the *ITA*. Others are considered to have their "ordinary meanings", but are discussed in Interpretation Bulletins and Guides, which provide some indication as to how CRA interprets them.

When speaking generally of taxpayers who have dependants with disabilities, we shall use the phrase "individual supporting a person with a disability", or a variant. We will distinguish this from the phrase "supporting person", which has a specific definition in the *ITA* in connection with child care expenses.

For each key term, we set out its relevance in general terms, then we provide the definition or explanation given in the *ITA* or in other CRA publications, and finally we provide a commentary on this definition or explanation.

### (a) "Support"

An important consideration is what is required to determine that a taxpayer provides "support" to a person with a disability, who then becomes her or his "dependant". Appendix "A" to Interpretation Bulletin IT-513R states:

**Support** -- The word "support" is not specifically defined for income tax purposes and, therefore, takes its ordinary meaning. In general terms, support involves the provision of the basic necessities of life such as food, shelter, and clothing. Support is generally something that is given voluntarily, but includes support under a legal commitment. Whether or not an individual supports another individual is a question of fact. For example, if an individual contributes amounts to a household, and such amounts can be regarded as being for the individual's own accommodation and meals, they should not be considered to have been paid by the individual for the support of another person in the household. Take the situation where a widow and her adult son and daughter live in the same home. The son is unable to support himself because of a physical infirmity and thus must rely on others for support. The mother and daughter contribute towards the maintenance of the dwelling. In this situation, if the daughter only contributes amounts that can be regarded as being for her own accommodation and meals, no amount should be

<sup>29</sup> Ss. 150(1.1)(b)(i) of the *ITA* states that there is no obligation to file a return unless "tax is payable under this Part by the individual for the year". Accordingly, a legal representative is not required to file a return simply to obtain benefits for the person represented.

considered to have been paid by her for the support of her brother and she cannot claim the dependant tax credit<sup>30</sup> for him. In another example, a person may be confined to a hospital for all or substantially all of the year because of mental or physical infirmity and the cost of hospitalization is paid by a provincial government, board or commission under a provincial hospital plan. The latter fact, in itself, does not necessarily mean that the person was not supported by an individual. If expenses such as clothing, comforts, and medical and hospital plan premiums were paid by the individual or the individual supported that person on those occasions when the latter was able to be out of hospital, then, ordinarily, it is recognized that the individual supported that person.

While there appears to be considerable flexibility in interpreting what constitutes support, it appears that what is provided must be actual, and not just nominal, assistance to the individual with a disability.

A common situation involves adults over 18 living at home with their parents, where the adult is in receipt of ODSP payments intended to cover the necessities of life. In this situation, typically the parents provide a significant amount of care, supervision and in-kind services such as meal preparation and transportation to their daughter or son, and there is a strong argument that this would constitute support, despite the ODSP benefits received.<sup>31</sup> But if the daughter or son receiving ODSP rents a self-contained apartment in the parents' home and is basically self-sufficient, unless the parents provide payments for some other items or services it would be likely that this would not be considered a support situation.

(b) *"Dependant" and "Dependent"*<sup>32</sup>

These terms are not generally defined in the *ITA*.<sup>33</sup> If an individual provides support to a person with a disability, as discussed in the previous section of this paper, that person is her or his "dependant" and is "dependent" upon her or him.

Generally, dependency claims for persons with disabilities in the income tax system require, not only that support be provided, but also that there be a family relationship between the individual providing support and the person with a disability. The

<sup>30</sup> The "dependant tax credit" referred to here is now called the "Infirm Dependant Credit" and is discussed in Part B(4) of this paper. [footnote added by authors]

<sup>31</sup> The ODSP payments would be taken into account in calculating the amount of the claims the parents could make based on the dependency of their daughter or son with a disability, as discussed in Parts B(1)(a), B(3), B(4), B(5), and B(10) of this paper. In some cases, the ODSP payments may reduce or eliminate the claim based on dependency. But this is a separate question from whether support is being provided. If no support is being provided, there is no entitlement to the claims based on dependency in any event, regardless of the income of the person with a disability.

<sup>32</sup> In the *ITA* and CRA publications, "dependant" is used as a noun and "dependent" as an adjective.

<sup>33</sup> While "dependant" is not generally defined in the *ITA*, a specific meaning is assigned to this term for purposes of two provisions we will be discussing, the Infirm Dependant Credit and the Medical Expenses Credit. This meaning is given by s. 118(6) of the *ITA*, and will be discussed in Parts B(4) and B(10) of this paper.

definitions and interpretation of family relationship terms are important in this context, as discussed in subsections (e) through (i) below.

(c) *“Wholly Dependent”*

In certain provisions in the *ITA*<sup>34</sup>, there is a reference to one person being not just “dependent” on another, but “wholly dependent”. There is no guidance as to what the qualifier “wholly” adds, but it seems to indicate generally that a greater degree of support is required than just being “dependent”. It would seem that for an individual with a disability to be “wholly dependent” on a taxpayer, the taxpayer must be the primary person providing support to the individual, at least for some period during the taxation year.

(d) *“Supporting Person”*

As already noted, there is a definition of “supporting person” in subsection 63(3) of the *ITA* for purposes of determining entitlement to a child care expenses claim:

**“supporting person”** of an eligible child of a taxpayer for a taxation year means a person, other than the taxpayer, who is

- (a) a parent of the child,
- (b) the taxpayer's spouse or common-law partner, or
- (c) an individual who deducted an amount under section 118 for the year in respect of the child,

if the parent, spouse or common-law partner or individual, as the case may be, resided with the taxpayer at any time during the year and at any time within 60 days after the end of the year.

In this definition, a supporting person must live with the taxpayer who has an eligible child, both at some point during and immediately after the taxation year in question. This is not a requirement for support with respect to other provisions within the *ITA*, however.

(e) *“Child”*

The term “child of a taxpayer” is given an extended meaning under s. 252(1) of the *ITA*, which indicates that:

words referring to a child of a taxpayer include

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<sup>34</sup> The provisions discussed in this paper are the Amount for an Eligible Dependant, s.118(1)(b) of the *ITA*, discussed in Part B(3), and the extended meaning of “child”, s. 252(1)(b) of the *ITA*, discussed in Part A(8)(e).

- (a) a person of whom the taxpayer is the legal parent;
- (b) a person who is wholly dependent on the taxpayer for support and of whom the taxpayer has, or immediately before the person attained the age of 19 years had, in law or in fact, the custody and control;
- (c) a child of the taxpayer's spouse or common-law partner; and
- (d) [Repealed]
- (e) a spouse or common-law partner of a child of the taxpayer.<sup>35</sup>

There is no age limit in the definition of child for income tax purposes. Adult sons and daughters are included, as are sons-in-law and daughters-in-law, whether through a spousal or a common-law relationship.

(f) *“Parent”*

In the *ITA*, “parent” is given an extended meaning corresponding to the extended definition of “child”. Subsection 252(2)(a) of the *ITA* provides:

In this Act, words referring to

- (a) a parent of a taxpayer include a person
  - (i) whose child the taxpayer is,
  - (ii) whose child the taxpayer had previously been within the meaning of paragraph 252(1)(b), or
  - (iii) who is a parent of the taxpayer's spouse or common-law partner

By virtue of clause (ii), a taxpayer is the parent of a person who was wholly dependent upon him or her for support at a previous time, "and of whom the taxpayer has, or immediately before the person attained the age of 19 years had, in law or in fact, the custody and control".

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<sup>35</sup> Subsection (d), which referred to adopted children, was made redundant when subsection (a) was amended to refer to “legal” rather than “natural” parents of children by the 2005 same-sex marriage bill. “An Act respecting certain aspects of legal capacity for marriage for civil purposes”, S.C. 2005, C-33, ss. 12(1) and (2).

By virtue of clause (iii), a taxpayer is the parent of a son-in-law or daughter-in-law, whether through a spousal relationship or a common-law partnership.

(g) “Spouse” and “Common-Law Partner”

CRA uses the term “spouse” of a person to mean someone to whom the person is legally married. There is, however, no longer any general definition of “spouse” in the *ITA*.<sup>36</sup>

“Common-law partner” is defined as follows in s. 248(1) of the *ITA*:

“common-law partner”, with respect to a taxpayer at any time, means a person who cohabits at that time in a conjugal relationship with the taxpayer and

- (a) has so cohabited with the taxpayer for a continuous period of at least one year, or
- (b) would be the parent of a child of whom the taxpayer is a parent, if this Act were read without reference to paragraphs 252(1)(c) and (e) and subparagraph 252(2)(a)(iii),<sup>37</sup>

and for the purposes of this definition, where at any time the taxpayer and the person cohabit in a conjugal relationship, they are, at any particular time after that time, deemed to be cohabiting in a conjugal relationship unless they were not cohabiting at the particular time for a period of at least 90 days that includes the particular time because of a breakdown of their conjugal relationship [.]

The Guide, and other CRA explanatory publications and material, refer to a proposed amendment<sup>38</sup> that would change clause (a) in the above definition to read “has so

<sup>36</sup> An extended definition of “spouse” and “former spouse”, which applies to certain provisions of the *ITA*, can be found at s. 252(3). The extended definition is not used in the disability-related tax provisions discussed in this paper.

<sup>37</sup> The effect of clause (b) is to read the definition of “child”, discussed above, in this context without including children of a spouse or common-law partner, and without including sons-in-law and daughters-in-law. This limitation is necessary so that the definition of “common-law partner” is not circular. The result is that two people are considered to be common-law partners, under this part of the definition, if they are both the legal or factual parents of a child, where factual parenting includes the requirement that the child is “wholly dependent” on the parent, or was “wholly dependent” immediately prior to the child’s 19<sup>th</sup> birthday. [footnote added by authors]

<sup>38</sup> See the discussion of “proposed amendments” in Part A(2), supra. The legislative proposal discussed here is found in *Draft Technical Amendments*, s. 118(1), on the Department of Finance web site at:

<http://www.fin.gc.ca/toce/2004/ita04-introe.html>

CRA is assuming this amendment in its 2005 taxation year materials, as noted, although the *ITA* has not yet been amended in accordance with this draft legislation. The proposed amendment will apply

cohabited throughout the twelve-month period that ends at that time". The effect of this amendment can best be illustrated using an example. If a couple without children together, who had previously cohabited for 12 continuous months (allowing for a separation of less than 90 days because of a breakdown in their conjugal relationship), then later separated (for a period of 90 days or more), and finally resumed a conjugal relationship (in 2001 or afterwards), they would not be considered "common-law partners" again until they had completed 12 months in their current cohabitation period (again, allowing for a separation of less than 90 days). However, if they were the legal or factual parents of a child together, they would be common-law partners whether or not they were cohabiting.

The impact of these definitions is that with respect to the tax provisions discussed in this paper, all of the same benefits are equally available to spouses and common-law partners, and to those persons in same-sex and opposite-sex relationships.

CRA policy has been to interpret family relationships as surviving the death of a spouse. In Appendix "A" to IT-513R, it is stated that:

when a marriage has been dissolved by death, the family relationships created by the marriage continue to exist. For example, a man or woman is considered to remain a child of his or her deceased spouse's mother or father.

Presumably, the same principle would apply when a common-law partner dies.

(h) "Brother", "Sister", "Grandparent", "Aunt", "Uncle", "Great-Aunt", "Great-Uncle", "Niece", "Nephew"

Subsection 252(2) of the *ITA* clarifies the interpretation of all of the terms "brother", "sister", "grandparent", "aunt", "uncle", "great-aunt", "great-uncle", "niece", and "nephew", as follows:

In this Act, words referring to [ . . . ]

(b) a brother of a taxpayer include a person who is

- (i) the brother of the taxpayer's spouse or common-law partner, or
- (ii) the spouse or common-law partner of the taxpayer's sister;

(c) a sister of a taxpayer include a person who is

- (i) the sister of the taxpayer's spouse or common-law partner, or

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to 2001 and later taxation years. For same-sex couples, there are also transitional rules that may extend this definition, at the election of the taxpayer, to taxation years prior to 2001. A discussion of these transitional rules is beyond the scope of this paper.

- (ii) the spouse or common-law partner of the taxpayer's brother;
- (d) a grandparent of a taxpayer include a person who is
  - (i) the grandfather or grandmother of the taxpayer's spouse or common-law partner, or
  - (ii) the spouse or common-law partner of the taxpayer's grandfather or grandmother;
- (e) an aunt or uncle of a taxpayer include the spouse or common-law partner of the taxpayer's aunt or uncle, as the case may be;
- (f) a great-aunt or great-uncle of a taxpayer include the spouse or common-law partner of the taxpayer's great-aunt or great-uncle, as the case may be; and
- (g) a niece or nephew of a taxpayer include the niece or nephew, as the case may be, of the taxpayer's spouse or common-law partner.

In paragraphs (b) and (c), note that the expanded definitions of “brother” and “sister” have not been changed to include the same-sex partners of a taxpayer’s siblings, which is an apparent oversight, as the *ITA* has generally been amended to fully recognize same-sex relationships.

In paragraph (d), it is unclear whether clauses (i) and (ii) can be used together, so that the spouse or common-law partner of the grandparent of a taxpayer’s spouse or common-law partner would be the taxpayer’s “grandparent”.

Paragraph (e) states that the spouse or common-law partner of a taxpayer’s aunt or uncle are also the taxpayer’s “aunt” and “uncle”, but does not state that the aunt or uncle of the taxpayer’s spouse or common-law partner is the taxpayer’s “aunt” or “uncle”. Paragraph (f) sets out the same rule for great-aunts and great-uncles. But paragraph (g) takes the opposite approach, stating that the niece or nephew of the taxpayer’s spouse or common-law partner is also the taxpayer’s “niece” or “nephew”, but not including the spouses or common-law partners of nieces and nephews in this designation.

Some of the confusion that the expanded definitions of “grandparent”, “aunt”, “uncle”, “great-aunt”, and “great-uncle” might create is avoided with respect to the disability-related credits we will consider<sup>39</sup>, because these credits all have an additional rule which considers anyone who stands in any of these relationships to a taxpayer’s spouse or common-law partner in the same manner as someone who stands in the same

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<sup>39</sup> All of these family relationships are considered with respect to the IDC, the Caregiver Credit, a claim for the DTC by a relative providing support to a person with a disability, and a claim for the METC by a relative providing support to a person with a disability. Each of these credits has an additional rule treating these relatives of a taxpayer’s spouse or common-law partner as if they stood in the same relationship to the taxpayer. The Amount for an Eligible Dependant only involves grandparents, and not the other family relationships discussed in this Part.

relationship to the taxpayer. But even this additional rule would not include the spouses or common-law partners of a taxpayer's nieces and nephews as also being "nieces" or "nephews".

(i) *"Related" and "Blood Relationship"*

Subsection 251(2) of the *ITA* provides that:

For the purpose of this Act, "related persons", or persons related to each other, are

- (a) individuals connected by blood relationship, marriage or common-law partnership or adoption [.]

Subsection 251(6) of the *ITA* provides that:

(6) For the purposes of this Act, persons are connected by

- (a) blood relationship if one is the child or other descendant of the other or one is the brother or sister of the other;
- (b) marriage if one is married to the other or to a person who is so connected by blood relationship to the other;
- (b.1) common-law partnership if one is in a common-law partnership with the other or with a person who is connected by blood relationship to the other; and
- (c) adoption if one has been adopted, either legally or in fact, as the child of the other or as the child of a person who is so connected by blood relationship (otherwise than as a brother or sister) to the other.

It is important to keep in mind the implications of s. 251(6)(a) in particular. According to this definition of "blood relationship", a taxpayer is related by blood only to:

- the taxpayer's parents, grandparents, great-grandparents, and other direct ancestors,
- the taxpayer's children, grandchildren, great-grandchildren, and other direct descendants, and
- the taxpayer's brothers and sisters.

The taxpayer does not have a "blood relationship" under the *ITA* to aunts, uncles, nieces, nephews, and other "relatives". A reference to persons to whom the taxpayer is

"related" will not include persons in these classes.<sup>40</sup> On the other hand, a taxpayer is "related" to the "blood relatives" of the taxpayer's spouse or common-law partner.

Adoption, whether legal or factual, creates relationships equivalent to blood relationships.

(j) *"Mental" or "Physical" "Infirmity"*

Eligibility for a number of tax claims based on disability requires the taxpayer, or a dependant, to qualify for the DTC. But there are several other claims which require only that the taxpayer or dependant have a "mental or physical infirmity". Accordingly, a person who does not qualify for the DTC may still be eligible for claims that require only "mental or physical infirmity".

Unlike the DTC, there is no definition of "mental or physical infirmity" in the *ITA*, nor is there a specific form for certifying infirmity, although CRA generally requires that a medical doctor sign a statement indicating that the person is "infirm".

Appendix "A" to Interpretation Bulletin IT-513R contains the following explanation of "mental or physical infirmity":

**Mental or Physical Infirmity** -- The term "mental or physical infirmity" is not specifically defined for the purposes of subsection 118(1) and, therefore, takes its ordinary meaning. For an individual to be entitled to claim the equivalent-to-spouse tax credit<sup>41</sup> or dependant tax credit<sup>42</sup> for a person who is 18 years of age or over and dependent on the individual because of mental or physical infirmity, the dependency must be brought about solely by reason of the infirmity, and the degree of the infirmity must be such that it requires the person to be dependent on the individual for a considerable period of time. Temporary illness is not classed as infirmity.

The "Explanation of Changes" in the Interpretation Bulletin notes that:

The discussion of the term "mental or physical infirmity" has been revised.<sup>43</sup> In former ¶ 33 of IT-513, for a person to be regarded as mentally or physically infirm, the degree of infirmity had to be such that it prevented the person from being gainfully employed during a considerable period of time.

<sup>40</sup> Aunts, uncles, nieces and nephews are, however, included in the class of persons with respect to whom the IDC and Caregiver Credit may be claimed, and for whom the METC can be claimed with respect to expenses paid on their behalf. See Parts B(4), B(5) and B(10) of this paper.

<sup>41</sup> Now referred to as the "Amount for an Eligible Dependant". [footnote added by authors]

<sup>42</sup> Now referred to as the "Infirm Dependant Credit". [footnote added by authors]

<sup>43</sup> This revision was made by CRA in 1998.

Thus, whether the person is employable is no longer directly a criterion of infirmity, although presumably it impacts, at least indirectly, on whether the person is dependent "for a considerable period of time".

Where a claim is made on the basis of infirmity, no form is required to be submitted to CRA. The taxpayer should obtain a physician's statement which confirms the nature, commencement and duration of the infirmity. The form should be available should CRA wish to verify the claim.<sup>44</sup>

(k) *"Net Income" and "Taxable Income"*

For purposes of determining entitlement to a number of the credits we will discuss, it is important to keep in mind the distinction in the income tax system between "net income" and "taxable income". The simplest way to distinguish these is that "net income" is the amount calculated at Line 236 of the T1 return, and "taxable income" is the amount calculated at Line 260.<sup>45</sup>

Some payments are included in net income but not in taxable income. While no tax is paid on such payments, they do affect entitlement to several benefits and credits which may be claimed by an individual, including benefits and credits based on the disability or infirmity of the individual or of the individual's dependant. For clients with disabilities, the most common payments which fall into this category are social assistance and workers' compensation.<sup>46</sup>

(l) *"Self-Contained Domestic Establishment"*

S. 248(1) of the *ITA* contains the following definition, which is used in some of the disability-related credits discussed in this paper:

"self-contained domestic establishment" means a dwelling-house, apartment or other similar place of residence in which place a person as a general rule sleeps and eats.

A communal form of residence, such as a boarding house, probably would not qualify as "self-contained", unless there were special circumstances.

Under the *ITA*, the issue is often whether the taxpayer "maintains" a "self-contained domestic establishment". Where the taxpayer owns or rents a home or apartment, it is clear that the taxpayer "maintains" the establishment. Otherwise, evidence that the taxpayer "pays the bills", such as taxes, insurance, utilities and repairs, will be required.

<sup>44</sup> The Guide states this in the discussion of Line 306 (dealing with the IDC).

<sup>45</sup> A third income amount, "total income", is calculated at Line 150. We do not refer to "total income" in connection with the claims discussed in this paper.

<sup>46</sup> Social assistance and workers' compensation payments are discussed in Parts B(1)(a) and B(1)(b) of this paper.

(m) “Age 18 or Older” and “Under 18”, and “Age 65 or Older” and “Under 65”

The Guide, like other CRA publications, often uses the expressions “age 18 or older” and “under 18” in describing eligibility for certain credits. A person is “age 18 or older” for the 2005 taxation year if the person reached the 18<sup>th</sup> birthday by December 31, 2005. That is, a person is “age 18 or older” if born in 1987 or earlier. Otherwise, the person is “under 18”.

Similarly, a person is “age 65 or older” for the 2005 taxation year if the person reached the 65<sup>th</sup> birthday by December 31, 2005. That is, a person is “age 65 or older” if born in 1940 or earlier. Otherwise, the person is “under 65”.

(n) “Deduction”, “Credit”, “Refundable Credit”, “Non-Refundable Credit” and “Amount”

In the income tax system, a “deduction” is an amount subtracted from “total income” to arrive at “taxable income”.<sup>47</sup> A “credit” is an amount calculated and then subtracted directly from income tax otherwise payable. The major difference in effect is that a deduction generally will benefit higher income individuals more than lower income individuals, as they are “in a higher tax bracket”. That is, as the income tax system is progressive and requires higher income individuals to pay tax at a higher rate, they also benefit more from a deduction which reduces their taxable income. Deductions discussed in this paper include the DSD and the CCED.

On the other hand, a credit, especially a personal credit of the kind we will be discussing in this paper, usually is designed within the income tax system to provide the same amount of tax reduction to lower income and higher income taxpayers. This is true of the DTC, the AED, the IDC, the Caregiver Credit, and the METC.

The personal credits just mentioned are “non-refundable” tax credits. To benefit from these credits, a taxpayer must have tax otherwise owing or payable from which to subtract these credits. For the taxation year in question, the tax may be owing or payable as a result of the calculations made on the income tax return, or it may have previously been deducted from the taxpayer’s salary or other payments received by the taxpayer.

The income tax system also contains “refundable” tax credits, which are paid to low income taxfilers, whether or not they otherwise pay or owe tax for the year in question. Some examples of refundable tax credits are the GST credit, the RMES, and the Ontario provincial property and sales tax credits. In many ways the CCTB (NCB) works like a refundable tax credit, but as it is paid on a monthly basis, rather than an annual basis, it is in some respects more like a “program” than a “tax benefit”.

Finally, in the *ITA* and in CRA forms and publications there are frequent references to “amounts”. “Amount” is a generic term which can refer to credits, deductions and other

<sup>47</sup> See Part A(8)(k) of this paper, *supra*, for an explanation of “total income” and “taxable income”.

quantities in the tax system, depending on the context. Where there is a reference to the “disability amount”, for example, this generally means the same as a reference to the DTC.

## **B. Overview of Income Tax Provisions Related to Disability**

### **(1) Taxable and Non-Taxable Disability Income and Related Payments**

Disability-related income is treated differently for tax purposes, depending on its source. Some types of disability-related income are dealt with explicitly in the *ITA*. For other types, the key is whether CRA regards the payments as “income from a taxable source”.

#### *(a) Social Assistance (Ontario Disability Support Program)*

Social assistance payments are not taxable, but are included in net income, and therefore affect eligibility for a number of other claims which a recipient with a disability may make, or which may be made by an individual supporting the person with a disability. Ontario's social assistance plan for persons with disabilities is the ODSP.<sup>48</sup> Persons who do not qualify for ODSP may be eligible for social assistance benefits through Ontario Works.<sup>49</sup>

The inclusion of social assistance payments in net income is set out at s. 56(1)(u) of the *ITA*. The exclusion of social assistance payments from taxable income is set out at s. 110(1)(f) of the *ITA*.

Social assistance payments are reported by the Ministry of Community and Social Services (and by other government departments and charities providing income support) using Form T5007. They are included in net income by being reported at Line 145 of the return, and excluded from taxable income by being deducted at Line 250 of the return.

Where an individual lives with a spouse or common-law partner, social assistance payments received by either of them must be reported by the spouse with the higher net income, regardless of whose name is on the cheque, unless there is a specific provision to the contrary elsewhere in the *ITA*.<sup>50</sup> If their net income is the same, the spouse or

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<sup>48</sup> See fn 18 *supra*.

<sup>49</sup> The Ontario Works Program (OW) is Ontario's general social assistance program, for persons in financial need who do not or have not qualified for ODSP. The enacting legislation is the *Ontario Works Act, 1997*, S. O. 1997, c. 25, Schedule A, as amended. For detailed information on OW, see the Ontario Ministry of Community and Social Services web site at:

<http://www.mcscs.gov.on.ca/CFCS/en/programs/IES/OntarioWorks/default.htm>

<sup>50</sup> *ITA* s. 56(1)(u). This provision is somewhat circular, in that it appears the spouses or common-law partners must determine which one includes the social assistance payments in net income by first calculating the net income of each. However, the Guide clarifies this in its discussion of Line 145 by

common-law partner whose name is on the cheque reports the payments. The spouse or common-law partner who reports the social assistance payments at Line 145 is also entitled to deduct them at Line 250.<sup>51</sup>

Social assistance payments are not explicitly defined in the *ITA*, but are described as "made on the basis of a means, needs or income test".<sup>52</sup> The CRA publication "T5007 Guide – Return of Benefits" (T4115)<sup>53</sup> lists certain types of payments as included in social assistance for tax purposes:

Social assistance payments are payments made to beneficiaries or third parties based on a means, needs, or income test and include payments for food, clothing, and shelter requirements to:

- individuals;
- impaired individuals in nursing homes or similar accommodations; and
- elderly individuals (generally over 64 years of age) whether or not they live in nursing homes or similar accommodations.

These amounts can also include actual rental or mortgage amounts paid for accommodation.

The Guide also indicates a number of types of payments which do not have to be reported as "social assistance":

Do not report a payment:

- that is made in a year as part of a series of payments totalling \$500 or less in the tax year;
- that is not part of a series of payments;
- for medical expenses (other than amounts paid for shelter in a nursing home) incurred by or for the payee;
- for child-care expenses that include baby-sitting services, day-nursery services, or services provided at a boarding school or camp, if the cost

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stating that the initial calculation of net income is to be made without including the social assistance payments, child care expenses (claimable at Line 214), and repayment of Old Age Security and Employment Insurance benefits (claimable at Line 235).

<sup>51</sup> *ITA* s. 110(1)(f).

<sup>52</sup> *ITA* s. 56(1)(u).

<sup>53</sup> This is a guide for governments and other organizations making social assistance and workers' compensation payments, rather than for recipients. It is available on the CRA web site at:

<http://www.CRA-adrc.gc.ca/E/pub/tg/t4115/README.html>

for these services would otherwise qualify for a deduction under section 63 of the *Income Tax Act*;

- for funeral expenses for a person related to the payee;
- for legal expenses incurred by or for the payee or a person related to the payee; or
- for job training or counselling for the payee or a person related to the payee.

**Note**

You do not have to prepare a T5007 slip for social assistance payments for amounts (often called bed reservation fees) paid to individuals to keep their residences available for use by a foster person.

Where a payment related to disability is received from a governmental or other public source, it may reasonably be assumed that it does not have to be declared as "social assistance" unless a T5007 form is issued. If there is any doubt, the matter should be discussed with the office responsible for paying the benefit.

The Ontario Government provides financial assistance to families whose children under 18 have severe disabilities through the Assistance to Children with Severe Disabilities (ACSD) program.<sup>54</sup> The families receive a monthly payment of between \$25 and \$400 depending on their income and their child's extraordinary needs related to disability. The Ontario Government also has the Special Services at Home (SSAH) program, which assists families whose children have physical or developmental disabilities, and families whose adult sons and daughters have developmental disabilities, to purchase needed items and services.<sup>55</sup> These programs are designed to pay for specific needs and costs which are of a medical or disability-related nature, and accordingly the payments from these programs are not considered "social assistance" to the parents and families within the meaning of the *ITA*. The Ontario Government does not issue T5007 forms for payments made under ACSD and SSAH, and they do not have to be reported at Line 145.

*(b) Workers' Compensation (Workplace Safety and Insurance Board payments)*

Workers' compensation payments are not taxable, but are included in net income, and therefore affect eligibility for a number of other claims which a recipient with a disability

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<sup>54</sup> See fn 23 *supra*.

<sup>55</sup> For more information regarding the SSAH program, see the Ontario Ministry of Children and Youth Services web site at:

[www.children.gov.on.ca/CS/en/programs/SpecialNeeds/specialServicesatHome.htm](http://www.children.gov.on.ca/CS/en/programs/SpecialNeeds/specialServicesatHome.htm)

may make, or which may be made by an individual supporting the person with a disability. Ontario's workers' compensation plan is administered by the Workplace Safety and Insurance Board (WSIB).<sup>56</sup>

The inclusion of workers' compensation payments in net income is set out at s. 56(1)(v) of the *ITA*. The exclusion of workers' compensation payments from taxable income is set out at s. 110(1)(f)(ii) of the *ITA*.<sup>57</sup>

Workers' compensation payments are reported using Form T5007. They are included in net income by being reported at Line 144 of the return, and excluded from taxable income by being deducted at Line 250 of the return.

Some non-income benefits under workers' compensation are not included in "net income" and no Form T5007 is issued for them, as explained in the CRA guide "T5007 Guide – Return of Benefits"<sup>58</sup> as follows:

Do not report a payment or an award for:

- medical expenses incurred by or for the employee;
- funeral expenses for the employee;
- legal expenses for the employee;
- job training or counselling for the employee that is not paid as part of, or in lieu of, wage replacement benefits; or
- the death of the employee, other than periodic payments made after the death of the employee.

**Note**

Do not include the interest portion of retroactive workers' compensation payments in the benefit amount you report on the T5007 slip. This interest, which accumulates to the date the award is made, is not included in income. Do not issue a T5007 slip or a T5 slip for these interest payments.

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<sup>56</sup> See fn 19 *supra*.

<sup>57</sup> Some special cases can arise with respect to workers' compensation payments, such as loans or advances from an employer in anticipation of the receipt of workers' compensation payments by an employee. These are dealt with in Interpretation Bulletin IT-202R2, "Employees' or workers' compensation", on the CRA web site at:

<http://www.cra-arc.gc.ca/E/pub/tp/it202r2/README.html>

<sup>58</sup> See fn 53 *supra*.

(c) *Canada Pension Plan (CPP) Disability Benefits*

Canada Pension Plan disability benefits, like other CPP payments, are taxable.<sup>59</sup> The taxability of CPP benefits is set out at s. 56(1)(a)(i)(B) of the *ITA*. The CPP provides recipients with a T4A(P) form, which is used to declare CPP benefits at Line 114 of the return.

The tax treatment of retroactive lump-sum payments from CPP is dealt with in the next part of this paper, Part B(2).

(d) *Long-Term Disability (LTD) Payments*

LTD payments, and payments from similar plans, are generally taxable where an employer paid the premiums as an employment benefit, but are not taxable where an employee or self-employed individual paid the premiums herself or himself, and the employer made no contributions to the plan.<sup>60</sup> In some circumstances, the employer makes the contributions on behalf of employees through payroll deduction in "after-tax" dollars. The employer receives no tax deduction in these circumstances, and the resulting payments are tax-free to the employees. Where the employer and employees share in paying the premiums, the resulting LTD payments are taxable, except for the portion that constitutes a return of the employees' premiums.<sup>61</sup>

The tax treatment of retroactive lump-sum payments from LTD is dealt with in the next section of this paper, Section B(2).

(e) *Personal Injury Awards and Settlements*

The tax treatment of personal injury awards and settlements involves complexities which are beyond the scope of this paper. Detailed information is provided in Interpretation Bulletin IT-365R2, "Damages, settlements, and similar receipts".<sup>62</sup> Here we provide only a summary of the main rules.

<sup>59</sup> Quebec Pension Plan (QPP) disability benefits also are taxable.

<sup>60</sup> *ITA* s. 6(1)(f). This provision lists three types of plans that are subject to this tax treatment: "(i) a sickness or accident insurance plan, (ii) a disability insurance plan, or (iii) an income maintenance insurance plan."

<sup>61</sup> For details of the tax treatment of LTD and related plans, see Interpretation Bulletin IT-428, "Wage Loss Replacement Plans", on the CRA web site at:

<http://www.cra-arc.gc.ca/E/pub/tp/it428/README.html>

However, IT-428 must be used with caution, as it has not been updated since 1995. In particular, it does not include any reference to the 2005 Supreme Court of Canada decision in the *Tsiaprailis* case, which we discuss in Part B(2) of this paper.

<sup>62</sup> On the CRA web site at:

<http://www.cra-arc.gc.ca/E/pub/tp/it365r2/README.html>

IT-365R2 must be used with caution, as it has not been updated since 1995.

The general rule is that both the general and special damages components of personal injury awards are exempt from income.<sup>63</sup> Income earned subsequently from the proceeds of a settlement, such as investment income, interest and capital gains on acquired property, is taxable, but not if the recipient is under 21 or becomes 21 during the year.<sup>64</sup> A structured settlement which meets certain conditions provides non-taxable payments to the injured person on an on-going basis.<sup>65</sup>

Class action settlements involving disability claims against the Government of Canada have been settled on the basis that the compensation payments are tax-free (while in the hands of the claimant with a disability). These include:

- the Hepatitis C (HCV) January 1, 1986-July 1, 1990 Class Actions Settlement,<sup>66</sup>
- the Ontario Hepatitis C Assistance Plan,<sup>67</sup> and
- financial assistance provided to Canadians who were directly infected with human immunodeficiency virus (HIV) from the blood supply ("primary infections") under the federal Extraordinary Assistance Plan (EAP) and a Federal/Provincial/Territorial Assistance Program for those who were secondarily infected.<sup>68</sup>

<sup>63</sup> Paragraph 2 of IT-365R2 states in part:

"All amounts received by a taxpayer or the taxpayer's dependant, as the case may be, that qualify as special or general damages for personal injury or death will be excluded from income regardless of the fact that the amount of such damages may have been determined with reference to the loss of earnings of the taxpayer in respect of whom the damages were awarded. However, an amount which can reasonably be considered to be income from employment rather than an award of damages will not be excluded from income."

It is not clear what would cause an amount to be considered as taxable according to this distinction. Presumably, counsel for an injured plaintiff would take care to avoid this result.

<sup>64</sup> *ITA* ss. 81(1)(g.1) and (g.2).

<sup>65</sup> IT-365R2, para. 5.

<sup>66</sup> See *ITA* ss. 81(1) (g.3) and Clause 8.01 of the Settlement, found on the Internet at:

<http://www.hepc8690.com/content/documents/agreement/scheduleA/SchAarticleEight-e.shtml>

<sup>67</sup> This plan provides payments for certain Hepatitis C victims infected before or after the dates which limit the Class Actions Settlement just referred to. See the Ontario Ministry of Health and Long-Term Care Fact Sheet on the plan at:

[http://www.health.gov.on.ca/english/public/program/hepc/hepc\\_assistplan.html](http://www.health.gov.on.ca/english/public/program/hepc/hepc_assistplan.html)

which indicates that the payments are tax-free.

<sup>68</sup> The authors have been unable to find a specific reference for the tax-free status of HIV compensation payments in the *ITA* or any CRA publication. The Health Canada news release announcing the compensation payments for persons who were secondarily infected states that these payments will be tax-free:

[http://www.hc-sc.gc.ca/dc-ma/aids-sida/eap-rae\\_e.html](http://www.hc-sc.gc.ca/dc-ma/aids-sida/eap-rae_e.html)

Government policy is apparently to treat this type of compensation as analogous to general and special damages, and therefore as tax-free.

(f) *Other Tax-Exempt Payments*

A number of other types of disability income and compensation payments have been exempted from taxation, either by specific provisions in the *ITA* or through interpretation by CRA, including:

- automobile insurance accident benefits ("no fault" benefits),<sup>69</sup>
- criminal injuries compensation payments,<sup>70</sup>
- war veterans allowances (Including allowances based on disability from Canada's allies),<sup>71</sup> and
- payments with respect to foster children being cared for, or payments with respect to adults being similarly cared for, who are unrelated to the tax filer.<sup>72</sup>

**(2) Tax Treatment of Retroactive Lump-Sum Disability Income Payments**

Disability income payments sometimes are received as retroactive lump sums, typically because of delays in submitting applications, delays in processing of benefits, or as the result of successful appeals. Where taxable disability income payments are partially or totally compensation for entitlement periods prior to the current taxation year, it is often more advantageous to the recipient to have the payments taxed as if they actually had been received in those previous years.

For CPP payments, the full amount of the retroactive lump sum is included on the tax return at Line 114, but information also can be provided by the Department of Human

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<sup>69</sup> The authors have been unable to find a specific reference for this proposition in the *ITA* or any CRA publication. The 2005 General Tax and Benefit Guide for Ontario, under the heading "Amounts that are not taxed", includes "compensation received from a province or territory if you were a victim of [...] a motor vehicle accident". In Ontario, however, automobile insurance accident benefits generally are received from insurance companies, rather than from the Government. Perhaps this is just imprecise wording, and the intent is to indicate that such payments are non-taxable. Under the Ontario automobile insurance system, income replacement benefits are based on a percentage of the injured person's net income, which implies that they are not taxable. See the "Statutory Accident Benefits Schedule – Accidents on or After November 1, 1996", *Insurance Act Reg.* 403/96 as amended, s. 61. As with the compensation schemes discussed in Part B(1)(e), automobile insurance benefits may be regarded by CRA as analogous to general and special damages. Or, they may be considered as "wage-loss replacement plans" for which injured drivers have paid the premiums themselves, and as analogous to the tax-free LTD payments discussed in Part B(1)(d) *supra*.

<sup>70</sup> *ITA* ss. 81(1)(q) and *ITA Reg.* 6501(h)(i).

<sup>71</sup> *ITA* ss. 81(1)(d) and (e).

<sup>72</sup> *ITA* ss. 81(1)(h). These payments would, but for this provision, be considered "social assistance" and included in the net income, although not in the taxable income, of the tax filer, as discussed in Part B(1)(a) *supra*.

Resources and Social Development<sup>73</sup> about the allocation of the payment entitlement to various years. If at least \$300 of the payments relates to previous taxation years, the payments can be taxed as if they had been received in those previous years, if the result is more favourable to the taxpayer.<sup>74</sup>

The taxation of retroactive lump-sum LTD payments was the subject of a 2005 Supreme Court of Canada decision. In *Tsiaprailis*<sup>75</sup>, by a 4-3 decision the Court upheld a Federal Court of Appeal decision that a retroactive lump-sum LTD payment should be divided into two components. One is a component representing arrears, which the Court held to be taxable under s. 6(1)(f) of the *ITA*, and the other a component representing future entitlements, which the Court held not to be taxable.

Practitioners will have to consider this case carefully before advising clients of the tax consequences of LTD settlements, and perhaps other settlements involving personal injury as well. It is important that settlements reflect a clear distinction between arrears and future entitlements. It would seem that this distinction should be made on a reasonable and defensible basis, but it is too soon to know on what basis CRA might challenge an allocation by counsel between arrears and future payments.<sup>76</sup>

Another important point is that, as of the 2004 taxation year, the CRA has allowed the deduction of legal fees from otherwise taxable disability insurance settlements and judgments. The Guide and other CRA explanatory materials indicate this is on the basis of "proposed legislation".<sup>77</sup>

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<sup>73</sup> The Department of Human Resources and Social Development was formed in early 2006 by joining the previously separate Departments of Social Development Canada (which delivered the CPP program) and Human Resources and Skills Development Canada.

<sup>74</sup> *ITA* ss. 56(8) and 120.3.

<sup>75</sup> *Tsiaprailis v. Canada*, [2005] 1 S.C.R. 113, on the Supreme Court of Canada web site at:

[http://www.lexum.umontreal.ca/csc-scc/en/pub/2005/vol1/html/2005scr1\\_0113.html](http://www.lexum.umontreal.ca/csc-scc/en/pub/2005/vol1/html/2005scr1_0113.html)

<sup>76</sup> In the *Siftar* case, decided by the Federal Court of Appeal after its decision in *Tsiaprailis* but prior to the Supreme Court of Canada's decision in that case, the Court dealt with a situation in which it was unclear what component of a lump sum insurance settlement dealt with arrears. As the Tax Court judge had held that the entire settlement was not taxable, the Federal Court of Appeal simply applied *Tsiaprailis* and required the matter to be reheard, with the onus on the taxpayer to establish the basis on which the settlement should be apportioned. *Canada v. Siftar* (Federal Court of Appeal), [2003] 4 F.C. 137, on the Federal Court of Appeal web site at:

<http://reports.fja.gc.ca/fc/2003/pub/v4/2003fc32285.html>

<sup>77</sup> See the discussion of "proposed legislation" in Part A(2), *supra*. The proposal is found in *Draft Technical Amendments* s. 4(1), on the Department of Finance web site at:

<http://www.fin.gc.ca/toce/2004/ita04-introe.html>

The legislative proposal would implement the reasoning of Miller, J. of the Tax Court of Canada in the *Zitko* case: *Zitko v. The Queen*, 2003 TCC 290, on the Tax Court of Canada web site at:

<http://decision.tcc-cci.gc.ca/en/2003/html/2003tcc290.html>

Once it is determined that part (or in an exceptional case, all) of a retroactive LTD lump-sum payment is taxable, the amount of the retroactive lump-sum is included in the return at Line 130, and a request can be made to CRA to calculate the tax on the lump sum as if it had been received in the previous years to which the payments relate, if the amount which would be reallocated is at least \$3,000 and the taxpayer was resident in Canada for the taxation years in question.<sup>78</sup> Information regarding the payments to be allocated to previous taxation years should be provided by the insurer using Form T1198, "Statement of Qualifying Retroactive Lump-Sum Payment"<sup>79</sup>, which is attached to the return.

The calculation of the most favourable tax treatment of the lump-sum payment is completed by CRA.

There is no provision in the *ITA* for re-allocating retroactive social assistance or workers' compensation payments, even though claims by the recipient or dependency claims relating to the recipient may be affected by the inclusion of the lump sum in net income for the year.

### **(3) Amount for an Eligible Dependant (AED)**

This is a claim that is available, in certain circumstances, to taxpayers who are not living with a spouse or a common-law partner, if they have a dependant living with them who is related to them.<sup>80</sup> To make this claim, while the taxpayer may have a spouse or a common-law partner from whom the taxpayer is separated, the taxpayer must neither support, nor be supported by, the spouse or common-law partner. The taxpayer only has to be in these circumstances for part of the taxation year, but cannot have a claim for a spouse or common-law partner amount for the same taxation year.

The disability or infirmity of the dependant for this claim is relevant only if the dependant is age 18 or older<sup>81</sup>, and is a child, grandchild, or brother or sister of the taxpayer, or of his or her spouse or common-law partner. In these cases, the dependant must be "infirm", although not necessarily eligible for the DTC. A parent or grandparent of the taxpayer, or of the spouse or common-law partner, need not be "infirm" for this claim to be made. The claim may also be made for a child under 18 who is not "infirm", if the

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<sup>78</sup> *ITA* ss. 110.2 provides for the deduction of a qualifying retroactive lump-sum payment from the current year's income, while *ITA* ss. 120.31 provides for its (retroactive) inclusion in previous years.

<sup>79</sup> The T1198 form is available on the CRA web site at:

<http://www.cra-arc.gc.ca/E/pbg/tf/t1198/README.html>

LTD payments are in the category referred to as "benefits from a wage loss replacement plan" on this form.

<sup>80</sup> This claim was called the "equivalent-to-spouse" claim for a number of years, up to and including the 2000 taxation year. It previously was called the "equivalent-to-married" claim for taxation year 1992 and prior years.

<sup>81</sup> See the discussion of "age 18 or older" and "under 18" in Part A(8)(m) *supra*.

eligibility conditions are met. The AED is a personal non-refundable credit<sup>82</sup>, which may be reduced or eliminated by the net income of the dependant.

The AED is set out at s.118(1)(b) of the *ITA*. It is claimed at Line 305 of Schedule 1 (Federal Tax), also using Schedule 5, and at Line 5816 of the Ontario Tax form<sup>83</sup>.

The eligibility conditions for claiming the AED are:

- the taxpayer cannot have claimed the spouse or common-law partner amount (at Line 303);
- at some time in the taxation year, the taxpayer must either be (A) unmarried and not living in a common-law partnership or (B) if married or having a common-law partner, not be living with, supporting or being supported by the spouse or common-law partner, and at that time the taxpayer must maintain a self-contained domestic establishment, either alone or with other persons, in which the taxpayer lives; and
- during the time the taxpayer meets the condition just stated, the taxpayer must provide actual support to a dependant in that establishment, and the dependant must be:
  - related to the taxpayer;<sup>84</sup>
  - resident in Canada, except for a claim with respect to a child of the taxpayer;<sup>85</sup>
  - wholly dependent for support on the individual, or the individual and the other person or persons;<sup>86</sup> and
  - "except in the case of a parent or grandparent of the individual, either under 18 years of age or dependent by reason of mental or physical infirmity"<sup>87</sup>.

<sup>82</sup> See the discussion of "non-refundable credit" in Part A(8)(n) *supra*.

<sup>83</sup> Form ON 428, on the CRA web site at:

<http://www.cra-arc.gc.ca/E/pbg/tf/5006-c/README.html>

<sup>84</sup> See the discussion of "related" in Part A(8)(i) *supra*. Essentially, the *ITA* definition of who is "related" to the taxpayer limits the Amount for an Eligible Dependand claim so that it may be made with respect to the taxpayer's parents, grandparents, children, grandchildren, brothers, sisters, and persons who stand in these relationships to the taxpayer's spouse or common-law partner. The Amount for Eligible Dependand claim cannot be made with respect to aunts, uncles, nieces, nephews, etc., even if they live with the taxpayer and receive support from the taxpayer.

<sup>85</sup> Thus a taxpayer deemed resident in Canada, but not actually living in Canada, may make the AED claim only with respect to a child, as discussed in the Guide at Line 305.

<sup>86</sup> As discussed in Part A(8)(c) *supra*, it is not clear what the qualifier "wholly" adds in this context, especially as according to ss. 118(1)(b)(ii)(B) of the *ITA*, the dependant can be "wholly dependent" on more than one person.

CRA considers that this claim may be made with respect to a student who lives with the taxpayer when not at school.

Only one claim for the AED can be made with respect to the same dependant. Only one claim for the AED can be made by taxpayers living in the same household, even if there is more than one taxpayer and more than one dependant living there who would otherwise qualify. If two taxpayers otherwise both entitled to make this claim are prevented from doing so by these rules, they must agree as to who will make the full claim. Otherwise, neither will be allowed to do so. The AED claim cannot be divided between two taxpayers.<sup>88</sup>

If a taxpayer claims the AED with respect to a dependant, no other person can claim either the Infirm Dependant Credit (IDC) or the Caregiver Credit with respect to the same dependant.<sup>89</sup> The same taxpayer can claim the AED and also make a partial claim for either the IDC or the Caregiver Credit, but not both. The AED claim is subtracted from either the IDC claim or the Caregiver Credit claim. The effect is that the taxpayer is entitled only to the larger of the two claims.<sup>90</sup>

For 2005, the federal value of the AED tax credit is 15 per cent of \$7,344, which provides a maximum federal tax reduction of \$1,102. The \$7,344 amount on which the credit is based is reduced dollar-for-dollar by the net income of the dependant over \$735, so that the credit is eliminated altogether at a net income of \$8,079. The credit amount and the income threshold at which the credit starts to be reduced are fully indexed to inflation.

The Ontario provincial value of the credit is 6.05 per cent of \$6,960, which provides a maximum provincial tax reduction of \$421. The \$6,960 amount on which the credit is based is reduced dollar-for-dollar, by the net income of the dependant over \$696, so that the credit is eliminated altogether at a net income of \$7,656.

Example:

Since social assistance is included in net income<sup>91</sup>, where an ODSP recipient lives with family and receives the standard boarder rate of \$730/month<sup>92</sup>, or \$8,760/year, no family member would be able to make the AED claim with respect to the ODSP recipient. \$8,760/year exceeds both the federal limit of \$8,079 and the provincial limit of \$7,656.

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<sup>87</sup> See the discussion of "mental or physical infirmity" in Part A(8)(j) *supra*.

<sup>88</sup> *ITA* s. 118(4)(b).

<sup>89</sup> *ITA* s. 118(4)(c).

<sup>90</sup> *ITA* ss. 118(1)(e) and 118(4)(c).

<sup>91</sup> See the discussion of social assistance in Part B(1)(a) *supra*.

<sup>92</sup> O.Reg. 222/98, the *Ontario Disability Support Program Act, 1997 General Regulation*, as amended, ss. 33(1). Each single person who boards with his or her family receives \$678 pursuant to paragraph 1(i) of this sub-section, and \$52 pursuant to paragraph 5.

#### **(4) Infirm Dependant Credit (IDC) (Amount for Infirm Dependents Age 18 or Older)**

The IDC is claimed by taxpayers who provide support to certain infirm<sup>93</sup> relatives 18 or over. It is an alternative claim to the Caregiver Credit, which is discussed next, in Part B(5). Only one of the two credits may be claimed with respect to a dependant. Unlike the Caregiver Credit, the IDC may be claimed for a dependant who lives in a separate residence from the taxpayer. The IDC is a personal non-refundable credit<sup>94</sup>, which may be reduced or eliminated by the net income of the dependant. While the maximum value of the IDC to the taxpayer is the same as for the Caregiver Credit, the level of net income of the dependant at which the credit is reduced is lower than for the Caregiver Credit. So if the Caregiver Credit is available, it should be claimed in preference to the IDC.

The IDC is provided for by s. 118(1)(d) of the *ITA*. It is claimed at Line 306 of Schedule 1 (Federal Tax), also using Schedule 5, and at Line 5820 on the Ontario Tax form.

The IDC may be claimed by a taxpayer supporting one or more of the following relatives who is 18 years of age or over and who is dependent due to a mental or physical infirmity: a child or grandchild, parent, grandparent, brother, sister, aunt, uncle, niece, or nephew.<sup>95</sup> The claim also may be made with respect to any of these relatives of the taxpayer's spouse or common-law partner.

Except for a child or grandchild of the taxpayer, the claim can be made only with respect to a dependant who resided in Canada at some point during the year.

The IDC claim with respect to a particular dependant may be divided between two or more taxpayers who each are entitled to it, but the total amount claimed cannot be more than the maximum amount if one taxpayer had claimed it. The CRA may divide the claims if the taxpayers have failed to agree.<sup>96</sup> Similarly, the IDC claim by one or more taxpayers with respect to a particular dependant may be divided with the Caregiver Credit claim by one or more taxpayers, subject to the maximum of any one claim. Again, the CRA may divide the claims if the taxpayers have failed to agree.

A taxpayer may partially combine a claim for the IDC with a claim for the AED, but may not claim the former if the latter is claimed with respect to the same dependant by anyone else. Where a taxpayer is entitled to both claims, however, the AED claim is

<sup>93</sup> See the discussion of "mental or physical infirmity" in Part A(8)(j) *supra*.

<sup>94</sup> See the discussion of "non-refundable credit" in Part A(8)(n) *supra*.

<sup>95</sup> *ITA* s. 118(1)(d) states that the IDC may be claimed with respect to "dependants", and goes on to provide a specific definition of this term in s. 118(6) which includes children, grandchildren, parents, grandparents, sisters, brothers, aunts, uncles, nieces or nephews, and persons standing in this relationship to the taxpayer's spouse or common-law partner. This is not a definition of "dependant" generally applicable in the *ITA*: it is specific to the IDC and the METC. For the Caregiver Credit, to be discussed in the next part of this paper, the same result is achieved more simply by listing the wider class of relatives! See Part A(8)(h) *supra* for a discussion of the meaning of the terms "aunt", "uncle", "niece", "nephew", etc. in the *ITA*.

<sup>96</sup> *ITA* ss. 118(4)(e).

subtracted from the IDC claim. The effect is that the taxpayer is entitled only to the larger of the two claims.<sup>97</sup>

For 2005, the federal value of the IDC is 15 per cent of \$3,848, which provides a maximum federal tax reduction of \$577. The \$3,848 amount on which the credit is based is reduced, dollar-for-dollar, by the net income of the dependant over \$5,460, so that the credit is eliminated altogether at a net income of \$9,308. The credit amount and the income threshold at which the credit starts to be reduced are fully indexed to inflation.

The Ontario provincial value of the credit is 6.05 per cent of \$3,863, which provides a maximum provincial tax reduction of \$234. The \$3,863 amount on which the credit is based is reduced dollar-for-dollar by the net income of the dependant over \$5,492, so that the credit is eliminated altogether at a net income of \$9,355.

Example:

Since social assistance is included in net income<sup>98</sup>, where an ODSP recipient lives with family and receives the standard boarder rate of \$730/month<sup>99</sup>, or \$8,760/year, while a family member would be able to make the IDC with respect to the ODSP recipient, it would be very limited in value. The amount - \$8,760/year - is only slightly below the federal "limit" of \$9,308 and the provincial limit of \$9,355, at which this claim would be reduced to zero. However, as discussed in the next Part of this paper, a family member with whom the dependant lives would be able to claim the full Caregiver Credit with respect to this dependant.

## (5) Caregiver Credit

The Caregiver Credit is claimed by taxpayers who provide support to certain infirm dependent relatives 18 or over who reside with them, or to parents or grandparents over 65 who need not be infirm. It is an alternative claim to the IDC. Only one of the two credits may be claimed with respect to a dependant. The Caregiver Credit is a personal non-refundable credit<sup>100</sup>, which may be reduced or eliminated by the net income of the dependant. While the maximum value of the Caregiver Credit to the taxpayer is the same as for the IDC, the level of net income of the dependant at which the credit is reduced is considerably higher than for the IDC. If the Caregiver Credit is available, then, it should be claimed in preference to the IDC.

The Caregiver Credit is provided for by s. 118(1)(c.1) of the *ITA*. It is claimed at Line 315 of Schedule 1 (Federal Tax), also using Schedule 5, and at Line 5840 on the Ontario Tax form.

<sup>97</sup> *ITA*, ss. 118(1)(e) and 118(4)(c).

<sup>98</sup> See the discussion of social assistance in Part B(1)(a) *supra*.

<sup>99</sup> See fn 92 *supra*.

<sup>100</sup> See the discussion of "non-refundable credit" in Part A(8)(n) *supra*.

The Caregiver Credit may be claimed by a taxpayer who maintains a self-contained domestic establishment<sup>101</sup>, either alone or with other persons, in which the taxpayer lives, and in which the taxpayer supports a dependant who also lives there and who is:

- one or more of the following relatives 18 years of age or over who is dependent due to a mental or physical infirmity<sup>102</sup>: a child or grandchild, brother, sister, aunt, uncle, niece, or nephew,
- a parent or grandparent of the taxpayer 65 or over, whether infirm or not, or
- any of these relatives of the taxpayer's spouse or common-law partner.

Except for a child or grandchild of the taxpayer, the claim can only be made with respect to a dependant who resided in Canada at some point during the year.

There are two ways in which the class of dependants eligible for the Caregiver Credit is different from the class of dependants eligible for the IDC. First, for the Caregiver Credit the dependant must live with the taxpayer, for at least part of the year, but this is not required for the IDC. Second, a parent or grandparent who is 65 or over during the taxation year is eligible for the Caregiver Credit without showing infirmity, but would not be eligible for the IDC unless infirm.

The Caregiver Credit claim with respect to a particular dependant may be divided between two or more taxpayers who are each entitled to it, but the total amount claimed cannot be more than the maximum amount either one could have claimed. The CRA may divide the claims if the taxpayers have failed to agree. Similarly, if one taxpayer were entitled to claim the Caregiver Credit for a dependant, and another were entitled to claim the IDC (but not the Caregiver Credit) for the same dependant, they could divide the claim, but only up to the maximum amount of the IDC (which might be less than the amount of the Caregiver Credit).<sup>103</sup>

A taxpayer may combine a claim for the Caregiver Credit with a claim for the AED, but may not claim the former if the latter is claimed with respect to the same dependant by anyone else. Where a taxpayer is entitled to both claims, the AED claim is subtracted from the Caregiver Credit claim. The effect is that the taxpayer is entitled only to the larger of the two claims.<sup>104</sup>

For 2005, the federal value of the Caregiver Credit is 15 per cent of \$3,848, which provides a maximum federal tax reduction of \$577. The \$3,848 amount on which the credit is based is reduced dollar-for-dollar by the net income of the dependant over \$13,141, so that the credit is eliminated altogether at a net income of \$16,989. The credit amount and the income threshold at which the credit starts to be reduced are fully indexed to inflation.

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<sup>101</sup> See the discussion of "self-contained domestic establishment" in Part A(8)(l) *supra*.

<sup>102</sup> See the discussion of "mental or physical infirmity" in Part A(8)(j) *supra*.

<sup>103</sup> *ITA* ss. 118(4)(e).

<sup>104</sup> *ITA* ss. 118(1)(e) and 118(4)(c).

The Ontario provincial value of the credit is 6.05 per cent of \$3,863, which provides a maximum provincial tax reduction of \$234. The \$3,863 amount on which the credit is based is reduced dollar-for-dollar by the net income of the dependant over \$13,218, so that the credit is eliminated altogether at a net income of \$17,081.

Example:

Although social assistance is included in net income<sup>105</sup>, where ODSP recipient lives with family and receives the standard boarder rate of \$730/month<sup>106</sup>, or \$8,760/year, a family member would be able to make the full Caregiver Credit claim with respect to the ODSP recipient. \$8,760/year is below the federal threshold of \$13,141 and the provincial threshold of \$13,218.

## **(6) Disability Tax Credit (DTC/Disability Amount)**

The Disability Tax Credit (DTC), also referred to as the "Disability Amount" in CRA publications, is a non-refundable credit available to persons with disabilities who have one or more severe and prolonged impairments in physical or mental functions<sup>107</sup>, the effect of which is a marked restriction in their ability to perform a basic activity of daily living, all or substantially all of the time, even with therapy and the use of appropriate devices and medication.<sup>108</sup>

Persons who require extensive therapy to sustain a vital function are also eligible, even if there is no marked restriction in their actual functioning. To be eligible, the person must receive therapy specifically designed to treat persons with their particular type of impairment, and must receive therapy at least three times during the week, for a total duration averaging not less than 14 hours per week.<sup>109</sup>

A taxpayer with a disability who is eligible for the DTC primarily claims it for himself or herself. Where a person who is eligible for the DTC cannot use it, either at all or in part, because she or he has little or no tax to pay, in certain circumstances the DTC may be used by an individual supporting the person with a disability. People of any age may be eligible for the DTC, and a person providing support to a dependant may claim a

<sup>105</sup> See the discussion of social assistance in Part B(1)(a) of this paper.

<sup>106</sup> See fn 92 *supra*.

<sup>107</sup> The Legislative Proposals (15 August 2005) (Legislative Proposals), s. 6(1), replaces the clause "an individual has a severe and prolonged mental or physical impairment" with the clause "an individual has one or more severe and prolonged impairments in physical or mental functions" in ss. 118.3(1)(a) of the *ITA*. This responds to Recommendation 2.1 (p. 33) of the Technical Advisory Committee's (TAC) report "Disability Tax Fairness", discussed in detail in Part D of this paper. The TAC advised that this change be made in the interests of conceptual clarity, so that there would be a distinction drawn between functions and activities, and accordingly between limitations in functions and limitations in activities. The TAC did not see this new language as changing the eligibility conditions for the DTC.

<sup>108</sup> *ITA* ss. 118.3(1)(a.1) and 118.4(1)(b).

<sup>109</sup> *ITA* ss. 118.3(1)(a.1).

“transfer” of the credit, regardless of the age of the dependant, if certain conditions are met.

The eligibility conditions for the DTC are set out in Subsections 118.3 and 118.4 of the *ITA*. The DTC is claimed on Schedule 1 (Federal Tax) at Line 316 by a taxpayer who is eligible for the DTC himself or herself, at Line 318 for a dependant other than a spouse or common-law partner, and at Line 326, also using Schedule 2, for a spouse or common-law partner. On the Ontario tax form, the DTC is claimed at Line 5844 by a taxpayer who is eligible for the DTC himself or herself, at Line 5848 for a dependant other than a spouse or common-law partner, and at Line 5864 using Schedule ON(S2) for a spouse or common-law partner. The conditions under which a DTC claim may be made with respect to a dependant are discussed in more detail below in Part B(6)(c) of this paper.

The DTC is claimed by submitting the T2201 form, "Disability Tax Credit Certificate". If the T2201 has been previously submitted and accepted, it does not have to be submitted again for a new taxation year, unless CRA requests that this be done, or the health professional completing the previous certificate stated an anticipated time limit for the disability which ended prior to the taxation year in question.

*(a) Medical Eligibility for the DTC: An Overview*

To qualify for the DTC, a DTC Certificate (Form T2201) must be completed with respect to the individual in question by a medical practitioner or another health professional designated under the *ITA* as able to certify that type of impairment. As Form T2201 was changed significantly in 2003, and has been amended again in 2005 to take account of the recommendations of the TAC, it is important to use the most recent version of the form, available on the CRA web site at:

<http://www.cra-arc.gc.ca/E/pbg/tf/t2201/README.html>

The questions asked of medical practitioners and other health professionals on Form T2201 in effect set out CRA's position as to what is required to qualify for the DTC.

The health professionals who can certify impairments by completing Form T2201 are:

- medical doctors - all types of impairments,
- optometrists - sight impairments,
- speech-language pathologists - speech impairments,
- audiologists - hearing impairments,
- occupational therapists - impairments with respect to an individual's ability in walking, and impairments with respect to an individual's ability in feeding and dressing themselves

- physiotherapists - impairments with respect to an individual's ability in walking (effective as of 22 February 2005)<sup>110</sup>
- psychologists - impairments with respect to an individual's ability in mental functions necessary for everyday life.<sup>111</sup>

As we shall see shortly, for the 2005 taxation year a new basis on which eligibility for the DTC may be based is the cumulative effect of multiple restrictions on functioning, where none of the restrictions taken by itself is sufficient for the individual to qualify. Eligibility on the basis of cumulative effects must be certified by a medical doctor, unless the cumulative effects relate solely to limitations in walking, feeding and dressing, in which case the certification may also be completed by an occupational therapist.<sup>112</sup>

The health professional must be authorized to practice in the Canadian province or territory, or in another jurisdiction in which the individual resides.<sup>113</sup> All of the health professions authorized under the *ITA* are regulated in Ontario by professional Colleges under the *Regulated Health Professions Act*.<sup>114</sup>

Medical eligibility for the DTC<sup>115</sup> as certified using Form T2201 is important to persons with disabilities and their families, as it is used as an eligibility condition for a number of other disability-related tax claims and entitlements, to be discussed in the following sections of this paper.

A common difficulty faced by low-income and modest-income individuals and families with disabilities, and their health professionals, is that there is no source of public funding to pay health professionals for completing Form T2201. It is not an insured

<sup>110</sup> The Legislative Proposals, ss. 6(3) add the clause "or after February 22, 2005, a physiotherapist", to paragraph (v), "an impairment with respect to an individual's ability in walking, an occupational therapist" in ss. 118.3(1)(a.2) of the *ITA*. This responds in part to Recommendation 2.6 (p. 44) of the TAC report "Disability Tax Fairness".

<sup>111</sup> *ITA* s. 118.3(1)(a.2). This provision is amended by the Legislative Proposals ss. 6(3) to be consistent with the new general description of the DTC, discussed at fn 108 *supra*.

<sup>112</sup> The Legislative Proposals, ss. 6(3) adds a new provision ss. 118.3(1)(a.3) to the *ITA* which contains this provision.

<sup>113</sup> *ITA* s. 118.4(2)

<sup>114</sup> S.O. 1991, c. 18, as amended. The Colleges which govern the various health professions can advise whether a professional is a member and therefore eligible to complete the DTC. A list of contact information for all of the professional health Colleges is on the web site of the Ontario Ministry of Health and Long-Term Care at:

[http://www.health.gov.on.ca/english/public/program/pro/procol\\_dt.html](http://www.health.gov.on.ca/english/public/program/pro/procol_dt.html)

<sup>115</sup> The term "medical eligibility for the DTC" is used here to indicate that the person has one or more severe and prolonged impairments in physical or mental functions leading to a marked restriction in one or more activities of daily living. A person who is "medically eligible for the DTC" is not necessarily able to actually claim it, as the person may have no taxable income against which to offset the non-refundable credit. Nor is the "medically eligible" person necessarily able to transfer the DTC to another person, since the person may not be anyone else's "dependant" meeting the conditions for transfer set out in the *ITA*. There are other circumstances in which the DTC cannot be claimed by an individual or with respect to the individual as a dependant, although the person "qualifies medically" for the credit.

service within the Ontario Health Insurance Plan (OHIP), nor does CRA provide funding for completing the forms. The person with a disability, or the family, either must pay to have the form completed, or else the health professional must complete the form without payment. While paying to have the form completed, in some circumstances, imposes some hardship on the family or individual, it is important to ensure that the health professional takes the time to complete the form correctly, and paying a fee may facilitate this.<sup>116</sup>

There is no age restriction on eligibility for the DTC. A child born in taxation year 2005 may be eligible, and so may be a senior. However, the age of the person is a factor to be considered in determining whether the person has a severe and prolonged impairment in physical or mental functioning leading to a marked restriction in an activity of daily living. Form T2001 states in a "Note" to the qualified practitioner:

Whether completing this form for a child or an adult, assess your patient relative to someone of a similar chronological age who does not have the marked restriction.

In other words, the individual is to be assessed in comparison with a (hypothetical) non-disabled peer of the same age.

Eligibility for the DTC requires that there be one or more impairments in physical or mental functions which are "severe" and "prolonged", leading either to a "marked restriction" in an activity or activities of daily living, or to the need for therapy required to sustain a "vital function" so that the person does not have a marked restriction.

The term "severe" is not defined in the *ITA*. The meaning of "severe impairments" is essentially determined by their effects, *i.e.*, that they are impairments in functioning leading to a marked restriction in activities of daily living, or to the need for therapy required to sustain a "vital function" so that the person does not have a marked restriction.

Subsection 118.4(1)(a) of the *ITA* provides that an "an impairment is prolonged where it has lasted, or can reasonably be expected to last, for a continuous period of at least 12 months". This requirement gives rise to a challenging problem of interpretation when disabilities are episodic or variable in their effects, such as multiple sclerosis or bipolar mood disorder. In many cases, the underlying disability is present on a continuous basis, but its effects are not evident on a continuous basis. For the individual with this type of disability to be eligible for the DTC, the "impairment" must be equated with the underlying disability, not with its variable effects. In this context, it is important to note

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<sup>116</sup> There is no consistency among health professionals as to their practices with respect to the DTC. Some will complete the form carefully for a patient without asking for a fee, while others require a fee. There is no consistent practice among practitioners. For example, the Ontario Medical Association has a Schedule of Fees for non-insured (*i.e.* non-OHIP) services, but physicians are not required to follow it, although they are required by the regulations under the Ontario *Medicine Act* to inform the patient if their fee will exceed the schedule: Ontario Regulation 856/93, as amended (made under the *Medicine Act*, 1991), s. 1(1)22.

that it is the impairment, and not the marked restriction, which is required to last, or be expected to last, for a continuous period of at least 12 months.

The conceptual distinction emphasized by the TAC between functions and activities assists in understanding how persons with episodic or variable disabilities may be eligible for the DTC. An impairment in physical or mental functioning may be present in an individual, even when there are no current activities of the individual which show the effects of the difficulties in functioning. When we come to discuss eligibility of persons with different types of specific disabilities for the DTC, we shall return to this important point.

We now consider the "marked restriction" requirement. Subsection 118.4(1)(b) of the *ITA* states that:

an individual's ability to perform a basic activity of daily living is markedly restricted only where all or substantially all of the time, even with therapy and the use of appropriate devices and medication, the individual is blind or is unable (or requires an inordinate amount of time) to perform a basic activity of daily living[.]

Note that blindness is treated separately than other disabilities under this provision. We shall return to this point when we discuss disabilities related to sight in more detail, in Part B(6)(c).

The phrase "all or substantially all of the time" leads to similar and related problems of interpretation as the definition of "prolonged" just discussed. For episodic and variable disabilities, the individual's ability to function may change repeatedly and rapidly. For much of the time, the person's functioning level may be uncertain. In this context, it is difficult to assign a clear and precise meaning to whether the inability to function is present "all or substantially all of the time".<sup>117</sup>

The phrase "even with therapy and the use of appropriate devices and medication" is also difficult to interpret and apply in some cases. There are a number of reasons why an individual with a disability may not be getting the maximum benefit from "appropriate devices and medication". They may not be available in the person's community (for example, if a specialist is not available to prescribe them), or the person and her or his family may not be able to afford them. With some mental health disabilities, the disability itself may be a barrier to the individual's recognizing that medication may be helpful. If applied strictly, this qualification has the potential to make some persons with severe disabilities, and limited resources to address them, ineligible for the DTC. Where there are good reasons why an individual cannot access or use "appropriate devices and medication", the health professional should be asked to take this into account in making her or his assessment of eligibility for the DTC.

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<sup>117</sup> CRA has, in the past, interpreted "all or substantially all of the time" to mean "90 [per cent] of the time", both for the DTC and in other contexts within the *ITA*, but it is far from clear how such a percentage test can be applied realistically in practice to a person with an episodic or variable disability who is thereby limited in functioning.

*(b) Medical Eligibility for the DTC; Impact of 2005 Changes*

We have already discussed two ways in which the certification of DTC eligibility for 2005 is different than for previous years.

- The general description of those who are eligible for the credit is changed to persons with disabilities who “ha[ve] one or more severe and prolonged impairments in physical or mental functions”<sup>118</sup>, which emphasizes that it is underlying functional abilities, not day-to-day activities, which are to be assessed in determining eligibility for the DTC.
- As of February 22, 2005, physiotherapists are allowed to certify eligibility for the DTC due to a marked restriction in walking.<sup>119</sup>

There are three further important respects in which the framework for determining eligibility for the DTC has been changed for the 2005 taxation year. It is essential that health professionals completing Form T2201 be aware of these developments.

- Eligibility for the DTC has been extended to persons who have significant restrictions in two or more activities of daily living, where the cumulative effect of these significant restrictions is equivalent to having a marked restriction in one specific activity of daily living.<sup>120</sup> (As noted above, eligibility under this new rule must be certified by a medical doctor, except where the activities of daily living are limited to walking, feeding and dressing, in which case the certification may also be completed by an occupational therapist.)<sup>121</sup>
- The activity of daily living that used to be described as “perceiving, thinking and remembering” is now described as “mental functions necessary for everyday life”.<sup>122</sup> “Mental functions necessary for everyday life” are further defined to include:

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<sup>118</sup> See fn 107 *supra*.

<sup>119</sup> See fn 110 *supra*.

<sup>120</sup> The Legislative Proposals, ss. 7(1) adds a new provision ss. 118.4(1)(b.1) to the *ITA* which reads as follows:

an individual is considered to have the equivalent of a marked restriction in a basic activity of daily living only where all or substantially all of the time, even with therapy and the use of appropriate devices and medication, the individual's ability to perform more than one basic activity of daily living (including for this purpose, the ability to see) is significantly restricted, and the cumulative effect of those restrictions is tantamount to the individual's ability to perform a basic activity of daily living being markedly restricted[.]

This responds to Recommendation 2.4 (p. 41) in the TAC's Report “Disability Tax Fairness”.

<sup>121</sup> See fn 112 *supra*.

<sup>122</sup> The Legislative Proposals, ss. 7(2) amends ss. 118.4(1)(c)(i) of the *ITA* to make this change. This amendment responds to Recommendation 2.2 (p. 37) in the TAC's Report “Disability Tax Fairness”.

- (i) memory
- (ii) problem solving, goal-setting and judgement (taken together), and
- (iii) adaptive functioning.<sup>123</sup>

The intent of this amendment is to allow health professionals to focus in a more realistic manner on the eligibility for the DTC of persons with a wide range of psychiatric, intellectual and learning disabilities.

- Where eligibility for the DTC is based on the person's requirement for extensive therapy, without which the person would have a marked restriction in functioning in an activity of daily living, there are now rules defining more precisely how the time spent in therapy is to be calculated.<sup>124</sup>

We shall discuss each of these developments in more detail, in the context of our discussion of specific grounds of eligibility for the DTC in the next Part of this paper.

### *(c) Specific Grounds of Eligibility for the DTC*

A person who is "blind" qualifies as having a "marked restriction", if the blindness is certified by a medical doctor or optometrist. On Form T2201, the question asked of the

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<sup>123</sup> The Legislative Proposals, ss. 7(3) add a new provision ss. 118.4(1)(c.1) to the *ITA* to include this definition. This amendment also responds, in part, to Recommendation 2.2 (p. 37) in the TAC's Report "Disability Tax Fairness". See the further discussion of Recommendation 2.2 in Part D.

<sup>124</sup> The Legislative Proposals, ss. 6.4 adds a new provision ss. 118.3(1.1) to the *ITA* which reads as follows:

For the purpose of paragraph 118.3(1)(a.1), in determining whether therapy is required to be administered at least three times each week for a total duration averaging not less than an average of 14 hours a week, the time spent on administering therapy

(a) includes only time spent on activities that require the individual to take time away from normal everyday activities in order to receive the therapy,

(b) in the case of therapy that requires a regular dosage of medication that is required to be adjusted on a daily basis, includes (subject to paragraph (d)) time spent on activities that are directly related to the determination of the dosage of the medication,

(c) in the case of a child who is unable to perform the activities related to the administration of the therapy as a result of the child's age, includes the time, if any, spent by the child's primary caregivers performing or supervising those activities for the child, and

(d) does not include time spent on activities related to dietary or exercise restrictions or regimes (even if these restrictions or regimes are a factor in determining the daily dosage of medication), travel time, medical appointments, shopping for medication or recuperation after therapy."

This responds, in part, to Recommendation 2.5 (p. 43) in the TAC's report "Disability Tax Fairness". See the further discussion of Recommendation 2.5 in Part D.

health professional with respect to blindness is essentially whether the person meets the following objective standard:

- visual acuity in both eyes [with proper refractive lenses or medication] is 20/200 (6/60) or less with the Snellen Chart (or an equivalent), or
- the greatest diameter of the field of vision in **both** eyes is 20 degrees or less.<sup>125</sup>

Among the disabilities which can be used to qualify an individual for the DTC, blindness is unique in having this type of objective standard. However, it does exclude some people who have low vision, but fail to meet this standard.

For disabilities related to areas other than vision, however, there is a test of a "marked restriction" which is considerably more difficult to apply. The key starting point is provided by *ITA* s. 118.4(1)(c), which characterizes a "basic activity of daily living" as follows:

(c) a basic activity of daily living in relation to an individual means

(i) mental functions necessary for everyday life,<sup>126</sup>

(ii) feeding oneself or dressing oneself,<sup>127</sup>

(iii) speaking so as to be understood, in a quiet setting, by another person familiar with the individual,

(iv) hearing so as to understand, in a quiet setting, another person familiar with the individual,

(v) eliminating (bowel or bladder functions), or

(vi) walking;

(d) for greater certainty, no other activity, including working, housekeeping or a social or recreational activity, shall be considered as a basic activity of daily living:

(e) feeding oneself does not include

<sup>125</sup> This definitional test of "blindness" is used in a number of statutes and regulations, both federal and provincial/territorial, throughout Canada.

<sup>126</sup> The Legislative Proposals, ss. 7(2) makes this amendment to *ITA* ss. 118.4(1)(c)(i).

<sup>127</sup> This was changed from the former wording of "feeding and dressing oneself" in the 2003 Budget, effective for 2003 and later taxation years.

(i) any of the activities of identifying, finding, shopping for or otherwise procuring food, or

(ii) the activity of preparing food to the extent that the time associated with the activity would not have been necessary in the absence of a dietary restriction or regime; and

(f) dressing oneself does not include any of the activities of identifying, finding, shopping for or otherwise procuring clothing.<sup>128</sup>

What is considered to be an "activity of daily living" for purposes of the DTC is considerably narrower than the usual understanding of this term in the context of disability. To qualify for the DTC (other than as blind or as requiring extensive therapy), the individual must have a marked restriction in one of the specific areas of functioning listed in ss. 118.4(1)(c), or an equivalent cumulative marked restriction comprised of significant restrictions in two or more of these areas.

Specific questions are used on Form T2201 to elicit an opinion from the health professional as to whether the person concerned is unable, or takes an inordinate amount of time, to perform one or more of these activities of daily living. In the past, these questions have been the subject of considerable public controversy and of appeals to the Tax Court of Canada. Over the past three years, the CRA has engaged in a consultation process with representatives of disability organizations and organizations of health professionals who certify eligibility for the DTC. This consultation process has resulted in a significantly expanded DTC Certificate Form T2201, which attempts to respond to many of the criticisms and issues which have arisen. As noted previously, for 2005 Form T2201 also responds to a number of recommendations in the TAC's report "Disability Tax Fairness".

Form T2201 now sets out in more detail than in previous years the criteria for each of the specific functioning areas listed, using more carefully worded questions, giving additional explanatory notes, and providing examples. The intent of the new form is to reflect more accurately the legislative intent underlying the DTC.

Whether your client is applying for the DTC for the first time, is re-applying because she or he has not been able to qualify in the past, or is in a dispute about eligibility relating to previous taxation years, it is essential to review the new Form T2201 for 2005 carefully, and to ensure that your client's health practitioner who is completing the form is aware that it is different in some key respects than in previous years. You should explain to the health practitioner that the new Form T2201 for 2005 has been re-designed carefully to better reflect the law, and that there have been important changes in the law underlying the DTC as well. You should ask the health professional to consider the questions on the 2005 form carefully with respect to your client, and to set aside previous ideas and information about eligibility for the DTC.

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<sup>128</sup> The limitations on the definition of "feeding" and "dressing" in 118.4(1)(e) and (f) were introduced by the 2003 Budget, effective for 2003 and later taxation years.

Form T2201 for 2005 has a number of examples for each area of functional limitation. These examples are brief descriptions of the types of disabilities that would qualify for DTC eligibility. While these examples are helpful, it may be important to remind the health practitioner that they are only examples. As the form itself indicates in each case, the examples are not intended to be exhaustive. They are not intended to provide further limiting criteria to exclude individuals from eligibility. Rather, they are intended to indicate some circumstances in which it would be appropriate to certify the person as eligible for the DTC. But there are many other equally legitimate claims, which do not necessarily fit under the examples under each heading.

Besides completing the section(s) of the T2201 form which relate to the person's specific areas of limited functioning, the health practitioner is also required to complete the last page of the form in every case.

On the last page, the practitioner is required to describe the "Effects of Impairment" (except perhaps where DTC eligibility is certified on the basis of blindness or the need for life-sustaining therapy). While only a few lines are provided for this description, it is important that the practitioner describe here the key facts and information on which her or his decision about eligibility was based. Otherwise, the CRA reviewer may believe there are grounds to question the practitioner's judgment. As well, on the last page the practitioner must answer the questions relating to the duration of the functional impairment(s).

The following comments may be helpful with respect to certain specific areas of disability or functional limitation.

The area of "mental" disability has been especially challenging for both CRA and for doctors and psychologists. As already mentioned, there has been an important change for 2005 in the way this type of activity of daily living is described in the *ITA*. The activity of daily living that used to be described as "perceiving, thinking and remembering" is now described as "mental functions necessary for everyday life".<sup>129</sup> "Mental functions necessary for everyday life" are further defined to include:

- (i) memory
- (ii) problem solving, goal-setting and judgement (taken together), and
- (iii) adaptive functioning.

The previous wording found in the *ITA* and on Form T2201, "perceiving, thinking and remembering", suggested that, to be eligible, a person would have to be unable to perform these functions at all. However, people with severe mental health disabilities, developmental disabilities, learning disabilities, Alzheimer's disease, and acquired brain injuries all "perceive, think and remember". Typically, their cognitive abilities are

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<sup>129</sup> See fn 126 *supra*.

impaired in certain respects, which may impact in a profound way on their ability to care for themselves and manage their own affairs, but that is very different from describing them as incapable of “perceiving, thinking and remembering”.

The new terminology referring to “mental functions necessary for everyday life” provides a more realistic framework in which physicians and psychologists can assess the impact of this type of disability on an individual’s day-to-day life. This is explained well in the “Notes” included in this section of the 2005 Form T2201:

- “Mental functions necessary for everyday life include:
  - Adaptive functioning (for example, abilities related to self-care, health and safety, social skills and common, simple transactions);
  - Memory (for example, the ability to remember simple instructions, basic personal information such as name and address, or material of importance and interest); and
  - Problem-solving, goal-setting, and judgement (for example, the ability to solve problems, set and keep goals, and make appropriate decisions and judgements).

**Important** - a restriction in problem-solving, goal-setting, or judgement that markedly restricts adaptive functioning, all or substantially all the time, would qualify.
- Devices for the mental functions necessary for everyday life include memory aids, adaptive aids, etc.
- An **inordinate amount of time** means that the mental functions necessary for everyday life take **significantly** longer than for an average person who does not have the impairment.

These comments make it clear that someone who has very significant difficulties in functioning on a day-to-day basis due to a mental disability has a marked restriction with respect to mental functions. The examples on Form T2201 in this section place an emphasis on whether these difficulties mean that the person requires supervision and support on a daily or ongoing basis. For a young child or elderly senior, the parallel question is whether considerably more supervision is required for that person than for a “typical” peer. Where a person’s disability related to “mental functions” requires the person to have support and supervision, the health practitioner should note this carefully in the section of the Form T2201 called “Effects of impairment”.

With respect to the other activities of daily living, which are more physically oriented, it is often important to note that s. 118.4(1)(b) of the *ITA*, as set out above, refers to a

person with an impairment either being unable to perform an activity of daily living, or requiring an inordinate amount of time to do so. A person who uses a walker, for example, can walk with the assistance of this device, but would typically require an inordinate amount of time to go from one place to another. A person with a disability affecting the use of both arms may be able to feed and dress herself or himself, but require an inordinate amount of time to do so.

With respect to walking, it is important to note this example on the revised Form T2201 for 2005: "Your patient can walk 100 metres (or approximately one city block), but only by taking a significant amount of time, stopping because of shortness of breath or because of pain, all or substantially all of the time." This provides a practical guide as to what is a "marked restriction" with respect to this activity of daily living. There is also an example described in this section relating to "severe episodes of fatigue, ataxia, incoordination, and problems with balance." This example makes it clear that it is not just full-time wheelchair and scooter users who qualify for the DTC as having a mobility disability. At the same time, the limitation in walking must be quite significant.

The eligibility of many persons with significant hearing or speaking disabilities for the DTC is limited by the qualifications in the legislation that the assessment of a marked restriction is to be made "in a quiet setting" and in the context of communicating with another person familiar to the individual. Much of the communicating which people do in real life is not under these conditions. These qualifications should be interpreted in a realistic and not overly-idealized way. That is, "in a quiet setting" should mean in a relatively quiet setting that occurs in real life, not in an artificially quiet setting such as a facility for conducting hearing tests. Similar, "another person familiar with the" individual should not be interpreted to be limited to a family member or close friend who knows the person extremely well.

With respect to the activities of feeding and dressing oneself, a somewhat restrictive interpretation has been imposed by an amendment to the legislation. As of the 2003 taxation year, the *ITA* was amended to specifically provide that:

- (e) feeding oneself does not include
  - (i) any of the activities of identifying, finding, shopping for or otherwise procuring food, or
  - (ii) the activity of preparing food to the extent that the time associated with the activity would not have been necessary in the absence of a dietary restriction or regime; and
- (f) dressing oneself does not include any of the activities of identifying, finding, shopping for or otherwise procuring clothing.<sup>130</sup>

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<sup>130</sup> See fn. 128 *supra*.

This amendment had the effect of reversing the Federal Court of Appeal's decision in the *Hamilton*<sup>131</sup> case, in which a taxpayer with celiac disease had argued successfully that he should receive the DTC because of the extra effort required to purchase and prepare foods he could safely eat, according to the required gluten-free diet.<sup>132</sup> However, a person who requires assistance in feeding themselves due to a physical limitation, such as an inability to use his or her hands, would still qualify for the DTC under this provision.

As of the 2005 taxation year, eligibility for the DTC has been extended to persons who have significant restrictions in two or more activities of daily living, where the cumulative effect of these significant restrictions is equivalent to having a marked restriction in one specific activity of daily living.<sup>133</sup> The intent of this change is to make a person eligible for the DTC where the person has a combination of functional limitations which limit the person's activities, but where no one functional limitation taken by itself would meet the criteria for a marked restriction. The revised Form T2201 for 2005 makes it clear that, in order to qualify, the person must have significant restrictions which are present together, for all or substantially all of the time. The form, consistent with other CRA publications, states in the "Notes" that vision-related limitations can be considered together with the activities of daily living in determining cumulative effects.<sup>134</sup> However, the time spent on life-sustaining therapy cannot be considered in determining cumulative effects.<sup>135</sup>

The provision in clause (d) of s. 118.4(1)(c) that "no other activity, including working, housekeeping or a social or recreational activity, shall be considered as a basic activity of daily living" is difficult for many clients with disabilities to understand and accept, especially those who have qualified for CPP disability benefits, or another disability income program, as "permanently unemployable". However, CRA makes it clear in its publications, including Form T2201, that eligibility for CPP or similar programs does not imply eligibility for the DTC. At the same time, a person who is working but who also is medically eligible for the DTC can receive it, and similarly the ability to take part in housekeeping or social and recreational activities does not disqualify the individual from the DTC.

As noted at the beginning of this section, persons who require extensive therapy to sustain a vital function are also eligible, even if there is no marked restriction, if the

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<sup>131</sup> *The Queen v. Hamilton*, (F.C.A.) 2002 DTC 6836, affirming 2001 DTC 3720. The Federal Court of Appeal decision is on its web site at:

<http://decisions.fct-cf.gc.ca/fct/2002/2002fca118.shtml>

<sup>132</sup> At the same time, the incremental cost of the gluten-free diet was made claimable as a medical expense. *ITA* ss. 118.2(2)(r).

<sup>133</sup> See fn 120 *supra*.

<sup>134</sup> Seeing is not ordinarily included in "activities of daily living" in the *ITA*, as it is not in the list in ss. 118.4(1)(c). However, the "ability to see" is added to activities of daily living for purposes of considering cumulative effects in the Legislative Proposals. See the wording in fn 121 *supra*.

<sup>135</sup> Presumably, this is because qualifying for the DTC as a recipient of life-sustaining therapy requires prior determination that the person would have a marked restriction if the therapy were not provided.

effect of the therapy is to alleviate or avoid the marked restriction. As amended for the 2005 taxation year, subsection 118.3(1)(a.1) of the *ITA* provides that where an individual has one or more severe and prolonged impairments in physical or mental functions, and:

the effects of the impairment or impairments are such that the individual's ability to perform more than one basic activity of daily living is significantly restricted where the cumulative effect of those restrictions is equivalent to having a marked restriction in the ability to perform a basic activity of daily living or are such that the individual's ability to perform a basic activity of daily living is markedly restricted or would be markedly restricted but for therapy that<sup>136</sup>

- (i) is essential to sustain a vital function of the individual,
- (ii) is required to be administered at least three times each week for a total duration averaging not less than 14 hours a week, and
- (iii) cannot reasonably be expected to be of significant benefit to persons who are not so impaired [...]

the individual is medically eligible for the DTC.<sup>137</sup>

So the "cumulative effects rule" now can be used by the health practitioner in determining whether there would be a marked restriction, if the therapy were not provided. (However, as already noted, the time spent in therapy cannot be considered in applying the cumulative effects rule.)

Eligibility on the basis of cumulative effects must be certified by a medical doctor, unless the cumulative effects relate solely to limitations in walking, feeding and dressing, in which case the certification also may be completed by an occupational therapist.<sup>138</sup>

The specific requirement that therapy be provided at least three times a week for not less than 14 hours (on average) limits eligibility for the DTC on the basis of requiring life-sustaining therapy. In the 2005 changes to the DTC provisions in the *ITA*, specific rules have been introduced regarding the calculation of time in connection with the "14 hours" requirement. The new provision, s.118.3 (1.1), reads as follows:

For the purpose of paragraph 118.3(1)(a.1), in determining whether therapy is required to be administered at least three times each week for a total duration

<sup>136</sup> The Legislative Proposals, ss. 6(2) amend the portion of ss. 118.3(1)(a.1) before subparagraph (i).

<sup>137</sup> The life-sustaining therapy provision originally was enacted to be effective for the 2000 and subsequent taxation years.

<sup>138</sup> See fn. 112 *supra*.

averaging not less than an average of 14 hours a week, the time spent on administering therapy

(a) includes only time spent on activities that require the individual to take time away from normal everyday activities in order to receive the therapy,

(b) in the case of therapy that requires a regular dosage of medication that is required to be adjusted on a daily basis, includes (subject to paragraph (d)) time spent on activities that are directly related to the determination of the dosage of the medication,

(c) in the case of a child who is unable to perform the activities related to the administration of the therapy as a result of the child's age, includes the time, if any, spent by the child's primary caregivers performing or supervising those activities for the child, and

(d) does not include time spent on activities related to dietary or exercise restrictions or regimes (even if these restrictions or regimes are a factor in determining the daily dosage of medication), travel time, medical appointments, shopping for medication or recuperation after therapy.<sup>139</sup>

The following examples of life-sustaining therapy which would qualify, assuming that the 14-hour test is met, are given on the revised Form T2201 for 2005:

- chest physiotherapy to facilitate breathing
- kidney dialysis to filter blood
- insulin therapy to treat Type 1 diabetes in a child who cannot independently adjust the insulin dosage (for 2005 and subsequent years).

In connection with Type 1 diabetes in children, the parents, or other primary caregivers, typically have to wake the child at night to test her or his blood glucose level. They also must monitor the child to determine if glucose testing is necessary after, and during, physical activity. These activities are included in applying the 14-hour rule through paragraph (c) in the new provision. However, in the opinion of the CRA, the time spent in carbohydrate calculation cannot be included, as indicated on the revised Form T2201, because of the wording of paragraph (d).

We will return to consider issues of medical eligibility for the DTC in more detail when discussing disputes and appeals in Parts C(1), (3) and (4) of this paper.

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<sup>139</sup> See fn 124 *supra*.

(d) *Value and Calculation of the DTC: Restrictions on Claiming the DTC*

For 2005, the federal value of the DTC credit is 15 per cent of \$6,596, which provides a maximum federal tax reduction of \$989. The credit amount is fully indexed to inflation.<sup>140</sup> The Ontario provincial value is 6.05 per cent of \$6,622<sup>141</sup>, which provides a maximum provincial tax reduction of \$401.

Since the DTC is a non-refundable credit, it can be used only to reduce tax which would otherwise be payable. However, as will be soon discussed, where a person eligible for the DTC cannot make use of it, subject to certain conditions it may be claimed by an individual providing support to the person who is DTC-eligible.

The DTC claim cannot be combined with a medical expense claim for care in a nursing home of any amount, whether made by the individual eligible for the DTC or by any other person.<sup>142</sup> However, the DTC claim can be combined with a medical expense claim for care in a group home, or with a medical expense claim for care in a "school, institution, or other place".

For federal tax purposes, the DTC claim can be combined with a medical expense claim for attendant care of under \$10,000, or under \$20,000 in the year the person receiving care dies, but not with a larger attendant care claim under medical expenses.<sup>143</sup> For Ontario tax purposes, the DTC claim can be combined with a medical expense claim for attendant care of under \$11,335, or under \$22,670 in the year the person receiving care dies, but not with a larger attendant care claim under medical expenses.<sup>144</sup> The DTC claim can be combined with an employment-, research- or study-related DSD claim (at Line 215), including a claim for attendant care in any amount permitted by DSD.<sup>145</sup>

(e) *Claiming the DTC with Respect to a Spouse, Common-Law Partner, or other Dependent Relative*

While CRA sometimes describes taxpayers as able to claim the DTC with respect to family members who are dependent on them, its publications usually refer to the DTC-eligible person "transferring" the credit to someone who provides support to them. Keep in mind that the person doing the "transferring" may be, for example, a small child who

<sup>140</sup> The base amount was set at \$6,000 for the 2001 taxation year, more than a 30 per cent increase from the 2000 level of \$4,293.

<sup>141</sup> Note that the Ontario DTC amount is set slightly above the federal DTC amount.

<sup>142</sup> *ITA* ss. 118.3(1)(c).

<sup>143</sup> *Ibid.*

<sup>144</sup> Ontario is unique among the provinces and territories in that it indexes these amounts. The Ontario amounts for 2005 are found in the publication "Completing Your Ontario Forms", at the discussion of Line 5868 on p. 3. This publication is found on the CRA web site at:

<http://www.cra-arc.gc.ca/E/pub/tg/5006-n/README.html>

<sup>145</sup> These restrictions on claiming the DTC are found in *ITA* s. 118.3(1)(c). Note that we do not discuss here whether the nursing home, group home, "school, institution, or other place" and attendant care claims can be combined with each other, only whether they can be combined with the DTC. We will discuss the restrictions on combining these claims with each other in the following parts of this paper dealing with these claims in more detail.

does not complete a tax return. The "transfer" is conceptual, rather than requiring a specific act of "transfer".

What is available to be transferred is referred to generally as the "unused portion" of the DTC. As we will see, the exact amount that can be transferred is determined by taking the total of the DTC and certain other personal non-refundable credits available to the person who is DTC-eligible, and subtracting the person's taxable income from this amount. More precisely, then, the amount that is available to be transferred is the "unused portion of the DTC, taking certain other personal credits into account".

The rules governing transfer of the DTC are provided in s. 118.3(2) of the *ITA*.

A transfer of the DTC from a spouse or common-law partner is made at Line 326 of Schedule 1 (Federal Tax), using Schedule 2, and at Line 5864 of the Ontario Tax form, using Schedule ON(S2). The other non-refundable credits which may be transferred in this way are the age amount, the pension income amount, and tuition and education amounts.<sup>146</sup> The amount that can be transferred is reduced by the taxable income of the spouse or common-law partner.

A transfer of the DTC from another dependant is made at Line 318 of the federal return and at Line 5848 of the Ontario Tax form. The rules governing this transfer are complex, but may be summarized as follows:

- a taxpayer may claim a transfer of the DTC only from a dependant who resided in Canada at some time during the taxation year
- a taxpayer may claim a transfer of the DTC from a dependant with respect to whom the taxpayer was entitled to claim any of the AED (Line 305), the IDC (Line 306), or the Caregiver Credit (Line 315)
- a taxpayer may claim a transfer of the DTC from a dependant with respect to whom the taxpayer could have claimed the AED (Line 305), if the taxpayer did not have a spouse or common-law partner and if the dependant did not have any net income (this means that during the taxation year the taxpayer must maintain a self-contained domestic establishment<sup>147</sup>, either alone or with other persons, in which the taxpayer lives, and the taxpayer must provide actual support to a dependant living in that establishment, and the dependant must be:
  - related to the taxpayer<sup>148</sup>

<sup>146</sup> The transferable tuition and education amount to a spouse or common-law partner is limited to \$5,000, less what the student uses herself or himself.

<sup>147</sup> See the discussion of "self-contained domestic establishment" in Part A(8)(l) *supra*.

<sup>148</sup> See the discussion of "related" in Part A(8)(i) of this paper. Essentially, the *ITA* definition of who is "related" to the taxpayer limits the AED claim so that it may be made with respect to the taxpayer's parents, grandparents, children, grandchildren, brothers, sisters, and persons who stand in these relationships to the taxpayer's spouse or common-law partner. The AED claim cannot be made with respect to aunts, uncles, nieces, nephews, etc., even if they live with the taxpayer and receive support from the taxpayer. However, the transfer of the DTC can proceed, as indicated in the next point, on another basis which will include aunts, uncles, nieces and nephews.

- wholly dependent for support on the individual, or the individual and the other person or persons<sup>149</sup>
- except in the case of a parent or grandparent of the individual, either under 18 years of age or dependent by reason of mental or physical infirmity<sup>150</sup>.
- a taxpayer may claim a transfer of the DTC from a dependant with respect to whom the taxpayer could have made an IDC (Line 306) or a Caregiver Credit claim (Line 315) if the dependant had had no income and had been 18 years of age or older during the taxation year. This means that during the taxation year the taxpayer was supporting one or more of the following relatives:
  - a child or grandchild, brother, sister, aunt, uncle, niece, or nephew who is dependent due to a mental or physical infirmity
  - a parent or grandparent 65 or over, whether infirm or not
  - any of these relatives of the taxpayer's spouse or common-law partner.

A taxpayer cannot claim a transfer of the DTC if the spouse or common-law partner of the person eligible for the DTC already is claiming either the DTC or any other non-refundable tax credit (other than medical expenses) with respect to the person.<sup>151</sup>

In summary, in most circumstances where a taxpayer supports a relative who is eligible for the DTC, the taxpayer can get a transfer of the unused portion of the DTC, provided that the relative lives in Canada at some time during the taxation year. The relative must be the child, grandchild, parent, grandparent, brother, sister, aunt, uncle, niece or nephew of the taxpayer, or of the taxpayer's spouse or common-law partner. Except for a parent or grandparent living with the taxpayer or over 65, the relative must be dependent because of infirmity. However, where the relative qualifies for the DTC this condition will almost always be satisfied.

The income of the relative may affect eligibility for transfer of the DTC to the taxpayer, but unlike the AED claim, the IDC claim, and the Caregiver Credit claim, the transfer of the DTC depends on the relative's taxable income rather than net income.<sup>152</sup> Thus, social assistance income such as ODSP, and workers' compensation income such as WSIB, will not affect eligibility for the DTC transfer.<sup>153</sup>

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<sup>149</sup> As discussed in Part A(8)(c) of this paper, it is not clear what the qualifier "wholly" adds in this context, especially as according to s. 118(1)(b) of the *ITA*, the dependant can be wholly dependent on more than one person.

<sup>150</sup> See the discussion of mental or physical infirmity in Part A(8)(j) of this paper.

<sup>151</sup> *ITA* s. 118(2)(a).

<sup>152</sup> See the discussion of "net income" and "taxable income" in Part A(8)(k) *supra*.

<sup>153</sup> See the discussion of social assistance and workers' compensation income in Parts B(1)(a) and B(1)(b) of this paper.

The starting point for calculating a transfer of the federal DTC claim is the 2005 level of \$6,596 for this claim.<sup>154</sup>

Where the calculation is with respect to a dependent child who had not yet reached her or his 18th birthday by the end of the taxation year, the federal DTC Supplement for Children is now calculated and added on, as described in the next Part of this paper.

At the next step, regardless of the age of the dependant, the total of all non-refundable personal credits which the dependant can claim at Lines 300 to 315 of her or his Schedule 1 (Federal Tax), is added to the DTC amount. Thus some personal credits are included in this calculation, and some are not.<sup>155</sup>

The final step is to subtract the dependant's taxable income from the credits just summed up. This determines the "unused portion" of the DTC available for transfer. The calculation is carried out at Line 318 of the federal worksheet.

The starting point for calculating a transfer of the Ontario DTC claim is the 2005 level of \$6,622 for this claim.<sup>156</sup>

Where the calculation is with respect to a dependent child who had not yet reached her or his 18th birthday by the end of the taxation year, the Ontario DTC Supplement for Children now is calculated and added on, as described in the next Part of this paper.

At the next step, regardless of the age of the dependant, the total of all non-refundable personal credits which the dependant can claim at Lines 5804 to 5840 of her or his Ontario Tax form, is added to the DTC amount. Thus some personal credits are included in this calculation, and some are not.<sup>157</sup>

The final step is to subtract the dependant's taxable income from the credits just summed up. This determines the "unused portion" of the DTC available for transfer. The calculation is carried out at Line 5848 of the provincial worksheet.

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<sup>154</sup> See Part B(6)(b) *supra*.

<sup>155</sup> The personal credits that are included in the calculation for this purpose are the Basic Personal Amount (Line 300), the Age Amount (Line 301), the Spouse or Common-Law Partner Amount (Line 303), the AED (Line 305), the IDC (Line 306), CPP or QPP Contributions (Line 308), Employment Insurance Premiums (Line 312), Adoption Expenses (line 313), the Pension Income Amount (Line 314), and the Caregiver Credit (Line 315). Not included are the Student Loan Interest Credit (Line 319), Tuition and Education Amounts (Line 323), Amounts Transferred from a Spouse or Common-Law Partner (Line 326), Medical Expenses (Line 332), and Donations and Gifts (Line 349).

<sup>156</sup> See Part B(6)(b) of this paper *supra*.

<sup>157</sup> The list of personal credits that are included in the calculation for this purpose is the same as that given in fn 155 *supra* for the federal calculation.

Example:

Although social assistance is included in net income, it is not included in taxable income.<sup>158</sup> Accordingly where an ODSP recipient lives with family and receives the standard boarder rate of \$730/month<sup>159</sup>, or \$8,760/year, a family member who provides support to the ODSP recipient ordinarily would be able to get a transfer of the full DTC claim.

## **(7) DTC Supplement for Children**

Where a family is caring for a child who qualifies for the DTC, the DTC Supplement is available up to and including the year in which the child reaches her or his 17th birthday. The DTC Supplement increases the value of the DTC to those families. The maximum value of the DTC Supplement is the same as the maximum value of the IDC or Caregiver Credit, which may be claimed with respect to adult dependants with disabilities.

The DTC Supplement is set out at s. 118.3(1) of the *ITA*<sup>160</sup>, and is claimed at Line 318 on Schedule 1 (Federal Tax), based on calculations at Lines 316 and 318 on the federal worksheet. The calculations are completed as if it were the child's return that is being prepared, whether the child actually files a return or not.

The DTC Supplement was introduced in 2000.<sup>161</sup> For 2005, the Supplement provides an additional maximum federal tax reduction of up to \$577, or 15 per cent of \$3,848. The \$3,848 supplement amount is reduced by the amount of child care expenses or attendant care expenses claimed by anyone with respect to the child over \$2,254. Both this threshold and the supplement amount itself are fully indexed to inflation.

Where a parent, or other person providing support, claims a "transfer" of the DTC Supplement with respect to a child, the calculation described in the previous Part<sup>162</sup> of this paper is completed, with the DTC Supplement calculation inserted at the appropriate place.

The Ontario DTC Supplement is calculated in the same manner as the federal Supplement. It is claimed at Line 5848 of the Ontario Tax form, based on calculations at Lines 5844 and 5848 on the Ontario worksheet. The calculations are completed as if it were the child's return that is being prepared, whether the child actually files a return or not.

For 2005, both the Ontario Supplement amount of \$3,863, and the threshold of \$2,263 over which the Supplement is reduced by child care or attendant care expenses, are slightly higher than for the federal DTC supplement. The reduction in Ontario tax is at

<sup>158</sup> See the discussion in Part B(1)(a) of this paper.

<sup>159</sup> See fn 92 *supra*.

<sup>160</sup> See the calculation of amount "C" at the end of this section.

<sup>161</sup> The base amount was set at \$3,500 for the 2001 taxation year.

<sup>162</sup> Part B(6)(e).

the lowest Ontario marginal rate of 6.05 per cent, so the maximum reduction due to the DTC Supplement is \$234.

### **(8) Child Disability Benefit (CDB)**

The CDB first was announced in the 2003 Federal Budget. It is a tax-free benefit available to low-income and modest-income families who qualify financially for the Canada Child Tax Benefit (CCTB)<sup>163</sup>, and who have a child whose disability makes her or him eligible for the DTC.<sup>164</sup> Because of an increase announced in the 2005 Federal Budget, the CDB now has a maximum value of \$2,000 annually, or \$166.66 monthly, per child, and is included as a supplement to the family's monthly CCTB payments.<sup>165</sup>

The CDB is enacted in the CCTB section of the *ITA*.<sup>166</sup> To apply for the CDB, it is necessary to apply for both the DTC for the child, as discussed in Part B(6) of this paper, and for the CCTB.<sup>167</sup>

The full \$2,000 CDB will be provided for each DTC-eligible child to families having a net income less than the base amount for that family. The base amount is determined by the number of children for whom the family receives the CCTB. For the 2005-2006 benefit year, which runs from July 2005 to June 2006, the base amount is set by the following table:

<b>Number of children in [the] family for whom [it] receives the CCTB</b>	<b>Base amount</b>
<b>1</b>	\$35,595
<b>2</b>	\$35,621
<b>3</b>	\$35,596
<b>4</b>	\$39,912
<b>5</b>	\$44,228
<b>6</b>	\$48,544
<b>7</b>	\$52,860
<b>8</b>	\$57,176
<b>9 or more</b>	Contact the CRA

<sup>163</sup> The CCTB also is known as the "National Child Benefit", as discussed in Part A(3) *supra*.

<sup>164</sup> The CDB also is paid to agencies which receive the Children's Special Allowance for a child in care who is DTC-eligible. See fn 14 *supra*.

<sup>165</sup> This increased level of the CDB was a partial response to Recommendation 4.3 (p. 103) in the TAC's report "Disability Tax Fairness". The Committee recommended that the maximum amount of the CDB be increased by \$600 over its 2004-2005 level, to \$2,253.

<sup>166</sup> S. 122.61. amounts M and N.

<sup>167</sup> The CCTB Application form (RC66) is on the CRA web site at:

<http://www.cra-arc.gc.ca/E/pbg/tf/rc66/README.html>

If the family net income is more than the base amount, [its] CDB will be reduced as follows:

- If [the family has] one child who qualifies for the CDB, the amount of CDB is reduced by 12.2% of family net income that is more than the corresponding base amount.
- If [the family has] two children who qualify for the CDB, the amount of CDB is reduced by 22.8% of family net income that is more than the corresponding base amount.
- If [the family has] three or more children who qualify for the CDB, the amount of CDB is reduced by 32.9% of family net income that is more than the corresponding base amount.<sup>168</sup>

Ontario has a separate tax-based program for working poor families (as opposed to social assistance) families, called the "Ontario Child Care Supplement for Working Families".<sup>169</sup> It does not have any special provisions relating to the disability of a parent or a child. Ontario also has the Assistance for Children with Severe Disabilities program, under the Ministry of Children and Youth Services, which provides financial support to parents to help meet the extraordinary costs of raising a child with very significant disabilities, on an income-tested basis.<sup>170</sup>

#### **(9) Ontario Tax Reduction for Taxpayers with Dependents Who Are Disabled or Infirm**

The Ontario Tax Reduction eliminates or reduces Ontario income tax for lower income taxpayers. The program also provides additional tax relief for eligible individuals with dependent children 18 years of age or under, or dependents of any age who are disabled or infirm. It does not provide any additional tax relief for taxpayers who have disabilities themselves.

Details of the Ontario Tax Reduction are beyond the scope of this paper. Section 7 of the *OITA* provides for this claim, which is made on the Ontario Tax form. The maximum

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<sup>168</sup> This information comes from the CRA Information Sheet "About the Child Disability Benefit (CDB)", on the CRA website at:

[http://www.cra-arc.gc.ca/benefits/faq\\_cdb-e.html#q1](http://www.cra-arc.gc.ca/benefits/faq_cdb-e.html#q1)

<sup>169</sup> A brochure for this program is available on the Ontario government web site at:

[http://www.trd.fin.gov.on.ca/userfiles/page\\_attachments/Library/3/OCCS-rev.pdf?N\\_ID=3](http://www.trd.fin.gov.on.ca/userfiles/page_attachments/Library/3/OCCS-rev.pdf?N_ID=3)

<sup>170</sup> Information about the Assistance to Children with Severe Disabilities program is on the web site of the Ministry of Children and Youth Services at:

<http://www.children.gov.on.ca/CS/en/programs/SpecialNeeds/assistanceforChildrenwithSevereDisabilities.htm>

See also fn 23 *supra*.

value of each claim for a child or dependant in 2005 is \$350, which can be used to reduce Ontario tax payable.

As a careful review of the Ontario Tax form indicates, a taxpayer who has a child under 18 who is disabled or infirm gets a "double" claim for this dependant.<sup>171</sup> That is, the claim may be made twice with respect to the same child.

### **(10) Medical Expense Tax Credit (METC) for Disability-Specific Expenses**

The METC is claimed by taxpayers who have medical expenses that are above a certain net income threshold. Whether an item or service can be claimed as a medical expense depends on whether it is included in a detailed list of expenses created by the *ITA* and Regulations.<sup>172</sup>

A number of disability-specific items and services, not necessarily "medical" in nature, have been included in the list of "medical expenses", especially during the past 10 to 15 years. As the METC is available to taxpayers generally, and is not specific to persons with disabilities, the rules governing the METC will not be discussed in full detail in this paper.

The METC is set out at s. 118.2 of the *ITA*. A number of specific items eligible for the METC are prescribed by *ITA* Reg. 5700. As noted in Part A(1) of this paper, there is an Interpretation Bulletin, "Medical Expense and Disability Tax Credits and Attendant Care Expense Deduction" (IT-519R2 [Consolidated]) which is very useful with respect to the details of METC claims.<sup>173</sup>

The taxpayer's medical expenses are claimed at Line 330 of Schedule 1 of the federal return, and at Line 5868 of the Ontario return. Taxpayers may claim the medical expenses incurred by themselves, their spouses or common-law partners, and for dependent children of the taxpayer, the spouse, or the common-law partner who were born in 1988 or later and who depended on the taxpayer for support.

Taxpayers also can claim medical expenses that they, their spouses or their common-law partners paid for certain other family members, but only if these family members are "dependants" as defined in s. 118(6).

The qualifying family members according to s. 118(6) are:

- children of the taxpayer, the spouse, or the common-law partner who were born in 1987 or earlier
- grandchildren of the taxpayer, the spouse, or the common-law partner

<sup>171</sup> See the reference to Lines 6097 and 6269 at Step 4 on the Ontario Tax form.

<sup>172</sup> Income Tax Regulations, C.R.C., c. 945, on the web site of the Federal Department of Justice at:

<http://lois.justice.gc.ca/en/l-3.3/C.R.C.-c.945/135506.html>

<sup>173</sup> The IT-519R2 is under revision as of the date of writing.

- parents, grandparents, brothers, sisters, aunts, uncles, nieces and nephews of the taxpayer, the spouse, or the common-law partner, but only if they were resident in Canada at any time during the year.

These expenses are claimed at Line 331 of Schedule 1 of the federal return, to a maximum of \$10,000<sup>174</sup>, and at Line 5872 of the Ontario return, to a maximum of \$10,000.

For 2005, the Federal credit equals 15 per cent, and the Ontario credit equals 6.05%, of qualifying medical expenses in excess of the lesser of \$1,844 (federal) or \$1,856 (Ontario), or 3 per cent of net income. The net income threshold is used to determine when expenses are considered "above-average" for tax purposes. When a claim is made by a taxpayer for a "qualifying family member" who is a "dependant" within the meaning of s. 118(6), as just discussed, the net income threshold is applied to the dependant's, rather than the taxpayer's, net income.<sup>175</sup>

It is important to keep in mind when advising clients that the combined effect of the net income threshold and the setting of the METC (like the other non-refundable credits) at the lowest marginal rate means that the value of an METC claim often is limited.

Example:

Jane, a taxpayer with \$50,000 in net income, spends \$10,000 on exceptional medical expenses due to a disability. 3 per cent of \$50,000, or \$1,500, is excluded from the METC calculation due to the net income threshold. The METC combined federal and provincial credit is thus 21.05% (15% federal and 6.05% provincial) of \$8,500, or \$1,789.25. While helpful, this is far from a reimbursement of the medical expenses.

Spouses and common-law partners should consider carefully which of them should claim the METC for the expenses that they paid for themselves or their dependants during calendar year 2005. The ability to choose who claims the METC for which expenses, and to choose to claim medical expenses paid during any 12-month period ending in 2005, as long as they were not claimed in 2004<sup>176</sup>, may make a significant difference in the total amount of tax payable by the couple.

Usually it will be most advantageous for the partner or spouse with the lower net income to claim all of the medical expenses because of the net income threshold.<sup>177</sup> However, this will not always be the case. Building on the example above, if Jane has other deductions and credits that already reduce her 2005 income tax liability to \$1,000, \$789 of the non-refundable METC will be lost. Therefore, it would be preferable that her

<sup>174</sup> A proposed amendment included in the Ways and Means Motion to implement the 2005 Budget, tabled by then Minister of Finance Ralph Goodale on 17 November 2005 ("Motion") increases this amount to \$10,000 for the taxation year 2005.

<sup>175</sup> This change was announced in the 2004 Federal Budget, and draft legislation was presented in a Ways and Means motion (dated 23 March 2004), but has not been enacted into law.

<sup>176</sup> See *ITA* s. 118.2(1), amount B. Note that the taxpayer must use the same time period in calculating the Ontario METC. This is required by ss. 4.0.1(23.1) of the *OITA*.

<sup>177</sup> The point at which the net income threshold exceeds the statutory deduction is at a net income of \$61,466.67 (\$61,866.67 for Ontario).

partner Chris claim some of her medical expenses, even if Chris's income is higher and thus will reduce the total METC claim available to the couple, so long as Chris has income tax liability which the METC will reduce.

Most, but not all, medical expenses included within the METC require "prescription by a medical practitioner" or "certification by a medical practitioner".<sup>178</sup> In these phrases, "medical practitioner" refers to the same list of health professionals as those who are authorized to certify eligibility for the DTC, as discussed in Part B(6)(a) of this paper. That is, it includes audiologists, dentists, medical doctors, nurses, occupational therapists, pharmacists, psychologists, and speech-language pathologists authorized to practice in the jurisdiction where the taxpayer resides or the service is rendered.<sup>179</sup> Although the type of "medical practitioner" who may prescribe or certify eligibility is not specified for each type of medical expense, presumably it is assumed that practitioners will only prescribe or certify within their own areas of expertise.

The most significant disability-related items included as medical expenses are:

- reasonable incremental costs relating to the construction of the principal place of residence, or renovations or alterations to a dwelling, of a person who "lacks normal physical development" or has a severe and prolonged mobility impairment (as defined by the DTC criteria), to enable a person to gain access to, or to be more mobile or functional within the dwelling<sup>180</sup>
- power-operated lifts or transportation equipment designed exclusively for use by or for a person with a disability to allow the person access to different areas of a building or to assist the person to gain access to a vehicle or to place his or her wheelchair in or on a vehicle, if prescribed by a medical practitioner
- a power-operated guided chair installation used in a stairway, if prescribed by a medical practitioner
- reasonable expenses relating to alterations to the driveway of the principal place of residence of a person who has a severe and prolonged mobility impairment (as defined by the DTC criteria), to facilitate access to a bus
- reasonable moving expenses (to a maximum of \$2,000 on the federal return and \$2,267 on the Ontario return) of a person who "lacks normal physical development" or has a severe and prolonged mobility impairment (as defined by the DTC criteria) if incurred for moving to a dwelling more accessible by the person or in which the person is more mobile and functional (these moving expenses cannot also be claimed as work-related moving expenses)
- if prescribed by a medical practitioner, payments to adapt a vehicle for the

<sup>178</sup> See fn 182 and 184 for a discussion of "prescription" and "certification".

<sup>179</sup> *ITA* ss. 118.4(2).

<sup>180</sup> Another proposed amendment included in the Motion would limit the deduction for costs incurred after 22 February 2005 to expenses that are not of a type that typically would be expected to increase the value of the dwelling, and that are of a type that would not normally be incurred by a person who has "normal physical development" or does not have a severe and prolonged mobility impairment.

transportation of a person who uses a wheelchair (driver or passenger) or for devices that enable an individual with a mobility impairment to operate a vehicle, plus 20% of the remaining cost of a van (to a maximum of \$5,000 on the federal return and \$5,667 on the Ontario return), that, at the time of acquisition or within 6 months thereafter, has been adapted for the transportation of a person who uses a wheelchair (driver or passenger)

- television closed caption decoders, if prescribed by a medical practitioner<sup>181</sup>
- any device to aid hearing, including bone-conduction telephone receivers, extra-loud audible signals and devices to permit volume adjustment of telephone equipment above normal level
- any equipment or accessory that enables a person who is Deaf or who does not speak to make and receive telephone calls, including visual ringing indicators, acoustic couplers, teletypewriters (TTY's) – also, amounts paid to provide additional equipment and accessories to others who know and regularly communicate with persons who are Deaf or who do not speak, in order to make telephone communications possible with those persons, if prescribed by a medical practitioner
- Fees for sign language interpretation or real-time captioning, paid to a person in the business of providing such services, for a person with a speech or hearing impairment
- the cost of note-taking services used by persons with mental or physical impairments, if the need is certified in writing by a medical practitioner and paid to a person in the business of providing such services
- voice recognition software used by individuals with a physical impairment, if the need is certified in writing by a medical practitioner
- electronic speech synthesizers that enable persons who do not speak to communicate using a portable keyboard, if prescribed by a medical practitioner
- optical scanners or similar devices designed to be used by persons who are blind to enable them to read print, if prescribed by a medical practitioner
- synthetic speech systems, Braille printers and large print-on-screen devices that enable persons who are blind to utilize computers, if prescribed by a medical practitioner
- electronic or computerized environmental control systems designed exclusively for the use of a person with severe and prolonged mobility restrictions (as defined by the DTC criteria), if prescribed by a medical practitioner
- expenses associated with the use of a guide dog or other service animal

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<sup>181</sup> This deduction would appear to be limited to persons who are Deaf, deafened or hard of hearing, but section (q) of Reg. 5700 does not so specify.

- 50% of the cost of an air conditioner, prescribed by a medical practitioner for an individual with a severe chronic ailment, disease, or disorder, to a maximum of \$1,000
- amounts paid for a person or a relative (other than the individual's spouse or common-law partner, or a person under 18) to learn to care for a relative who has a mental or physical infirmity and who is in the person's household or is dependent on her or him for support, and
- the incremental cost of gluten-free food products for individuals with celiac disease who are certified in writing<sup>182</sup> by a medical practitioner to require a gluten-free diet.

Other expenses that were proposed in the 2005 Budget, and that were included in the Motion as eligible for the METC as of tax year 2005, are:

- the cost of reading services provided to a person who is blind or who has a severe learning disability, if certified in writing as necessary by a medical practitioner, and paid to a person in the business of providing such services
- the cost of intervenor services provided to a person who is both blind and profoundly Deaf, if paid to a person in the business of providing such services
- the cost of phototherapy equipment for the treatment of skin disorders, including operation and maintenance
- the cost of operating an oxygen concentrator, including electricity
- drugs or medical devices purchased under Health Canada's Special Access Program<sup>183</sup>, and
- medical marijuana or marijuana seeds, if the person is authorized to possess or use it, and purchases it from Health Canada or a designated producer.<sup>184</sup>

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<sup>182</sup> *ITA* s. 118(2) distinguishes between items that must be "prescribed by a medical practitioner" and those that must be "certified in writing by a medical practitioner" in order to qualify for the METC. The distinction made in this section is logical: eyeglasses and drugs must be prescribed, while the need for services and gluten-free food, which ordinarily do not require prescriptions to be obtained, must be "certified in writing". However, ss. 118(2)(m) further requires that all items that are eligible for the METC because they are listed in *ITA* Reg. 5700 be "prescribed by a medical practitioner", although only two types of the listed items (orthopaedic shoes or boots or orthotics, and attachments for a hospital bed), specifically require prescriptions under ss. (e) and (h) of the Regulation. See also fn 184.

<sup>183</sup> The Health Canada Special Access Program allows physicians to apply for access to medical devices and drugs not yet licensed for sale in Canada, to treat patients with life-threatening and serious illnesses for whom conventional therapies are ineffective or unsuitable. Details of the Special Access Program are on the Health Canada web site at:

[http://www.hc-sc.gc.ca/dhp-mps/acces/index\\_e.html](http://www.hc-sc.gc.ca/dhp-mps/acces/index_e.html)

<sup>184</sup> The Guide and RC 4064 also list the following expenses as eligible for the METC beginning with tax year 2005:

Attendant care services provided by one full-time attendant who is not the taxpayer's spouse or common-law partner, and who is at least 18 years old, also may be claimed as a medical expense, as payments to a nursing home, group home, institution, school, or "other place" specially qualified to provide services and support related to disability. Of course, the same expenses can only be claimed under only one heading. For some claims, such as care in a group home or full-time attendant care exceeding \$10,000 (\$20,000 in the year of the recipient's death), the METC claim can only be made only if the DTC or DSD claim is not made. The taxpayer must choose which of the claims to make.

### **(11) Refundable Medical Expense Supplement (RMES)**

Solely a Federal tax measure, the RMES<sup>185</sup> is available to employed persons over 18 and resident in Canada throughout the taxation year who have earnings in a year over a modest threshold. It is a personal refundable credit, which is reduced or eliminated by net family income over a certain amount.<sup>186</sup>

In order to claim the RMES, the taxpayer also must claim either the METC or the DSD. While eligibility for the RMES does not depend on the disability of a taxpayer or of a dependant, the RMES is likely to benefit people with disabilities and their families because they often have high medical expenses, including disability-specific expenses.

The RMES is claimed at Line 452 of the Federal return, using the calculation on the Federal Worksheet.

For 2005, the maximum supplement is the lesser of \$750 or 25 per cent of the allowable portion of expenses that the taxpayer claimed under the METC and the DSD. The credit

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- Bliss symbol boards or similar devices used by persons with speech impairments to communicate
  - Braille note-takers with keyboards that are used by persons who are blind to take notes, and
  - Page-turner devices that are used by a person with a severe and prolonged impairment in physical functions that markedly restricts the person's ability to use his or her arms and hands, and
  - Devices and software that are designed to enable a person who is blind or has a severe learning disability to read print.

The Motion proposed that these expenses be eligible for the DSD beginning in tax year 2005, but they were not included in the proposed changes to the METC, either by amendment of the *ITA* or of Reg. 5700.

Of further interest, in light of the discussion in the preceding footnote, is that, according to the explanatory notes to the legislative proposals that were tabled as the Motion, these expenses are eligible for the DSD when "a medical practitioner certifies the need for" them. However, for both the METC and the DSD, the Instructions state that the need must be "certified in writing", while RC4064 states that they must be "prescribed by a medical practitioner"!

<sup>185</sup> *ITA* s. 122.51.

<sup>186</sup> For 2005, the net income of the taxpayer and spouse or common-law partner cannot exceed \$36,663.

is available to workers with net earnings above \$2,857.<sup>187</sup> To target assistance to those with low incomes, the credit is reduced by 5 per cent of net family income in excess of \$21,663.

This supplement is fully indexed to inflation.

## **(12) Disability Supports Deduction (DSD)**

The DSD is available to taxpayers who pay their own disability-related expenses to earn employment, business or research income, or to attend a secondary school or designated post-secondary institution. Only the person with a disability who actually incurred and paid the expenses may claim them under the DSD. The claim is not transferable to a spouse, common-law partner, or a person providing support.

There is a list of expenses which can be claimed under the DSD, most of which are alternatively claimable as medical expenses. However, expenses cannot be claimed under the DSD if anyone has claimed the same expenses as medical expenses.

The DSD is a deduction from total income used in calculating the taxpayer's net income. Unlike the METC, there is no income threshold for claiming the DSD. Accordingly, a taxpayer who has a disability generally should claim expenses under the DSD rather than as medical expenses, if possible. However, if the taxpayer's income tax liability will be reduced to zero without claiming expenses that can be claimed under either the DSD or the METC, and the taxpayer has a spouse or common-law partner, or was born in 1988 or later and is supported by a parent, who has income tax liability that would be reduced by the METC, the family should consider to whom and how best to allocate the expenses.

The DSD is provided for in s. 64 of the *ITA*. It is claimed on line 215 of the federal return, using Form T929, "Disability Supports Deduction". Form T929 and receipts do not have to be submitted with the return, but must be retained by the taxpayer in the event of review or audit by CRA.

A taxpayer can claim the DSD for eligible expenses that do not exceed his or her earned income, including income from employment or self-employment including partnerships, employee stock options, scholarships, bursaries, research grants, earnings supplements and financial supports. A student attending a secondary school or a post-secondary institution can claim the DSD for additional expenses up to the least of:

- \$15,000

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<sup>187</sup> This amount includes the total of net self-employment income, partnership income and employment income excluding amounts received from a wage-loss replacement plan, or deducted from employment income as RRSP contributions, union or professional dues, clergy residence deduction or employee business expenses.

- \$375 times the number of weeks during which the student attended the secondary school or a post-secondary institution, or
- his or her net income, to the extent that it exceeds earned income.

The following items and services qualify for the DSD:

- Fees for sign language interpretation or real-time captioning, paid to a person in the business of providing such services, for a person with a speech or hearing impairment
- any equipment or accessory that enables a person who is Deaf or who does not speak to make and receive telephone calls, including visual ringing indicators and teletypewriters (TTYs) , if prescribed by a medical practitioner
- synthetic speech systems, Braille printers and large print-on-screen devices that enable persons who are blind to utilize computers, if prescribed by a medical practitioner
- optical scanners or similar devices designed to be used by persons who are blind to enable them to read print, if prescribed by a medical practitioner
- electronic speech synthesizers that enable persons who do not speak to communicate using a portable keyboard, if prescribed by a medical practitioner
- the cost of note-taking services used by persons with mental or physical impairments, if the need is certified in writing by a medical practitioner and paid to a person in the business of providing such services
- voice recognition software used by individuals with a physical impairment, if the need is certified in writing by a medical practitioner
- tutoring services to supplement the primary education of persons with a learning disability or a mental impairment, provided by an unrelated person in the business of providing such services, if the need is certified in writing by a medical practitioner
- talking textbooks to be used by students at a secondary school in Canada or a post-secondary institution who have a perceptual disability, if the need is certified in writing by a medical practitioner, and
- attendant care services provided in Canada by a person who is not the taxpayer's spouse or common-law partner, and who is at least 18 years of age.

Persons who qualify for the DTC can claim amounts paid for part-time attendant care services. If a medical practitioner certifies in writing that the taxpayer will require full-time attendant care services for assistance with personal needs for an indefinite period of time due to a mental or physical infirmity<sup>188</sup>, the taxpayer need not qualify for the DTC

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<sup>188</sup> See the discussion of "mental or physical infirmity" in Part A(8)(j), *supra*.

to claim the DSD for these services.

For some claims, such as care in a group home or full-time attendant care exceeding \$10,000 (\$20,000 in the year of the recipient's death), the DSD claim can only be made only if the METC claim is not made with respect to the same expenses. The taxpayer must choose which of the claims to make.

The following devices and services also were proposed in the Motion as eligible for the DSD beginning with tax year 2005:

- job coaching services, not including job placement or career counselling services, that are provided to a person who is eligible for the DTC by a person in the business of providing such services, if the need is certified in writing by a medical practitioner
- reading services provided to a person who is blind or who has a severe learning disability, if certified in writing as necessary by a medical practitioner, and paid to a person in the business of providing such services
- intervenor services provided to a person who is both blind and profoundly Deaf, if paid to a person in the business of providing such services
- Bliss symbol boards or similar devices used by persons with speech impairments to communicate
- Braille note-takers with keyboards that are used by persons who are blind to take notes
- Page-turner devices that are used by a person with a severe and prolonged impairment in physical functions that markedly restricts the person's ability to use his or her arms and hands, and
- Devices and software that are designed to enable a person who is blind or has a severe learning disability to read print.

As stated in Note 2 of the instructions to Form T929, the DSD apparently may be claimed by a taxpayer who is a deemed or factual resident of Canada for expenses paid to a non-resident for services provided outside Canada while the taxpayer was living outside of the country. However, s. 64.1, which ostensibly provides for this deduction, was not updated to correspond with the 2004 amendments to s. 64.<sup>189</sup>

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<sup>189</sup> Prior to 2004, *ITA* s. 64 allowed only for the deduction of attendant care services that were provided to "enable" the taxpayer to work, conduct research or attend school. The cross-reference in *ITA* s. 64.1(a) to "child care expenses" apparently is an outdated reference to an even earlier version of s. 64.

### **(13) Tax-Exempt Status to Employees of Disability-Related Employment Benefits or Allowances**

An employer may provide two types of disability-related employment benefits or allowances to employees, without these being considered employment income. In each case, the employee must be eligible for the DTC.

The tax-exempt status of these disability-specific employment benefits or allowances is set out in s. 6(16) of the *ITA*. The effect of the tax-exempt status is to exclude such benefits or allowances from the employee's T4 form.

The first type of non-taxable allowance or benefit is transportation to and from work, including parking near the work place. For a transportation allowance or benefit to be non-taxable, the employee must qualify for the DTC either as blind or as having a mobility impairment. The "Employers' Guide: Taxable Benefits"<sup>190</sup>, Chapter 3, gives as examples allowances for taxis or specially designed public transit. A transportation allowance paid to an employee with a mental health or developmental disability would not qualify, even if the employee were eligible for the DTC.

The second type of non-taxable allowance or benefit is to provide attendant care to the employee. The employee must require attendant care as a result of an impairment which qualifies the employee for the DTC. As noted in the previous Part of this paper, attendant care must be personal in nature. The "Employers' Guide: Taxable Benefits", Chapter 3, gives as examples "readers for persons who are blind, signers for persons who are deaf, and coaches for persons who are intellectually impaired".

Allowances and benefits exempted from taxation under this provision must be "reasonable". Paragraph 71 of IT-519R2 states that "[a]n amount will be accepted as reasonable if it is designed to cover the related costs incurred by an employee".

### **(14) Tax Treatment of Accessibility-Related Expenses by Employers and Businesses**

Employers and businesses may deduct the amount they paid during the taxation year to make certain modifications or alterations to a building for purposes of accessibility to persons with disabilities. These amounts are thus claimable as current expenses, rather than using the Capital Cost Allowance method.

The treatment of these accessibility-related expenditures as current expenses is set out at ss. 20(1)(qq) and 20(1)(rr) of the *ITA*. Only those expenditures specifically prescribed by regulation are covered.

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<sup>190</sup> CRA publication T4130, on the CRA web site at:

<http://www.cra-arc.gc.ca/E/pub/tg/t4130/README.html>

The section of the *ITA* Regulation prescribing the expenditures which qualify is Section LXXXVIII, "Disability-Related Modifications and Apparatus", Section 8800.

Subsection 20(1)(qq) and Reg. 8800 cover the following prescribed accessibility-related modifications to accommodate people with a mobility impairment:

- installation of an interior or exterior ramp,
- installation of a hand-activated electric door opener, and
- modifications to a bathroom, an elevator or a doorway to accommodate its use by a person in a wheelchair.

Note that it is only renovations which are primarily specific to disability which are covered by this provision. For example, while modifications to an elevator are included in this provision, the full cost of purchasing and installing an elevator would not be included.

Under Reg. 8801, made pursuant to ss. 20(1)(rr), employers and businesses are allowed to deduct the following prescribed disability-related devices or equipment:

- an elevator car position indicator, such as a Braille panel or an audio signal for individuals having a visual impairment,
- a visual fire alarm, a listening device for group meetings or a telephone device for individuals who have a hearing impairment, and
- a disability-specific computer software or hardware attachment.

### **(15) Increased Child Care Expenses Deduction (CCED) Where the Child has a Disability**

The CCED is available to single parents and two-earner families who spend money on child care in order to earn employment or business income, pursue education or perform research. The rules regarding the CCED are somewhat complex, and a full discussion is beyond the scope of this paper. However, it is important to know that the maximum amount of a CCED claim is increased for a child who has a disability.

The CCED is covered primarily by Section 63 of the *ITA*. The deduction is claimed using Form T778<sup>191</sup>, the "Child Care Expenses Deduction". There is an Interpretation Bulletin, IT-495R3<sup>192</sup>, dealing with "Child Care Expenses".

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<sup>191</sup> On the CRA web site at:

<http://www.cra-arc.gc.ca/E/pbg/tf/t778/README.html>

<sup>192</sup> On the CRA web site at:

The usual maximum CCED claim is \$7,000 for a child under 7, and \$4,000 for a child aged 7 to 16. However, where a child qualifies for the DTC, the maximum claim is \$10,000 regardless of age. (This may include a "child" who is an adult, *i.e.*, a daughter or son of the taxpayer who is over 18.) A child who qualifies for the DTC can be older than 16, and the maximum claim to the parent or other supporting person is still \$10,000. If a child is older than 16 and is infirm, but does not qualify for the DTC, a maximum claim of \$4,000 may be made under the CCED, *i.e.*, the same maximum claim as if the child were aged 7-16.

#### **(16) Increased Availability of the CCED Where One Parent has a Disability**

Ordinarily if there are two parents or other supporting persons of a child, it is the parent or supporting person with the lower net income who is required to take the CCED. This limits the value of the deduction to the family.

However, in certain circumstances the parent or supporting person with the higher net income may make the CCED claim. The situation we are concerned with here is where one parent or supporting person is incapable of caring for children because of a mental or physical infirmity. A statement from the attending physician is required to document this claim and must be attached to the CCED Form T778. The infirmity leading to an inability to care for children must be either:

- for an indefinite period or
- for a period of at least two weeks where the parent or supporting person was confined to a bed or wheelchair, or was a patient in "a hospital, an asylum, or other similar institution".

Where the inability to care for children existed for only part of the year, the parent or supporting person with the higher net income can make the CCED claim for that period on a prorated basis.

#### **(17) Full Education Amount Claim for Part-Time Study**

The education amount is a personal non-refundable credit which can be claimed either on a full-time or on a part-time basis by students. The full-time claim is \$400/month. The part-time claim is \$120/month. Part-time students with disabilities may qualify for the full-time claim, however, if:

- they are eligible for the DTC, or
- they are limited to part-time studies by a mental or physical impairment, as certified by a medical doctor, or by an optometrist, audiologist, occupational

therapist, psychologist, or speech-language pathologist, as appropriate to the disability.

The Education Amount is set out in s. 118.6 of the *ITA*. It is claimed at Line 323 of Schedule 1 (Federal Tax), also using Schedule 11, and at Line 5856 of the Ontario Tax return (ON428), also using Schedule ON(S11). The student's educational institution completes and gives the student either Form T2202<sup>193</sup>, the "Education Amount Certificate", or Form T2202A<sup>194</sup>, the "Tuition and Education Amounts Certificate", to confirm the period in which the student was enrolled in a qualifying program. The Form need not be submitted with the return, but should be kept by the taxpayer in case CRA asks to see it.

Where students are not reasonably expected to carry a full-time course load because of a mental or physical impairment, this may be certified by the student's health professional at Part 3 of Form T2202. Form T2202A does not have a special section where the health practitioner can complete this certification, but it could be done in a separate document. Similarly, the TL11<sup>195</sup> forms which also are used to report on students' tuition and education amounts outside Canada, or when attending flying clubs, do not have special sections to make this certification. Again, the health practitioner can do this in a separate document.

In order to meet the full-time requirement as a "qualified educational program", the student's program must be at a college or university, or at a training school or institution designated by Human Resources [and Social] Development Canada. The program must be at least three weeks long and involve at least 10 hours of coursework per week. In order to meet the part-time requirement as a "specified educational program",

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<sup>193</sup> On the CRA web site at:

<http://www.cra-arc.gc.ca/E/pbg/tf/t2202/README.html>

<sup>194</sup> On the CRA web site at:

[http://www.cra-arc.gc.ca/E/pbg/tf/t2202a\\_flat/README.html](http://www.cra-arc.gc.ca/E/pbg/tf/t2202a_flat/README.html)

<sup>195</sup> These forms are:

- TL11A Tuition and Education Amounts Certificate - University Outside Canada
- TL11B Tuition Fees Certificate - Flying School or Club
- TL11C Tuition and Education Amounts Certificate - Commuter to the United States
- TL11D Tuition Fees Certificate - Educational Institutions Outside Canada for a Deemed Resident of Canada

Links to these four forms are on the CRA web site at:

[http://www.cra-arc.gc.ca/menu/AFAF\\_T\\_TL-e.html#ti](http://www.cra-arc.gc.ca/menu/AFAF_T_TL-e.html#ti)

the student's program must be at least 3 weeks long and involve at least 12 hours of coursework per month.

### **(18) Extended Registered Education Savings Plan (RESP) Rules for Students with Disabilities**

An RESP is an incentive program which assists individuals ("subscribers") to save to provide for the post-secondary education of children ("beneficiaries"). While typically the beneficiaries are the children or grandchildren of subscribers, there is no requirement that beneficiaries be related to subscribers. Some RESPs are "family plans" which create funds available for the post-secondary education of two or more related children.

RESPs are available on a group or individual basis from "promoters" – organizations which are responsible for the terms and administration of the RESP, and for its registration with CRA. The assets of an RESP must be kept by a trust company.

Contributions to an RESP by a subscriber are not tax deductible. However, the Government of Canada provides incentive grants equal to 20% of contributions, up to a maximum of \$2,000/year.<sup>196</sup> Further, RESPs are typically advantageous from a tax viewpoint to both subscribers and beneficiaries. This is because income accumulates within an RESP without being taxed, so the funds set aside for a child's education grow more quickly than they would if not in an RESP. When the funds eventually are paid out to the beneficiary, they are taxed as income to the beneficiary rather than to the subscriber, which typically will mean taxation at a lower rate.

The maximum contribution which can be made to an RESP with respect to a particular beneficiary during a taxation year by all taxpayers is \$4,000. There is a lifetime limit of \$42,000 per beneficiary for all RESPs established for that beneficiary.

Funds may be paid from an RESP as "educational assistance payments" (EAPs) to a beneficiary who has enrolled as a full-time or part-time student in a qualifying educational program at a post-secondary institution.<sup>197</sup> If the beneficiary does not attend such a program, there are complex rules regarding the circumstances under which the funds may be used for the benefit of another child pursuing post-secondary

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<sup>196</sup> This program is called the "Canada Education Savings Grant".

<sup>197</sup> Part-time students were made generally eligible to receive funds from RESPs by a consequential amendment to the *ITA* contained in the *Canada Education Savings Act*, S.C. 2004, c. 26, on the Justice Canada web site at:

<http://lois.justice.gc.ca/en/C-3.6/index.html>

Prior to this amendment, only part-time students who were unable to attend full-time studies because of disability or infirmity, as discussed in the previous Part, B(17), of this paper, were eligible to receive EAPs from RESPs. This was provided for by *ITA* ss. 146.1(2)(g.1)(i)(B). This provision apparently was made redundant by this amendment through the *Canada Education Savings Act*, but it was not repealed when this legislation was passed.

education, or returned to the subscriber. The contributions are typically not taxed if returned to the subscriber (as they were not made tax-free originally), and subject to certain conditions may be transferred to the Registered Retirement Savings Plan (RRSP) of the subscriber, or of the subscriber's spouse or common law partner.

The rules governing RESPs are found in s. 146.1 of the *ITA*. There is also a CRA guide entitled "Registered Education Savings Plans (RESPs)" (RC4092), on the CRA web site at:

<http://www.cra-arc.gc.ca/E/pub/tg/rc4092/README.html>

The detailed rules governing RESPs are beyond the scope of this paper. We shall focus on just two respects in which the disability of a beneficiary may affect the way in which these rules are applied.

First, there is a rule that contributions to an RESP may be made only within 21 years of the time that it is opened, but where there is a "specified plan" with a sole beneficiary who is medically eligible for the DTC during the 21<sup>st</sup> year and in subsequent taxation years, the contribution period is extended to 25 years, so long as the plan provides that no other individual shall be named a beneficiary after the 25<sup>th</sup> year.

Second, there is a rule that an RESP must be wound up after 25 years, but where there is a "specified plan" with a sole beneficiary who is medically eligible for the DTC during the 21<sup>st</sup> year and in subsequent years, the period before termination may be extended to 30 years, so long as the plan provides that no other individual shall be named a beneficiary after the 25<sup>th</sup> year.

These changes were implemented in 2005 by the Federal Budget, in response to Recommendation 3.6 of the TAC's Report "Disability Tax Fairness".<sup>198</sup> They were contained in the 2005 Budget Implementation Bill, Bill C-43,<sup>199</sup> and have been enacted into law.

### **(19) Accessing the Lifelong Learning Plan (LLP) for Part-Time Study**

The LLP<sup>200</sup> permits RRSP annuitants, who are residents of Canada, to access their RRSP savings on a tax-free basis up to a \$20,000 maximum to finance full-time studies by themselves, or their spouse or common-law partner. (The LLP cannot be used to finance the education of children or other relatives.) The amount up to \$20,000 must be withdrawn by January of the fifth year after the first calendar year in which a withdrawal is made.<sup>201</sup> There is a \$10,000 annual maximum as well.

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<sup>198</sup> See fn 6 *supra*.

<sup>199</sup> See fn 8 *supra*.

<sup>200</sup> *ITA* s. 146.02

<sup>201</sup> *ITA* ss. 146.02(1), definition of "eligible amount", para (i)(ii). The section gives the Minister authority to extend the period to a later month than January.

Part-time students with disabilities may access the LLP on the same basis as they qualify for the Education Amount discussed in Part B(17). That is, they may either qualify for the DTC, or be certified by a health professional in the appropriate categories to be not reasonably expected to carry a full-time course load because of a mental or physical impairment.

Funds withdrawn from an RRSP under the LLP must be repaid over a 10-year period starting in the second year after the individual ceases to be a full-time student. (More precisely, the repayment requirement starts in the second consecutive year in which the individual does not qualify for the full-time education amount for at least three months.) The obligation to repay, however, will start five years after the withdrawal of the funds in any event.

## **(20) Extended Home Buyers' Plan for Persons who Qualify for the DTC**

The Home Buyers' Plan generally allows first-time home buyers to withdraw up to \$20,000 from an RRSP on a tax-free basis to assist in the purchase of the home. Amounts withdrawn under the Home Buyers' Plan are required to be repaid to the individual's RRSP over a period of 15 years, using "after-tax dollars" (*i.e.*, the repayments to the RRSP are not tax-deductible).

Persons with disabilities who qualify medically for the DTC, or their relatives, may participate in the Home Buyers' Plan to buy a home that is more accessible for, or better suited for the care of, the person with a disability, even if the purchaser is not a first-time home buyer.<sup>202</sup> The person with a disability does not have to actually claim the DTC to qualify, but must be medically eligible to do so. The relative assisting in purchasing the house must be related to the person with a disability by blood, marriage or adoption, but need not be providing support to the person with a disability.

The Home Buyers' Plan is set out in s. 146.01 of the *ITA*.

Example:

Fred is a person with a disability who requires attendant care, but there is no attendant care provider in his community. Fred qualifies for the DTC as having a severe and prolonged impairment in physical or mental functions, leading to a marked restriction in an activity of daily living. However, Fred is a social assistance recipient who cannot benefit from the DTC. There is no supporting person who can claim a transfer of the DTC from Fred either, so no actual DTC claim has ever been made with respect to Fred. Fred's aunt, Sarah, does not provide regular support to him, but is willing to assist him in buying a condominium apartment in a new community near an attendant care service provider. Sarah owns her own home. Sarah would be permitted under the Home Buyers' Plan to make a tax-free withdrawal from her RRSP of up to \$20,000, and advance the money to Fred to assist him in making a down payment on his

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<sup>202</sup> This provision became effective as of the 1999 taxation year.

condominium. Sarah would be required to recontribute the \$20,000 to her RRSP over 15 years, without obtaining any tax benefit from the recontributions.

### **(21) Contributions to an RRSP from Canada Pension Plan Disability Benefits**

A recipient of Canada Pension Plan disability benefits, or Quebec Pension Plan disability benefits, will have these benefits included in "earned income" for RRSP purposes, and therefore can contribute to an RRSP from these benefits.

This is set out in paragraph (b.1) of the definition of "earned income" in s. 146(1) of the *ITA*.

### **(22) RRSP/RRIF Rollovers for an Infirm Child or Grandchild (Including Adult Sons, Daughters, and Grandchildren)**

Upon the death of the annuitant under an RRSP or Registered Retirement Income Fund (RRIF), the income tax rules generally provide that the value of the RRSP or RRIF is included in computing the deceased's income for the year of death. However, preferential tax treatment of RRSP or RRIF distributions made after death is provided in certain circumstances, where the distribution is made to a "qualified beneficiary". One such case is where the proceeds are distributed to a child or grandchild, whether over or under 18, who was financially dependent on the deceased annuitant by reason of physical or mental infirmity<sup>203</sup>. In this case, the RRSP or RRIF proceeds may be transferred without tax to an RRSP of the child, or may be used to purchase an immediate life annuity.<sup>204</sup> This rollover is called a "refund of premiums" in the *ITA*. (If the proceeds are distributed to a child or grandchild under 18 who was financially dependent on the deceased annuitant but who is not infirm, the RRSP or RRIF proceeds may be transferred without tax only to provide an annuity to age 18.

The *ITA*, ss. 146(1.1), provides a rebuttable presumption that a child or grandchild was not financially dependent on the RRSP or RRIF annuitant immediately before the annuitant's death, if the income of the child or grandchild for the previous taxation year

<sup>203</sup> See the discussion of "mental or physical infirmity" in Part A(8)(j) *supra*.

<sup>204</sup> This became the rule as of the 1999 taxation year. For previous years, there were additional rules if the deceased annuitant had a surviving spouse or common-law partner.

The relevant *ITA* provisions covering the rollover for infirm adults children and grandchildren are:

- s. 60(l) – deduction of amounts received by a dependent child or grandchild when transferred to an RRSP or an annuity
- s. 146(1) – definition of "refund of premiums"
- s. 146(8.9) – rollover from an RRSP
- s. 146.3(6.2) – rollover from an RRIF

was greater than the sum of the basic personal exemption and the DTC amount for that year. If the annuitant died in 2005, for example, the income of a child or grandchild would be presumed to be enough for the child or grandchild to not be financially dependent on the annuitant, if the child or grandchild had income of more than \$14,498.<sup>205</sup> This means that ODSP<sup>206</sup> recipients generally would be considered “qualified beneficiaries” on financial dependency grounds under this calculation.

This calculation, as noted, provides only a presumption that could be rebutted in an appropriate case. Where the deceased annuitant, in the period immediately prior to her or his death, had spent considerable amounts on the care of her or his child or grandchild, for example, it may be argued that the child or grandchild was financially dependent on the annuitant even where the child or grandchild had an income somewhat over the “presumed independence level” described in the preceding paragraph.

At the same time, even where a child or grandchild of an annuitant had income below the “presumed independence level” during the previous year, it would have to be shown that the annuitant was actually providing support to the child or grandchild immediately before the annuitant’s death. The meanings of “support” and “dependent” were discussed in Parts A(8)(a) and A(8)(b) of this paper, where we saw that “support” leading to a “dependency” relationship must be substantial, and not just nominal.

There are other complex rules governing this type of rollover which are beyond the scope of this paper. A detailed description of when the rollover is permitted, and how it is to be carried out, is contained in the CRA publications “Death of an RRSP Annuitant” (RC4177), on the CRA web site at:

<http://www.cra-arc.gc.ca/E/pub/tg/rc4177/README.html>

and “Death of a RRIF Annuitant” (RC4178), on the CRA web site at:

<http://www.cra-arc.gc.ca/E/pub/tg/rc4178/README.html>

The transfers (rollovers) are made using the CRA forms “Death of an RRSP Annuitant – Refund of Premiums” (T2019), on the CRA web site at:

<http://www.cra-arc.gc.ca/E/pbg/tf/t2019/README.html>

and “Death of a RRIF Annuitant – Designated Benefit” (T1090), on the CRA web site at:

<http://www.cra-arc.gc.ca/E/pbg/tf/t1090/README.html>

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<sup>205</sup> The basic personal amount for 2004 was \$8012 and the DTC amount was \$6,486.

<sup>206</sup> See fn 18 *supra*.

Where a RRIF annuitant or annuitant of a matured RRSP dies, to be a “qualified beneficiary” of the fund, the child or grandchild who was financially dependent on the annuitant must also be a beneficiary of the annuitant’s will.

For parents and grandparents of adults with disabilities, it is often important to be able to transfer savings to a trust for the adult, rather than directly to the adult. There are two main reasons for this. First, some adults with disabilities have limited, or no, capacity to manage their own finances. Setting up an inheritance trust for the adult provides a trustee to manage the savings being left to the adult, without requiring costly guardianship proceedings or the involvement of the Office of the Public Guardian and Trustee. Second, approximately 200,000 adults in Ontario are recipients of income support payments under the Ontario Disability Support Program (ODSP). Their continued eligibility for ODSP after receiving a significant inheritance requires that the inheritance be placed in trust for them.<sup>207</sup>

In 2004 draft legislation was proposed which would have permitted a tax-exempt rollover from the RRSP or RRIF of a deceased annuitant to a trust established for an infirm spouse, common-law partner, child or grandchild, provided that the infirm dependant were the only person beneficially entitled to the trust during his or her lifetime.<sup>208</sup> Further, the “refund of premiums” would have to be transferred to a life annuity, or to a term-to-age-90 annuity, of which the trust was the annuitant. Finally, this rollover was to be permitted as of the 2001 taxation year for all infirm “qualified beneficiaries”, but as of the 2005 taxation year, was to be restricted to mentally infirm “qualified beneficiaries”. As of the date of writing, there is no indication as to when and if these legislative proposals will be enacted into law.

There is a further discussion of the issues involved in rollovers from RRSPs and RRIFs to trusts for beneficiaries with disabilities in Part D, in connection with Recommendation 4.2 of the TAC.

### **(23) Preferred Beneficiary Election under a Trust**

A “preferred beneficiary” of a trust during a taxation year is defined under the *ITA*, s. 108(1), as a person who either:

- is eligible for the DTC, and for whom a DTC certificate has been submitted for the taxation year, or

<sup>207</sup> These issues are discussed in detail in author Harry Beatty’s article “Estate Planning for Beneficiaries with Disabilities in Ontario : Inheritances, Trusts and the Ontario Disability Support Program”, on the ARCH Disability Law Centre web site at:

<http://www.archdisabilitylaw.ca/publications/index.asp>

<sup>208</sup> *Draft Technical Amendments*, s. 25(2) – s. 25(6), on the Department of Finance web site at:

<http://www.fin.gc.ca/toce/2004/ita04-introe.html>

- is an adult who was a dependant of another individual during the year because of mental or physical infirmity,<sup>209</sup> using the specific definition of “dependant” in s. 118(6) which includes children, grandchildren, parents, grandparents, sisters, brothers, aunts, uncles, nieces or nephews, and persons standing in this relationship to the taxpayer's spouse or common-law partner, and who had an income less than the basic personal exemption (\$8,648 for 2005) for the taxation year in question.<sup>210</sup>

In addition, the “preferred beneficiary” must be one of:

- the settlor of the trust,
- the spouse or common-law partner or former spouse or common-law partner of the settlor of the trust, or
- a child, grandchild, or great grandchild of the settlor of the trust or the spouse of common-law partner [of a child, grandchild, or great-grandchild of the settlor.]

Thus for infirm preferred beneficiaries, a closer relationship to the settlor of the trust is required than to the person providing support, although there must be a person providing support. For example, a preferred beneficiary who is infirm but not DTC-eligible may be a niece or nephew of the person on whom she or he is dependent, but cannot be only a niece or nephew of the settlor of the trust.

The preferred beneficiary election allows income to be taxed in the hands of the beneficiary rather than in the hands of the trust, which may be advantageous if the beneficiary has a marginal tax rate lower than the tax rate of the trust. The rules governing the preferred beneficiary election in a given year are complex and beyond the scope of this paper.<sup>211</sup>

Example:

Where an ODSP recipient lives with family and receives the standard boarder rate of \$730/month<sup>212</sup>, or \$8,760/year, and is also the beneficiary of a trust, the ODSP recipient would not be able to qualify as a preferred beneficiary as an “infirm” person, because \$8,760 is greater than the income limit of \$8,648 for purposes of the election. However, if the ODSP recipient were DTC-eligible, he or she could qualify as a preferred

<sup>209</sup> See the discussion of “mental or physical infirmity” in Part A(8)(j) *supra*.

<sup>210</sup> Prior to 1995, “preferred beneficiaries” were not required to be DTC-eligible or infirm.

<sup>211</sup> For details see IT-394R2, “Preferred Beneficiary Election”, on the CRA web site at:

<http://www.cra-arc.gc.ca/E/pub/tp/it394r2/it394r2-e.html>

<sup>212</sup> See fn 92 *supra*.

beneficiary (assuming the other conditions were met), as there is no income limit for DTC-eligible beneficiaries.

## C. Disputes Involving Disability-Related Tax Claims

### (1) Leading Cases on the Disability Tax Credit (DTC)

Many cases on the DTC have been argued in the Tax Court of Canada, and a few have been reviewed judicially by the Federal Court of Appeal.<sup>213</sup> However, it is not easy to identify clear jurisprudential principles arising out of these cases, for a number of reasons.

The cases in the Tax Court are invariably heard using the informal procedure, which is not supposed to have any precedential value.<sup>214</sup> Often the person claiming the DTC, or a family member, argues the case for eligibility. In these circumstances, there is considerable room for the Tax Court judge to give weight to first-hand impressions of the impact of the disability on the individual's life. There is also an opportunity for the judge to attempt to limit a decision in favour of the taxpayer to the circumstances of the particular case.

The cases which have reached the Federal Court of Appeal have often been decided on relatively narrow grounds, specific to the facts of the particular case.

It is also important to keep in mind that cases decided previously by the Tax Court and the Federal Court will not take into account the 2005 amendments to the DTC legislation, and the significant revisions to the DTC T2201 form beginning with the 2003 taxation year. These developments were discussed in detail in Part B(6) of this paper.

Nevertheless, principles of importance may be discerned from previous decisions. A case which is often cited as to the general principles governing the DTC is the decision of Judge Bowman of the Tax Court in *Radage*.<sup>215</sup> With respect to the DTC, the Judge stated, in a frequently-quoted passage:

The legislative intent appears to be to provide a modest amount of tax relief to persons who fall within a relatively restricted category of markedly

<sup>213</sup> No DTC case has yet reached the Supreme Court of Canada.

<sup>214</sup> *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, as amended, ss. 18.28. The informal procedure is available to taxpayer under ss. 18(1)(a) of this *Act* where the tax amount in dispute is less than \$12,000, which is typically the case for DTC claims, which have a maximum value of approximately \$1,500/year, as discussed in Part B(6)(d), *supra*. The *Tax Court of Canada Act* is on the Department of Justice web site at:

<http://laws.justice.gc.ca/en/T-2/index.html>

<sup>215</sup> *Radage v. Canada*, [1996] 3 C.T.C. 2510, 96 D.T.C. 1615, [1996] T.C.J. No. 730 (T.C.C.).

physically or mentally impaired persons. The intent is neither to give the credit to everyone who suffers from a disability nor to erect a hurdle that is impossible for virtually every disabled person to surmount. It obviously recognizes that disabled persons need such tax relief and it is intended to be of benefit to such persons.

[...]If the object of Parliament, which is to give to disabled persons a measure of relief that will to some degree alleviate the increased difficulties under which their impairment forces them to live, is to be achieved the provision must be given a humane and compassionate construction. [...]<sup>216</sup>

This passage was expressly approved by Létourneau J.A. of the Federal Court of Appeal in *Johnston*.<sup>217</sup>

In *Radage*, Judge Bowman formulated a number of principles relevant to consideration of DTC issues, including the following with respect to mental disabilities:

In these guidelines I have emphasized the need to recognize the way in which one function depends on the others, and to attempt to relate the use of those functions to some meaningful result in everyday life.

(e) Finally there must be considered -- and this is the most difficult principle to formulate -- the criteria to be employed in forming the judgement whether the mental impairment is of such severity that the person is entitled to the credit, i.e. that that person's ability to perceive, think and remember is markedly restricted within the meaning of the Act. It does not necessarily involve a state of complete automatism or anoësis, but it should be of such a severity that it affects and permeates his or her life to a degree that it renders that person incapable of performing such mental tasks as will enable him or her to function independently and with reasonable competence in everyday life.<sup>218</sup>

This is another passage often cited in cases dealing with limitations related to "perceiving, thinking and remembering", which has now been replaced by the more inclusive but related descriptive phrase "mental functions necessary for everyday life".

Where the primary issue in a DTC case is medical eligibility, it is generally useful to search cases in which a similar disability has been considered by the Tax Court, to see what factors have been found to indicate eligibility or ineligibility. However, these are only guidelines, and not all of the judges of the Tax Court have taken the same

<sup>216</sup> *Radage*, para. 45.

<sup>217</sup> *Johnston v. Canada* (1998), 223 N.R. 101, [1998] 2 C.T.C. 262, 98 D.T.C. 6169, [2001] F.C.J. No. 169 (F.C.A.), on the Federal Court of Canada web site at:

<http://decisions.fct-cf.gc.ca/fct/1998/a-347-97.shtml>

<sup>218</sup> *Radage*, para. 45.

approach. The issue in each case is really how the disability affects the individual taxpayer or dependant, and it is important to be specific about limitations in activities of daily living which the individual has.

While DTC cases often focus on medical eligibility, they also often are concerned with the DTC T2201 form which the health professional (usually a doctor) has completed. The basic issue is often whether it is open to the taxpayer to present evidence that shows that the taxpayer, or the taxpayer's dependant, meets the eligibility criteria for the DTC even though the health professional has not certified that the person is eligible (that is, the doctor "checked the wrong box"). A 2002 case from the Federal Court of Appeal, *Buchanan*, indicates that there is a limited power in the court to correct a wrongly-completed certificate.<sup>219</sup>

Lembi Buchanan, the spouse of the appellant in the *Buchanan* case, argued the case successfully on her husband's behalf in the Tax Court of Canada, and maintains a web site entitled "Fighting for Fairness" in which this and a number of additional leading DTC cases are summarized, as well as linked for easy access.<sup>220</sup>

In addition, there are a number of articles and resources available which address issues of DTC eligibility for particular types of disabilities. These include:

- Arthritis Society of Canada:  
<http://www.arthritis.ca/local%20programs/alberta/advocacy/disability/tax%20credit/default.asp?s=1>
- Canadian Cystic Fibrosis Foundation:  
<http://www.ccff.ca/page.asp?id=196>
- Canadian Diabetes Association:  
[http://www.diabetes.ca/section\\_main/NewsReleases.asp?ID=117](http://www.diabetes.ca/section_main/NewsReleases.asp?ID=117)
- Canadian Hearing Society:  
<http://www.chs.ca/info/tax/index.html>
- Kidney Foundation of Canada  
<http://www.kidney.ca/page.asp?intNodeID=23422>
- Learning Disabilities Association of British Columbia/Vancouver Chapter

<sup>219</sup> *Buchanan v. Canada*, 2002 D.T.C. 7397 (F.C.A.).

<sup>220</sup> Lembi Buchanan's "Fighting for Fairness" web site is at:

[www.disabilitytaxcredit.com](http://www.disabilitytaxcredit.com)

and is an invaluable resource to persons with disabilities, family members and advocates involved in DTC claims and appeals. Lembi Buchanan was a member of the TAC on Tax Measures for Persons with Disabilities, and is currently a member of the CRA Disability Advisory Committee.

[http://www.ldav.ca/adv\\_tax.html](http://www.ldav.ca/adv_tax.html)

- Mood Disorders Society of Canada:  
<http://www.mooddorderscanada.ca/dtc/print/index.htm>
- Multiple Sclerosis Society of Canada  
<http://www.mssociety.ca/en/involved/advocacy/dtc.htm>

- Parkinson's Society of Canada

<http://www.parkinson.ca/society/parkpost/spring2002/PostEn.pdf>

There are many other disability, health professional and advocacy web sites which have information on DTC eligibility.<sup>221</sup> In using the information on these web sites, however, it is important to ensure that it is current. As discussed in Part B(6) of this paper, significant changes have been made to the DTC legislation for the 2005 taxation year, and significant changes have been made to the DTC T2201 form beginning with the 2003 taxation year, and continuing into 2005.

## (2) Leading Cases on the Medical Expense Tax Credit (METC)

As with cases on the DTC, cases on the METC typically are decided by factors unique to the individual situation. The judges of the Tax Court, particularly as these cases are typically brought under the informal procedure<sup>222</sup>, often emphasize that while a particular medical expense claim is being allowed, it is not necessarily the case that all similar claims will be granted. The particular facts of individual cases, and their presentation by tax filers and their advocates, are very important in METC cases.

One issue that has been litigated in the Tax Court on a number of occasions is whether fees to a private school, paid on behalf of a student with special needs, can be considered a medical expense within the meaning of s. 118.2(2)(e) of the *ITA*.<sup>223</sup> In *Collins*<sup>224</sup>, Judge Rowe decided, after careful and thorough reasoning, that payments made as tuition to a school on behalf of a child with Attention Deficit Hyperactivity Disorder (ADHD) did qualify as medical expenses. The criteria set out in this case give

<sup>221</sup> The authors welcome suggestions as to additional links of organizations with helpful DTC information.

<sup>222</sup> See fn 214 *supra* for information about the informal procedure.

<sup>223</sup> A medical expense under this provision is described generally as an expense:

for the care, or the care and training, at a school, institution or other place of the patient, who has been certified by an appropriately qualified person to be a person who, by reason of a physical or mental handicap, requires the equipment, facilities or personnel specially provided by that school, institution or other place for the care, or the care and training, of individuals suffering from the handicap suffered by the patient[.]

<sup>224</sup> *Collins v. The Queen*, (1998) 3 CTC 2980, on the Tax Court of Canada web site at:

<http://decision.tcc-cci.gc.ca/en/1998/html/1998tcc97648.html>

considerable guidance in other cases dealing with this issue. In *Attas*<sup>225</sup>, Judge Beaubier held that payments made to an educational consultant, who had a Ph.D. but was not a registered health professional, for treatment and instruction of a child with a severe learning disability, also qualified as medical expenses under this provision. The educational consultant's office was considered to be included under "other place" in s. 118.2(2)(e).

Another type of case deals with home improvements which are beneficial to the person with a disability, but which are not entirely disability-specific. The Tax Court has tended to allow these as medical expenses, if they are reasonable. For example, In *Brown*<sup>226</sup>, an air conditioner purchased by the spouse of a person with multiple sclerosis was found to have been designed to assist an individual with a mobility impairment in walking within the meaning of subsection 5700(i) of the Regulations and its cost was therefore deductible as a medical expense. In *Williams*<sup>227</sup>, the court allowed as medical expenses the cost of a chemical-free mattress, and of removing carpets and replacing them with hardwood flooring. In *Crockart*<sup>228</sup> the cost of a modified bed was allowed, notwithstanding that the taxpayer slept in it as well as his spouse with a disability.

It is helpful for counsel to search cases dealing with medical expense claims similar to those which your client has, but Tax Court cases tend to turn on specific facts. Careful documentation of the disability-related, or health-related, reasons for the particular expense is a key. The web sites of disability organizations, such as those cited in the previous section of this paper, can be a valuable resource in documenting the reasons for particular expenses claimed under the METC.

### **(3) Transportation and Travel Expenses to Obtain Medical Services**

The *ITA* contains very specific rules regarding METC claims for transportation and travel expenses to obtain medical services. Ss. 118.2(2)(g) and (h) provide respectively that "a medical expense of an individual is an amount paid":

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<sup>225</sup> *Attas v. The Queen*, Tax Court of Canada 1999-3793-IT-I; 1999-3794-IT-I, on the Tax Court of Canada web site at:

<http://decision.tcc-cci.gc.ca/en/2000/html/2000tcc19993793.html>

<sup>226</sup> *Brown v. Minister of National Revenue* (1994), 95 DTC 5126 (Fed. Ct., T.D.) Subsequently the *ITA* Regulations were amended to permit a 50 per cent claim, not to exceed \$1,000, for air conditioners required for medical reasons. See *ITA* Reg. ss. 5700(c.3).

<sup>227</sup> *Williams v. The Queen*, [1998] 1 C.T.C. 2813, on the Tax Court of Canada web site at:

<http://decision.tcc-cci.gc.ca/en/1997/html/1997tcc97445.html>

<sup>228</sup> *Crockart v. The Queen*, [1999] 2 C.T.C. 2409, on the Tax Court of Canada web site at:

<http://decision.tcc-cci.gc.ca/en/1999/html/1999tcc97395.html>

(g) to a person engaged in the business of providing transportation services, to the extent that the payment is made for the transportation of

(i) the patient, and

(ii) one individual who accompanied the patient, where the patient was, and has been certified by a medical practitioner to be, incapable of travelling without the assistance of an attendant

from the locality where the patient dwells to a place, not less than 40 kilometres from that locality, where medical services are normally provided, or from that place to that locality, if

(iii) substantially equivalent medical services are not available in that locality,

(iv) the route travelled by the patient is, having regard to the circumstances, a reasonably direct route, and

(v) the patient travels to that place to obtain medical services for himself or herself and it is reasonable, having regard to the circumstances, for the patient to travel to that place to obtain those services;

(h) for reasonable travel expenses (other than expenses described in paragraph 118.2(2)(g)) incurred in respect of the patient and, where the patient was, and has been certified by a medical practitioner to be, incapable of travelling without the assistance of an attendant, in respect of one individual who accompanied the patient, to obtain medical services in a place that is not less than 80 kilometres from the locality where the patient dwells if the circumstances described in subparagraphs 118.2(2)(g)(iii), 118.2(2)(g)(iv) and 118.2(2)(g)(v) apply[.]

Further, ss. 118.4 provides that:

(4) Where, in circumstances in which a person engaged in the business of providing transportation services is not readily available, an individual makes use of a vehicle for a purpose described in paragraph 118.2(2)(g), the individual or the individual's legal representative shall be deemed to have paid to a person engaged in the business of providing transportation services, in respect of the operation of the vehicle, such amount as is reasonable in the circumstances.

In interpreting these rules, the important points to keep in mind are:

- For all transportation and travel expense claims, the three conditions in (g)(iii),(iv) and (v) must be met. CRA will reject the claim if:

- There are “substantially equivalent medical services” available for the individual (patient) closer to home
  - The route chosen to access the medical services is not a “reasonably direct route” or
  - The purpose of the transportation or travel is not to enable the individual (patient) to obtain medical services
- Transportation claims require a trip of 40 km (one way), whereas travel claims (which include accommodation and meals as well as transportation) require a trip of 80 km (one way)
  - Where a transportation or travel claim is made for an attendant, a medical practitioner must certify that the individual (patient) cannot travel without an attendant. Only one attendant may be claimed, regardless of the individual’s needs. While it may be obvious that a young child would require an attendant to travel, a brief note to that effect from the child’s doctor or other health professional would be useful to obtain.
  - Ss. 118(4) permits an METC claim for the use of the individual’s (patient’s) own vehicle, or that of a family member or friend, to obtain medical services, but not unless commercial services “are not readily available”. This is another basis on which CRA may deny an METC claim for transportation or travel expenses.
  - Finally, an METC claim for transportation or travel expenses to obtain medical services may be denied if the expenses are not “reasonable in the circumstances”.

These detailed rules limit the METC transportation or travel expense claims in ways that seem arbitrary. The 40 km test would exclude a claim by parents who regularly had to take their child 30 km to a medical facility, even if there were dozens of trips a year, and significant parking costs. Similarly, a family member may have to stay overnight with the individual (patient) even where the one-way trip is shorter than 80 km. There is no provision for claiming the expenses of more than one attendant, even though some individuals may require the support and care of more than one person while traveling.

The Tax Court of Canada has made some decisions which at least indirectly address these limitations.

In *Bryce*<sup>229</sup>, the taxpayer was the adoptive parent of a twenty-year-old daughter who was born with fetal alcohol syndrome. The taxpayer and her family lived in Whitehorse, Yukon. Because of the daughter’s exceptional mental health, learning disability and substance dependence needs, she was admitted to a program in Calgary. The medical

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<sup>229</sup> *Bryce v. The Queen*, TCC Docket 97-3606-IT-1, on the Tax Court of Canada web site at:

<http://decision.tcc-cci.gc.ca/en/1998/html/1998tcc973606.html>

director of the program advised that it was essential to her treatment that her parents (*i.e.*, the taxpayer and her husband) travel to Calgary for case review meetings. The taxpayer submitted a medical expense claim for 12 trips to Calgary, some with her husband and other children, which were rejected because they were not trips accompanying the individual (patient), who was her daughter.

C.H. McArthur, J.T.C.C. found that, while these travel expense claims did not fit within ss. 118.2(2)(h) discussed above, they could fit within a more general provision, ss. 118.2(2)(e), which states that an METC claim may be made:

for the care, or the care and training, at a school, institution or other place of the patient, who has been certified by an appropriately qualified person to be a person who, by reason of a physical or mental handicap, requires the equipment, facilities or personnel specially provided by that school, institution or other place for the care, or the care and training, of individuals suffering from the handicap suffered by the patient.

In effect, Judge McArthur held that the travel expenses were part of the daughter's "care and training" at the treatment centre, although they were not expenses for which the treatment centre charged the parents, but rather expenses incurred by the parents themselves.<sup>230</sup> The rationale for this decision was that the parents were included in the "care and training" of the individual (patient) with a disability.

In the recent *Patton*<sup>231</sup> decision, B. Paris, J.T.C.C. dealt with a situation in which a child living in Simcoe, Ontario, attended a special school in Hamilton because of a significant learning disability. As the trip between Simcoe and Hamilton is more than 40 km. one way, the parent claimed transportation expenses to the program under the METC, as well as the tuition costs of the school program itself. While CRA allowed the tuition costs pursuant to ss. 118.2(2)(e), cited above, on the basis that the school was delivering a program specifically for students with disabilities, it denied the transportation claim on the ground that the school did not provide "medical services". It was acknowledged that the staff of the school had educational degrees and qualifications, but did not have medical qualifications or training.

Judge Paris noted that "medical services" is not defined in the *ITA*, and using dictionary definitions of "medical", concluded that "medical services" could be interpreted to include services not provided by medical practitioners or persons with medical training,

<sup>230</sup> In this case, it is interesting to note that Judge McArthur rejected a claim by the mother for \$4,000 in telephone expenses involved in calling the treatment centre, on the grounds that "telephone costs are not provided in the medical expenses enumerated in subsection 118.2(2)". However, the travel expenses which he allowed were not enumerated specifically in this subsection either. If the telephone calls had been part of formal meetings which were part of the treatment plan, arguably there should have been a different result with respect to these costs as well.

<sup>231</sup> *Patton v. The Queen*, TCC Docket 2005-437(IT)I, on the Tax Court of Canada web site at:

<http://decision.tcc-cci.gc.ca/en/2005/html/2005tcc704.html>

so long as the purpose was the diagnosis, treatment and prevention of “disease”, a broad term which the Judge used to include disabilities. Judge Paris also stated that it would seem inconsistent to allow the expenses of a program itself as “medical expenses” while denying that the program constituted “medical services”. For these reasons, the claim of the parents for transportation expenses was allowed. It would seem that the same argument could be made with respect to transportation or travel expenses to any school or program qualifying under ss. 118.2(2)(e).

#### (4) Cases on Other Tax Provisions Related to Disability

There are two cases which have challenged the taxation of the post-secondary Bursary for Students with Disabilities (BSWD). The BSWD is provided specifically to meet the accommodation needs of post-secondary students with disabilities. It must be used to pay for these specific needs. Nevertheless, it is taxed under the *ITA* in the same manner as grants and bursaries used for living and other expenses. In the *Simser*<sup>232</sup> and *Wignall*<sup>233</sup> cases, the *Charter* and the *Canadian Human Rights Act*<sup>234</sup> were used to challenge the taxation of the BSWD as a violation of the equality rights of persons with disabilities, but both cases were unsuccessful in the human rights tribunal (*Wignall*) and in the courts.

However, the principle advanced in these cases was at least indirectly recognized by the Government of Canada with the establishment of the Disability Supports Deduction

<sup>232</sup> *Simser v. R.* (22 May 2003), 2003TCC366 (Tax Court of Canada), on the Tax Court of Canada web site at:

<http://decision.tcc-cci.gc.ca/en/2003/html/2003tcc366.html>

aff'd F.C.A. [2006] 1 F.C.R. 253, [2004] F.C.J. No. 2075, 2004 FCA 414, on the Federal Court of Canada web site at:

<http://decisions.fca-caf.gc.ca/fca/2004/2004fca414.shtml>

leave to appeal to the Supreme Court of Canada refused (23 June 2005), SCC Docket 30746, on the Supreme Court of Canada web site at:

[http://205.193.81.30/information/cms/docket\\_e.asp?30746](http://205.193.81.30/information/cms/docket_e.asp?30746)

<sup>233</sup> *Wignall v. Canada (Department of National Revenue)* [2001] C.H.R.D. No. 9, CHRT, on the Canadian Human Rights Tribunal web site at:

[http://www.chrt-tcdp.gc.ca/search/view\\_html.asp?doid=273&lg=\\_e&isruling=0](http://www.chrt-tcdp.gc.ca/search/view_html.asp?doid=273&lg=_e&isruling=0)

aff'd F.C. [2004] 1 F.C.R. 679, [2003] F.C.J. 1627, 2003 FC 1280, on the Federal Court web site at :

<http://decisions.fct-cf.gc.ca/fct/2003/2003fc1280.shtml>

<sup>234</sup> R.S.C. 1985, c. H-6, as amended

(DSD).<sup>235</sup> While BSWD payments and similar “bursaries” to pay for accommodation will remain taxable, they are now fully deductible under the DSD, which in effect makes them “tax-free”. However, the DSD has been in effect only since the 2004 taxation year, and will not assist persons with disabilities who were taxed on BSWD payments prior to that time.

#### **(5) The Process of Appealing a DTC, METC or other Disability-Related Tax case – Strategic Considerations**

A full discussion of the tax appeals process is beyond the scope of this paper. A basic overview of the process is given in CRA's pamphlet "Resolving Your Dispute: Objections and Appeal Rights Under the *Income Tax Act*" (P148).<sup>236</sup> Here we will only discuss a few strategic considerations relevant to DTC or METC cases.

If your client has been denied the DTC, the first step is to obtain the DTC certificate (Form T2201) that was filed on her or his behalf. In many cases, the client will not realize that the doctor or other health professional has completed the form in such a way as to indicate that the client, or her or his dependant, is not eligible. In other words, the professional has "checked the wrong boxes". While in exceptional cases counsel have been able to overcome a "negative" certificate on appeal, it is far better to discuss with the health professional why the form was completed in the way it was. Especially given that there is a new DTC form beginning in 2003 and with further major revisions in 2005, with significant changes in design and wording, it may make sense to have the professional consider completing a new form.

In both DTC cases and METC cases generally, it makes sense to collect all of the relevant health and disability information that will be required, and submit it to CRA prior to launching an appeal. Of course, you should file a Notice of Objection in a timely manner to protect your client's appeal rights, but this does not necessarily close the door to negotiating with CRA. It may well be possible to resolve your client's issue through negotiation, if you can demonstrate that you have the support of qualified professionals for your claim. Or if there is very little support for the claim, perhaps you should advise the client about the risks of proceeding.

Another strategic consideration is how much to ask for. It may make sense to ask only for what can reasonably be established, rather than for everything it is remotely possible to claim. It is possible to have claims reconsidered on a discretionary basis back as far as 10 years.<sup>237</sup> At the same time, if there is weak medical evidence that your client met

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<sup>235</sup> See Part B(12) of this paper *supra* and the discussion of the TAC's Recommendation 3.1 in Part D for an account of the DSD.

<sup>236</sup> Found on the CRA web site at:

<http://www.CRA-adrc.gc.ca/E/pub/tg/p148/README.html>

<sup>237</sup> Thus, a request made in 2006 must relate to the 1996 taxation year, or a later taxation year, to be considered by CRA on a discretionary basis. This authority is provided for by *ITA* ss. 152(4.2).

the DTC criteria several years ago, for example, it may make getting the credit currently more difficult if you require CRA to consider the retroactive claim. Similarly, your client may jeopardize his or her chances of getting "borderline" or novel medical expense claims accepted, if there are too many.

Most DTC and METC claims are heard under the informal procedure, if the case reaches the Tax Court, and many are argued by the taxpayer or by a family member as agent. In cases which are sympathetic but require some flexibility in legal interpretation, self-representation or representation by a family member sometimes is very successful. Clients who are unable to pay, or for whom the amounts at stake do not justify the legal fees involved, can be encouraged to argue the cases themselves. It works more often than you might expect.

#### **D. An Update: Current Status of the Recommendations of the Technical Advisory Committee on Tax Measures for Persons with Disabilities (TAC)**

The TAC was announced in the 2003 Federal Budget.<sup>238</sup> It was appointed jointly by the Ministers of Finance and of National Revenue in April 2003. The TAC was composed of leaders of organizations representing persons with disabilities, representatives of national organizations of health practitioners, and tax experts.<sup>239</sup>

The TAC completed its final report, *Disability Tax Fairness*, in December 2004.<sup>240</sup> The TAC made 25 recommendations, which it presented with cost estimates provided by Finance and CRA officials. The total cost of the TAC's recommendations was \$110 million annually in direct tax relief to persons with disabilities and their families, plus \$2 million in administrative costs.<sup>241</sup> The Federal Government had set aside an allocation of \$85 million annually in the Budget to implement the work of the TAC. As discussed earlier in this paper, a significant number of the TAC's recommendations were implemented in the 2005 Federal Budget.

In this Part of the paper, we set out the 25 recommendations of the TAC and comment on their implementation or current status. In each case, the recommendation is set out as it appears in the "Summary of Recommendations" in *Disability Tax Fairness*.<sup>242</sup>

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<sup>238</sup> 2003 Federal Budget information is found on the Department of Finance web site at:

<http://www.fin.gc.ca/budtoce/2003/budliste.htm>

<sup>239</sup> Author Harry Beatty was one of the 12 members of the TAC.

<sup>240</sup> Technical Advisory Committee on Tax Measures for Persons with Disabilities (Ottawa: Department of Finance Canada, 2004), available on the web site of the TAC at:

<http://www.disabilitytax.ca/report.html>

<sup>241</sup> *Ibid.*, p. 7.

<sup>242</sup> *Ibid.*, pp. 121-130.

## Chapter 2: Disability Tax Credit

### RECOMMENDATION 2.1

The Committee recommends that:

The *Income Tax Act* be amended to replace the present wording 'severe and prolonged mental or physical impairment' with the wording 'severe and prolonged impairment in physical or mental functions.'

This recommendation is for clarification purposes and does not involve any revenue cost. It is not intended to alter the scope of eligibility for the credit.

Current Status: Recommendation 2.1 was adopted in the 2005 Federal Budget and set out in proposed legislation, as discussed in Part B(6) of this paper.

### RECOMMENDATION 2.2

The Committee recommends that:

The term 'perceiving, thinking and remembering' as a basic activity of daily living in the *Income Tax Act* and on the T2201 form, be replaced with the term 'mental functions necessary for everyday life.'

In our view, mental functions are the range of processes that govern how people think, feel and behave. Based on our consultations and research, they include memory, problem solving, judgment, perception, learning, attention, concentration, verbal and non-verbal comprehension and expression, and the regulation of behaviour and emotions. These functions are necessary for activities of everyday life that are required for self-care, health and safety, social skills and simple transactions.

This recommendation is for clarification purposes and does not involve any revenue cost. It is not intended to alter the scope of eligibility for the credit.

Current Status: Recommendation 2.1 was adopted in the 2005 Federal Budget and set out in proposed legislation, as discussed in Part B(6) of this paper.

### RECOMMENDATION 2.3

The Committee recommends that:

The Canada Revenue Agency state in its explanatory materials and on the application form for the disability tax credit that some impairments

in function can result in a marked restriction in a basic activity of daily living, even though these impairments may have signs and symptoms that may be intermittent.

This action is not intended to alter the legislative requirement that a marked restriction in a basic activity of daily living be present 'all or substantially all of the time.' This recommendation should not involve any revenue cost.

**Current Status:** The revised Disability Tax Credit Certificate (Form T2201) for 2005 does not contain an explicit statement of the form envisaged by Recommendation 2.3. However, in both the section of the form covering walking-related disabilities, and in the section of the form on disabilities related to mental functions necessary for everyday life, there are examples given of episodic disabilities. As mobility and mental health disabilities are the most likely to be intermittent or episodic, these examples go a considerable distance towards implementing this recommendation, as discussed in Part B(6) of this paper.

#### RECOMMENDATION 2.4

The Committee recommends that:

The *Income Tax Act* be amended to provide that persons with a severe and prolonged impairment who are restricted in two or more basic activities of daily living qualify for the disability tax credit if the cumulative effects of the restriction are equivalent to a marked restriction in a single basic activity of daily living all or substantially all of the time.

This recommendation is estimated to involve a revenue cost of approximately \$50 million annually.

**Current Status:** Recommendation 2.4 was adopted in the 2005 Federal Budget and set out in proposed legislation, as discussed in Part B(6) of this paper.

#### RECOMMENDATION 2.5

The Committee recommends that:

The federal government ensure that the legislative and administrative requirements concerning the present interpretation regarding life-sustaining therapy adequately reflect the time taken for essential preparation, administration of and necessary recovery from life-sustaining therapy as recently interpreted in decisions of the Tax Court of Canada.

The revenue cost of this recommendation will ultimately depend on the nature of the changes implemented by the government.

Current Status: The revised Disability Tax Credit Certificate (Form T2201) for 2005, in the life-sustaining therapy section, reflects the proposed provision discussed in Part B(6) of this paper, which clarifies which activities will, and which will not, be included in the calculation of the “14-hour/week” requirement. While a number of activities recognized in Tax Court decisions are included, carbohydrate calculation is excluded, although it had been recognized as a component of therapy for a child with Type 1 diabetes in the *Sullivan*<sup>243</sup> case. Thus, while this recommendation was implemented in part, the implementation was narrower than envisaged in Recommendation 2.5.

## RECOMMENDATION 2.6

The Committee recommends that:

The *Income Tax Act* be amended to include physiotherapists in the list of qualified practitioners eligible to certify for the purposes of the disability tax credit a marked restriction in walking.

The federal government consult with the Canadian Nurses Association to determine under what circumstances nurse practitioners could be allowed to certify eligibility for the disability tax credit.

This recommendation does not involve any revenue cost.

Current status: The first part of Recommendation 2.6 was adopted in the 2005 Federal Budget and set out in proposed legislation to include physiotherapists in the list of “qualified practitioners” with respect to walking, as discussed in Part B(6) of this paper. In the 2005 Federal Budget, the Government also made a commitment to consult further with respect to the second part of this recommendation, that under certain circumstances nurse practitioners be allowed to certify eligibility for the DTC.<sup>244</sup> As of the date of writing, no further information is available with respect to this consultation.

## RECOMMENDATION 2.7

The Committee recommends that:

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<sup>243</sup> *Sullivan v. The Queen*, 2004TCC420, Court File No. 2004-763(IT)I, on the Tax Court of Canada web site at:

<http://decision.tcc-cci.gc.ca/en/2004/html/2004tcc420.html>

<sup>244</sup> 2005 Budget Plan, Annex 8, on the Department of Finance’s web site at:

<http://www.fin.gc.ca/budget05/bp/bpa8ae.htm#IncomeTax>

The Canada Revenue Agency:

- ensure that its staff follow the procedures relating to the disability tax credit in its Taxation Operations Manuals and Interpretation Bulletins;
- ensure that its general staff are able to assist persons with disabilities with respect to completing and filing the T2201 form, or refer them to appropriate specialized personnel where required;
- develop training programs, workshops and guidelines for its staff regarding changes to the legislation and interpretive guidelines for the disability tax credit, and the administration of tax measures for persons with disabilities;
- develop appropriate communications and educational material for qualified practitioners to assist them in completing the T2201 form;
- make clear in its communication materials that a second informal review is available to taxpayers denied the disability tax credit; and
- monitor the achievement of these recommendations.

Elements of this recommendation that are consistent with current practice do not involve any revenue cost. The Committee estimates that about \$2 million annually will be required to implement the components of this recommendation that represent new initiatives.

Current Status: The CRA has devoted resources to implementing these administrative recommendations on an on-going basis since the Federal Budget 2005, in conjunction with the Disability Advisory Committee (DAC) established in accordance with Recommendation 2.12 (discussed below).

## RECOMMENDATION 2.8

The Committee recommends that:

The Canada Revenue Agency continue to improve the T2201 form by ensuring that:

- its ongoing consultations involve a wide representation of consumers and qualified practitioners regarding the T2201 form or related disability tax credit materials such as clarification letters and letters to individuals whose claim has been denied;

- the guidelines relating to the completion of the form are clear and concise to enable claimants and qualified practitioners to understand the eligibility criteria for the disability tax credit;
- examples and questions on the T2201 form reflect real-life situations to enable an appropriate determination of the severity of the impairment;
- examples and questions on the T2201 form continue to be revised as necessary and appropriate to reflect changes in legislation and court decisions; and
- data are collected, in order to evaluate the impact of the revisions to the T2201 form, on the number and percentage of successful and unsuccessful claims by basic activity of daily living, and claims for which additional information was requested (clarification letters) by basic activity of daily living.

This recommendation is largely consistent with current practice and would involve only minor costs.

**Current Status:** During 2005, the CRA conducted a consultation with national organizations representing persons with disabilities and national organizations representing qualified professionals regarding the revisions to the DTC certificate (T2201) form, as discussed in Part B(6) of this paper.<sup>245</sup> Clarification letters were the subject of a previous consultation in 2004, and the CRA seems committed to consultations of this type as an ongoing process. As of the date of writing, however, the development of DTC data collection as envisaged by the last part of Recommendation 2.8 has not been committed to by the CRA.

## RECOMMENDATION 2.9

The Committee recommends that:

The Canada Revenue Agency take the following steps with respect to clarification letters:

- specify in writing why clarification is required in order to help qualified practitioners address specific issues or concerns; and
- ensure that all questions are relevant to the specific disability, instead of using a uniform approach for all impairments.

This recommendation does not involve any additional cost.

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<sup>245</sup> Authors Harry Beatty and Heidi Lazar-Meyn were both participants in this consultation, representing the Council of Canadians with Disabilities (Beatty) and ARCH Disability Law Centre (Lazar-Meyn).

Current Status: As discussed with respect to Recommendation 2.8, clarification letters were the subject of a consultation with national organizations representing persons with disabilities and national organizations representing qualified professionals in 2004, and considerable progress was made on improving clarification letters. This work is ongoing within CRA.

#### RECOMMENDATION 2.10

The Committee recommends that:

The Canada Revenue Agency intensify its existing efforts to ensure that:

- taxpayers who receive a letter denying their disability tax credit claims be:
  - (i) given specific reasons for the denial,
  - (ii) informed about their objection and appeal rights through a copy of the pamphlet, *Your Appeal Rights Under the Income Tax Act*, provided by the Agency,
  - (iii) informed that other persons, such as family members, friends or professional advisors, can act on their behalf, and
  - (iv) informed that they have access to documents in their file when the Canada Revenue Agency acknowledges receipt of the Notice of Objection through a copy of the pamphlet *Resolving your dispute — A more open, transparent process* provided by the Agency;
- appeals officers have access, if required, to competent medical advice when reviewing Notice of Objection and additional medical reports; and
- appeals officers meet with taxpayers or their representative in appropriate cases.

This recommendation should involve only minor incremental costs.

Current Status: The first part of Recommendation 2.10, including points (i)-(iv), has been implemented generally by the CRA through administrative procedures. While no specific announcement has been made by CRA with respect to the second part of Recommendation 2.10, increasing the medical advice available to appeals officers, the CRA is working towards a centralization of the DTC review process in its Sudbury Tax

Services Office. As of the date of writing, there has been no implementation of the third part of Recommendation 2.10, involving face-to-face meetings between appeal officers and taxpayers and their representatives in DTC cases.

#### RECOMMENDATION 2.11

The Committee recommends that:

The Canada Revenue Agency develop an alternative dispute resolution process for disability tax credit claims following an Appeals Branch denial, relying on an informal but independent process based on basic fairness criteria.

The Canada Revenue Agency mount a pilot project to test the operation of the suggested alternative dispute resolution process.

This pilot project is estimated to cost \$4 million over one to two years. Ongoing costs would depend on the results of this pilot project.

**Current Status:** As of the date of writing, no pilot project on alternative dispute resolution of DTC claims, as envisaged by Recommendation 2.11, has been implemented by CRA. The CRA considers the designation of the Sudbury Tax Services Office to become a centre of expertise on DTC reviews to be an alternative way of addressing the intent of this recommendation.<sup>246</sup>

#### RECOMMENDATION 2.12

The Committee recommends that:

In order to deal with the administrative aspects of the disability tax credit and the achievement of the previously enumerated recommendations, the Canada Revenue Agency form a consultative committee composed of consumer and professional representatives that would report directly to the Minister of National Revenue on all administrative aspects of the tax system related to persons with disabilities.

This recommendation should involve only minor costs.

**Current Status:** In 2005, the CRA implemented Recommendation 2.12 by appointing a 12-member Disability Advisory Committee, representative of organizations of and for persons with disabilities, organizations of qualified professionals, and tax professionals.<sup>247</sup>

<sup>246</sup> Information provided by CRA staff to the DAC at its meeting in Ottawa of February 28, 2006.

<sup>247</sup> Author Harry Beatty is a member of the DAC. Information about the DAC is available on the CRA web site:

## RECOMMENDATION 2.13

The Committee recommends that:

The Canada Revenue Agency, in conjunction with the appropriate departments, undertake a review of Canada Pension Plan disability beneficiaries and disability tax credit claimants with the goal of evaluating possible reasons for the low take-up of the disability tax credit by CPP disability beneficiaries.

The Canada Revenue Agency work with other government departments to ensure that all applicants for CPP disability benefits are advised of their potential eligibility for the disability tax credit, and furnished with forms and information so that they can readily consider their eligibility and make an application for the disability tax credit if appropriate. If, as a result of this work, the government finds that there is a significant overlap in eligibility, it should explore whether a simplified application process or joint administration of some aspects of the two programs is warranted.

This recommendation has an unknown revenue cost. Additional tax relief offered through the disability tax credit arising from this recommendation should already be provided under existing legislation. This recommendation should involve only minor administrative costs.

Current Status: As of the date of writing, it is unclear to what extent Recommendation 2.13 has been implemented, as it largely envisages internal consultation within the Government of Canada. There has been no announcement of a joint application process for the DTC and Canada Pension Plan (CPP) disability benefits. The Social Development Canada web page “CPP DISABILITY – I AM RECEIVING A BENEFIT” contains a brief reference to the DTC and a link to the CRA web site.<sup>248</sup> CRA indicates that work is ongoing with respect to this recommendation.

### *Chapter 3: Employment And Education-Related Tax Measures*

## RECOMMENDATION 3.1

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<http://www.cra-arc.gc.ca/newsroom/factsheets/2005/july/disability-e.html>

<sup>248</sup> This web page is at:

<http://www.sdc.gc.ca/en/isp/cpp/receive.shtml>

To recognize the cost of required accommodation for persons with disabilities, the Committee recommended prior to the March 2004 federal budget that:

The government introduce a disability supports deduction to allow the full deductibility of the cost of disability supports purchased for the purposes of employment or education.

The March 2004 budget implemented this proposal by introducing a disability supports deduction. The measure has an estimated cost of \$15 million annually.

**Current Status:** As noted in the above discussion, the TAC made an interim recommendation for a Disability Supports Deduction (DSD) prior to the 2004 Federal Budget, which was implemented following the Budget. The DSD is discussed in Part B(12) of this paper.

### RECOMMENDATION 3.2

To further improve the disability supports deduction, the Committee recommends that:

The cost of such items as job coaches and readers, Braille note takers, page turners, print readers, voice-operated software, memory books, assistive devices used to access computer technology, and similar disability-related expenses be added to the list of expenses recognized by the deduction.

We estimate that this improvement would cost \$5 million annually.

**Current Status:** Recommendation 3.2 was largely adopted in the 2005 Federal Budget and set out in proposed legislation, as discussed in Part B(12) of this paper. The items specifically mentioned in Recommendation 3.2 were added to the DSD, except for “memory books”. However, aside from the specific items mentioned, very few additional items were added as “similar disability-related expenses”.

### RECOMMENDATION 3.3

The Committee recommends that:

The government change the name of the medical expense tax credit to the ‘medical and disability expense tax credit.’

There is no cost associated with this recommendation.

Current Status: Recommendation 3.3 has not been implemented in the 2005 CRA tax forms, which still refer to the “Medical Expense Tax Credit” (METC), or, more simply, to “medical expenses”. CRA has indicated that this proposal has been rejected.<sup>249</sup>

#### RECOMMENDATION 3.4

The Committee recommends that:

The Department of Finance and the Canada Revenue Agency review currently available data and, where possible, gather new data on the actual expenses being claimed under the medical expense tax credit, and consider the appropriateness of these claims.

The estimated cost of this recommendation is nominal.

Current Status: As of the date of writing, the CRA has not announced a study as envisaged by Recommendation 3.4 of medical expenses which are being claimed under the DTC by taxpayers.

#### RECOMMENDATION 3.5

The Committee recommends that:

The maximum credit under the refundable medical expense supplement be increased from \$562 to \$1,000 and continue to be indexed to the cost of living.

The estimated cost of this recommendation is \$20 million per year.

Current Status: Recommendation 3.5 was partially adopted in the 2005 Federal Budget, as the maximum amount of the Refundable Medical Expense Supplement (RMES) was increased to \$750, rather than \$1,000. This change has been enacted into legislation, as discussed in Part B(11) of this paper.

#### RECOMMENDATION 3.6

To address the special needs of students with disabilities, the Committee recommends that:

The time over which contributions may be made to a registered education savings plan for a person with a disability be extended to 25 years from 21 years, and that the time before the plans must be liquidated be extended from 25 to 30 years from inception.

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<sup>249</sup> Information provided by CRA staff to the DAC at its meeting in Ottawa of 28 February 2006.

The government broaden the list of educational programs that qualify under registered education savings plans to ensure that they accommodate the more diverse needs of persons with disabilities.

The estimated cost of these measures is nominal.

Current Status: Recommendation 3.6 was adopted in the 2005 Federal Budget and has been enacted into legislation, as discussed in Part B(18) of this paper.

#### RECOMMENDATION 3.7

The Committee recommends that:

Information for businesses about the deductibility of capital expenses to accommodate persons with disabilities be made more widely available in Canada Revenue Agency guides.

The estimated cost of this recommendation is nominal.

Current Status: Recommendation 3.7 has generally not been implemented as of the date of writing. For example, while the “Business and Professional Income Guide” (T4002)<sup>250</sup> covers these provisions in Chapter 3, “Expenses”, it is only as part of a lengthy list of provisions related to business expenses. It is not mentioned in the Table of Contents.

#### RECOMMENDATION 3.8

The Committee recommends that:

As part of its efforts to develop measures to encourage the full participation of persons with disabilities, the government review the effectiveness of the United States’ Work Opportunity Tax Credit.

Current Status: As of the date of writing, there is no indication that either the Department of Finance or the CRA has undertaken a review of the U.S. Work Opportunity Tax Credit.

### *Chapter 4: Measures For Caregivers And Children With Disabilities*

#### RECOMMENDATION 4.1:

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<sup>250</sup> On the CRA web site at:

<http://www.cra-arc.gc.ca/E/pub/tg/t4002/t4002-e.html>

The Committee recommends that:

The limit of expenses claimable under the medical expense tax credit by caregivers be increased from \$5,000 to \$10,000 for those with dependent relatives eligible for the disability tax credit.

The estimated cost of this measure is \$5 million annually.

Current Status: Recommendation 4.1 was adopted in the 2005 Federal Budget and set out in proposed legislation, as discussed in Part B(10) of this paper.

#### RECOMMENDATION 4.2

The Committee recommends that:

The government review the RRSP/RRIF rules in order to allow additional flexibility in respect of a deceased's RRSP or RRIF proceeds left to a financially dependent child or grandchild with a disability. Such provisions should include allowing these proceeds to be rolled over to a discretionary trust for that individual, provided that no person other than the disabled beneficiary may access the income or capital of the trust during his or her lifetime.

The revenue cost of this measure is small.

Current Status: As discussed in Part B(22) of this paper, as of the date of writing the Government has circulated a draft legislative proposal to implement Recommendation 4.3, but has not yet changed its materials to reflect an expectation that this legislative proposal will be adopted. A further commitment to study the issue of rollovers to trusts for dependants with disabilities was made by the Government of Canada in the 2005 Federal Budget. The detailed Budget Plan stated as follows:

Currently, financially-dependent children with mental or physical infirmities are eligible to receive, on a tax-deferred basis, a deceased parent's (or in the case of a child that is financially dependent on a grandparent, the deceased grandparent's) proceeds from a registered retirement savings plan (RRSP) or a registered retirement income fund (RRIF) if the funds are transferred to the child's RRSP or are used to purchase a life annuity. The [TAC] recommended that the Government review these rules in order to allow more flexibility in respect of a deceased's RRSP or RRIF proceeds left to a financially-dependent child or grandchild with a disability and, in particular, that the use of a discretionary trust be permitted in these circumstances. The Government will review the tax rules in this area with a view to providing more flexibility where appropriate.<sup>251</sup>

<sup>251</sup> 2005 Budget Plan, Annex 8, on the Department of Finance web site at:

In July 2005, then Minister of Finance, the Honourable Ralph Goodale, published a proposal which would permit a rollover to a discretionary trust having a beneficiary with a disability under certain conditions, through introducing the concept of a “lifetime benefit trust”.<sup>252</sup> This proposal apparently was inadequate to meet the intent of the TAC’s recommendations in two important respects. First, conditions were put on the wording of the “lifetime benefit trust” which would jeopardize its status as an absolute discretionary trust, as required by social assistance legislation and the *Henson* precedent.<sup>253</sup> Second, the proposal would limit the “lifetime benefit trust” to beneficiaries who are “mentally infirm”, while low-income persons with disabilities which are physical in nature have a similar need to benefit from this type of provision. As of the date of writing, the status of this proposed legislation is not known.

### RECOMMENDATION 4.3

The Committee recommends that:

The federal government increase the amount of the Child Disability Benefit by \$600 to raise the total maximum annual benefit from \$1,653 to \$2,253, and that this amount continue to be indexed to the cost of living.

The estimated cost of this measure is \$15 million annually.

Current Status: Recommendation 4.3 was partially adopted in the 2005 Federal Budget, as the maximum amount of the Child Disability Benefit (CDB) was increased to \$2,000, rather than \$2,253. This change has been enacted into legislation, as discussed in Part B(8) of this paper.

### *Chapter 5: Future Directions*

#### RECOMMENDATION 5.1

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<http://www.fin.gc.ca/budtoce/2005/budliste.htm>

<sup>252</sup> Department of Finance, Legislative Proposals Relating to Income Tax (July 2005), s.72, on the Department of Finance web site at:

[http://www.fin.gc.ca/drleg/ITA05l\\_e.html](http://www.fin.gc.ca/drleg/ITA05l_e.html)

<sup>253</sup> These issues are discussed in detail in author Harry Beatty’s article “Estate Planning for Beneficiaries with Disabilities in Ontario : Inheritances, Trusts and the Ontario Disability Support Program”, on the ARCH web site at:

<http://www.archdisabilitylaw.ca/publications/index.asp>

Our previous recommendations represent priority actions to improve tax fairness for persons with disabilities. Going forward, the Committee recommends that:

Priority should be given to expenditure programs rather than tax measures to target new funding where the need is greatest. The Committee recognizes that the development of such programs would involve consultations with provincial and territorial governments and the disability community.

**CURRENT STATUS:** This is a much more general policy-oriented recommendation than any of the other recommendations of the TAC. As of the date of writing, whether it has influenced the policy of the Government of Canada is not known.