

Introduction to the Disability Tax Credit

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Table of Contents

I.	Introduction	1
	A. History	2
	B. <i>Public Awareness</i>	4
	C. <i>Administration</i>	4
	D. <i>Value and Cost</i>	4
II.	Purpose	5
III.	Eligibility	7
	A. <i>Severe and Prolonged Impairment</i>	8
	B. <i>Activities of Daily Living</i>	9
	C. <i>Marked Restriction</i>	10
IV.	DTC Certificate	12
V.	Appealing a DTC Denial	16
VI.	Future of the DTC.....	19
VII.	Further Information	20

I. Introduction

What is commonly known as the “disability tax credit” (“DTC”) is called the “disability amount” on line 316 of Schedule 1 to the “T1 General” form for individual income tax and benefit returns. In the *Income Tax Act*,¹ the name given to the credit is the

* Staff Lawyer, ARCH: A Legal Resource Centre for Persons with Disabilities. This is a working document, now in fourth draft (revised in July of 2004), originally prepared for the provision of training with respect to the Disability Tax Credit. The second draft of this paper was included in the 27 November 2003 Continuing Legal Education Program titled “A Disability Law Primer” sponsored by ARCH, Pro Bono Law Ontario, and the Law Society of Upper Canada. The purpose of this paper is to introduce lawyers and advocates to the law as it pertains to the DTC and to facilitate their representation of persons with disabilities in such cases. Lawyers and advocates contemplating DTC representation are strongly encouraged to read Harry Beatty’s paper, also included in the materials for “A Disability Law Primer,” titled “Disability-Related Income Tax Provisions,” for an in-depth examination of the DTC.

¹ R.S.C. 1985, c. 1 (5th Supplement), as amended. This paper will make references to several parliamentary and governmental reports, including the following: Standing Committee on Human Resources Development and the Status of Persons with Disabilities, “Tax Fairness for Persons with Disabilities” (Ottawa: House of Commons, 2002); Sub-Committee on the Status of Persons with Disabilities, “Getting it Right for Canadians: The Disability Tax Credit” (Ottawa: Government of Canada, 2002); Department of Finance, “The Government of Canada’s Response to the Seventh Report of the Standing Committee on Human Resources Development and the Status of Persons with Disabilities” (Ottawa: Department of Finance, 2002) (hereinafter “Canada’s Response to ‘Getting it Right’”); and Department of Finance, “The Government of Canada’s Response to the First Report of the Standing Committee on Human Resources Development and the Status of Persons with

“credit for mental or physical impairment.”² The form that must be completed to qualify for the credit is called the “Disability Tax Credit Certificate.”³

A. History

The legislative precursor to the DTC was introduced into the income tax system in 1944.⁴ In that year, the Government of Canada established a special deduction for persons who are “totally blind.” Upon its introduction, the Minister of Finance indicated that the deduction was intended to offset the “additional expenses” associated with living with a disability.⁵

In 1949, eligibility for the deduction was extended to persons “confined” to a bed or wheelchair.⁶ In 1986, eligibility for what had become known as the “disability

Disabilities” (Ottawa: Department of Finance, 2003) (hereinafter “Canada’s Response to ‘Tax Fairness’”).

² *Income Tax Act*, *supra* note 1 at s. 118.3(1).

³ Form T2201.

⁴ The precursor, introduced in 1944, was probably conceived to be, at least in part, a measure the purpose of which was to assist veterans returning from the Second World War. Many disability programs, in Canada and in other countries, can trace their origins to governmental responses to the needs of war veterans. In “Honouring Canada’s Commitment: ‘Opportunity with Security’ for Canadian Forces Veterans and their Families in the 21st Century” (Ottawa: Veterans Affairs Canada, 2004) at 6 it is noted that “[v]eterans benefits have been a building block of the Canadian social welfare state. They have provided a social laboratory for Canadians and have made them aware of what is possible when government acts decisively to meet a demonstrated social and economic need (and, in the case of the Second World War, to anticipate it). By serving the particular good, veterans benefits have also served the common good. Many of the social benefits we take for granted today originated or were pioneered in the context of Canadian veterans benefits, including free hospital coverage, vocational retraining for the disabled, federal support to post-secondary educational institutions, business development loans, publicly funded legal aid, income support for the needy, and home care.” Some disability organizations can also trace their origins to the needs of war veterans. On the website of the Canadian National Institute for the Blind (www.cnib.ca) it is indicated that the CNIB was “established in response to an evident need for a national service and rehabilitation organization to help returning veterans and others achieve recognition and independence.”

⁵ David Sherman, *Taxes, Health and Disabilities* (Toronto: Carswell, 1995) at 63. Refer also to David Duff, “Disability and the Income Tax,” (2000) 45 McGill L.J. 797 at 826 and the Department of Finance, “Disability Tax Credit: Evaluation of Recent Experience” (Ottawa: Department of Finance, 1991) at 4 and 10. The Minister of Finance is referenced to the 1944 Budget Speech. A short history of the DTC is also recounted in a publication of the Office for Disability Issues titled “Defining Disability: A Complex Issue” (Gatineau: Human Resources Development Canada, 2003) at 21. Refer also to the Standing Committee on Human Rights and the Status of Disabled Persons, “As True as Taxes: Disability and the Income Tax System” (Ottawa: House of Commons, 1993) at 3, where it states that “Income tax changes in 1944 provided blind people with the first disability-related deductions based on the additional costs that they had to incur.”

⁶ Sherman, *ibid.* Refer to S.C. 1949, c. 25, s. 11(4). The 1984 Interpretation Bulletin, IT-225R, indicates to whom, beyond persons who are blind, Revenue Canada considered the disability deduction to apply: “The phrase ‘necessarily confined’ is considered to cover the situation where an individual is unable to leave a bed or wheelchair without the assistance of another person. Individuals afflicted with spina bifida, cerebral palsy or spastic diplegia would be examples of the individuals who would be considered necessarily confined for a substantial period for the purposes of the disability deduction. An individual who is almost completely confined to a room or rooms as a result of severe

deduction” was tied to a general definition of disability (“severe and prolonged mental or physical impairment”⁷), and in 1988 the deduction was transformed into a non-refundable credit, used to offset income tax payable.⁸

A deduction is applied to reduce the amount of one’s income to levels known as “net income” and “taxable income.” The value of a deduction is equal to the amount of the deduction multiplied by one’s tax rate. Because taxpayers with high incomes pay tax at higher rates than taxpayers with lower incomes, deductions are more valuable to taxpayers with high incomes than taxpayers with low incomes. A credit is applied to reduce one’s amount of tax payable; a non-refundable credit can only be used to the extent of tax that is payable.⁹ A person who does not owe tax does not benefit from a non-refundable tax credit.¹⁰

As a consequence of the conversion of the DTC into a non-refundable credit in 1988, the Department of Finance estimated that “about 36 *per cent* of severely disabled individuals [were] unable to claim a full credit” because of their low levels of income.¹¹

In 2000, the value of the DTC became indexed to inflation.

emphysema or chronic chest diseases and who provides a medical certificate to that effect will be considered ‘necessarily confined’ to a bed or wheelchair.”

⁷ S.C. 1986, c. 6, at s. 55(5) amended s. 110(1)(e) of the *Income Tax Act* to add the general definition. The number of people accessing the DTC in 1985 was 85,000. With the new definition added in 1986, the number increased to 180,000. Refer to Anne Crichton and Lyn Jongbloed, *Disability and Social Policy in Canada* (Toronto: Captus Press, 1998) at 148. The 1987 Interpretation Bulletin, IT-509, indicates to whom Revenue Canada considered the disability deduction to apply, with the new eligibility criteria: “Such persons . . . include those with disabling conditions such as blindness, severe cardio-respiratory failure, severe mental impairment, profound bilateral deafness, and functional impairment of the neuro- or musculo-skeletal system.”

⁸ Sherman, *supra* note 5 at 21. Refer to S.C. 1988, c. 55, s. 92.

⁹ Sherman, *ibid.* at 20-21.

¹⁰ The Standing Committee has recommended, for children with disabilities, that the DTC be converted into a *refundable* credit. Refer to “Tax Fairness,” *supra* to note 1 at 22. For arguments supportive of making the DTC refundable, refer to Lisa Philipps, “Disability, Poverty, and the Income Tax: The Case for Refundable Credits,” (2001) 16 *Journal of Law and Social Policy* 77 and to Raquel Chisholm, “The Disability Tax Credit and Amputees: It’s Time for a Reality Check,” (2003) 2 *Journal of Law & Equality* 156. Richard Shillington has stated the case for refundability as follows: “The argument in favour of refundability is to extend to the lowest income person with a disability the same recognition of costs which are now afforded higher income persons with disabilities or persons with disabilities who live in a taxable household.” Refer to “Taxation and Disability,” constituting c. 8 of the Federal Task Force on Disability Issues, “The Will to Act for Canadians with Disabilities: Research Papers” (Hull: Human Resources Development Canada, 1996) at 17.

¹¹ Refer to “Disability Tax Credit: Evaluation of Recent Experience,” *supra* note 5 at 51. Gail Fawcett and Richard Shillington note that the DTC is criticized because it is “of no benefit to persons with disabilities who have no taxable income.” Refer to “Income Support and Tax Relief for People with Disabilities,” (1996) *Perception*, vol. 20, no. 2.

B. Public Awareness

The DTC has been described as “the most visible federal disability program,”¹² but regrettably many persons are unaware of it.¹³ A 1996 federal task force described the problem as follows:

Of Canadians identified in the 1991 Health and Activity Limitations Survey as having severe disabilities, only 23 *percent* claimed the DTC in that year. Of people with moderate disabilities, 16 *percent* claimed the credit. About half of the people in these groups surveyed said that they did not claim the credit because they did not know about it until they were asked. The remainder had been refused the credit or thought that they would not qualify for it.¹⁴

In 2002, calls were still being made for the Government to “educate the general public about the purpose, nature, and provisions” of the DTC.¹⁵

In 2003, the results of the Participation and Activity Limitation Survey (“PALS”) of Statistics Canada determined that over 900,000 Canadians with disabilities do not know that the DTC exists. The PALS survey also revealed that the majority of Canadians living with “very severe” disabilities do not know that the DTC exists.¹⁶

C. Administration

The Department of Finance determines income tax policy at the federal level, and is therefore responsible for establishing the parameters of the DTC. The Canada Revenue Agency (“CRA”), formerly known as the Canada Customs and Revenue Agency (which was previously known as Revenue Canada), carries out the income tax policy of the Department of Finance. The CRA administers the *Income Tax Act* and makes eligibility determinations with respect to claims made by taxpayers to the DTC.

D. Value and Cost

For the tax year 2004, the value of the DTC to eligible taxpayers is listed at \$6486.¹⁷ At line 338 of the tax return, however, the worth of the DTC is multiplied by 16%,

¹² “Tax Fairness,” *supra* note 1 at 5.

¹³ Gail Fawcett and Richard Shillington, *supra* note 11, point out that “[o]nly 2.3 *per cent* of taxfilers claim the disability tax credit far below the 18% of the population with disabilities.”

¹⁴ Federal Task Force on Disability Issues, “Equal Citizenship for Canadians with Disabilities: The Will to Act” (Ottawa: Human Resources Development Canada) at 90 (the Task Force was chaired by the Honourable Andy Scott and will hereinafter be referred to as the “Scott Task Force”). Refer also to Duff, *supra* note 5 at 832, who notes that “many disabled Canadians do not claim the DTC either because they are not aware of the credit or believe that they would be refused.”

¹⁵ “Getting it Right,” *supra* note 1 at 16 (recommendation 10(a)).

¹⁶ Statistics Canada, “Disability Supports in Canada, 2001” (Ottawa, Statistics Canada, 2003) at 11.

¹⁷ There has been, since 2000, an additional supplement to the DTC available to persons who are under the age of 18 at the end of the calendar year. For the tax year 2004, the supplement is listed

entailing an actual value to taxpayers of approximately \$1038.¹⁸ The DTC can only be used to offset federal taxes payable and is non-refundable.¹⁹

The DTC may be transferred from a dependant and from a spouse or common-law partner.²⁰ A transfer may be desirable, for instance, if the person eligible for the DTC has a level of taxable income that is too low to benefit from the credit.

The cost to the Government of Canada for the DTC is approximately \$400 million.²¹ The DTC is currently utilized by approximately 450,000 Canadians.²²

II. Purpose

As indicated above, the DTC was originally introduced to help offset the additional day-to-day expenses associated with living with a disability. The purpose remains the same today. The DTC exists to give tax relief to Canadians with disabilities who unavoidably must, as a consequence of living with disabilities, incur personal expenses on a daily basis that are not incurred by Canadians without disabilities.²³

at \$3784 which, when multiplied by 16%, is worth approximately \$605 to taxpayers. The supplement is reduced by the amount of child care expenses and attendant care expenses claimed over \$2216. The supplement has been indexed to inflation since its introduction. In Ontario, taxpayers can claim a corresponding disability amount as an Ontario tax credit that is listed, in 2003, at \$6316 and multiplied by 6.05% for a value of approximately \$382. The additional supplement for children, in 2003, is listed at \$3684 and is worth, when multiplied by 6.05%, approximately \$222.

¹⁸ As will be explained, the DTC is intended to compensate for the day-to-day expenses of living with a disability. Despite the fact that individuals with disabilities will have differing expenses, the DTC provides relief at a set value. Richard Shillington has therefore offered, *supra* note 10 at 6, the following criticism: "The primary purpose of the DTC is to improve tax fairness by recognizing the effect of a severe disability on an individual's ability to pay tax. The DTC does not try to perform this function precisely; it is a blunt instrument. By being blunt it is easy to administer; it does not require claimants to keep detailed records of cost. The administrative advantage which is inherent in treating all claimants the same brings with it the disadvantage of providing too much tax recognition to some claimants and not enough to others." This criticism was also articulated in "As True as Taxes," *supra* note 5 at 13.

¹⁹ The DTC cannot be claimed by a taxpayer if nursing home expenses are being claimed or if more than \$10,000 is being claimed for attendant care (or \$20,000 in the year of a taxpayer's death) under the Medical Expense Tax Credit (for Ontario taxpayers, the corresponding 2003 amounts are \$10,810 and \$21,620). Refer to s. 118.3(1)(c) of the *Income Tax Act*.

²⁰ Canada Customs and Revenue Agency, "Information Concerning People with Disabilities" (Ottawa: House of Commons, 2003) at 15-16. A dependant is described as "your or your spouse or common-law partner's parent, grandparent, child, or grandchild, brother, sister, aunt, uncle, niece, or nephew."

²¹ "Canada's Response to 'Getting it Right,'" *supra* note 1.

²² "Canada's Response to 'Tax Fairness,'" *supra* note 1.

²³ The rationale for providing tax relief to persons with disabilities was recently described in "Defining Disability," *supra* note 5 at 21, in the following terms: "Because people with severe and prolonged impairments incur disability-related expenses that others do not, they are less able to pay tax, all other things being equal." For itemizable disability-related expenses that can also be characterized as medical expenses, there may be tax relief available through the Medical Expense Tax Credit (refer to s. 118.2 of the *Income Tax Act*). However, "the DTC is, in fact, the predominant vehicle for compensating for the pecuniary costs of severely disabled people while the medical tax credit for itemized expenses plays a much smaller role:" refer to "Disability Tax Credit: Evaluation of Recent Experience," *supra* note 5 at 48.

These expenses are difficult to itemize and document but include costs for food with special ingredients, food delivery costs, special transportation costs, and assistive devices. Disabilities may also necessitate “extra laundry, bedding, or heating costs, or [result] in greater wear and damage to clothing or household items.”²⁴

The extra costs associated with living with a disability were described by a federal task force as follows:

Living with a disability almost always entails additional costs. . . . A person with a disability may need to cover the cost of a special diet or nutritional supplements. There are extra costs to make one’s home accessible, or for personal supports and services, technical aids and devices, and the intangible costs associated with daily living that are greater because of disability.²⁵

The Department of Finance explicitly agrees with the purpose of the DTC as set out above. The Department has described the purpose as follows:

The DTC was established to recognize the fact that individuals with severe and prolonged impairments often face additional non-discretionary expenses for basic daily living which reduce their ability to pay tax. For example, individuals with severe mobility impairments may have special transportation needs that result in higher costs. Because it would be very difficult for individuals to determine and keep track of exactly how much extra they pay for everyday items and services, the DTC . . . does not require claimants to itemize the disability-related expenses they incur. Instead, eligible claimants are provided with a general expense claim.²⁶

The purpose of the DTC has been affirmed by the Federal Court of Appeal as being “to give disabled persons a measure of relief that will to some degree alleviate the increased difficulties under which their impairment forces them to live.”²⁷

The income tax system requires that tax be paid in accordance with one’s ability to pay. The extra costs associated with living with a disability reduce the ability of persons with disabilities to pay tax. The DTC exists to offset tax payable for persons with disabilities because of their reduced ability to pay tax. The Government of Canada describes the rationale for the DTC as being a matter of “fairness.”²⁸

²⁴ Duff, *supra* note 5 at 836.

²⁵ Scott Task Force, *supra* note 14 at 85.

²⁶ “Canada’s Response to ‘Getting it Right,’” *supra* note 1. The Department of Finance has also indicated that the purpose of the credit is to “compensate severely disabled people for the general reduction in well-being arising from severe disabilities.” Refer to “Disability Tax Credit: Evaluation of Recent Experience,” *supra* note 5 at 55.

²⁷ *Johnston v. Canada* (1998), 98 D.T.C. 6169 (F.C.A.) at 6171.

²⁸ “Canada’s Response to ‘Getting it Right,’” *supra* note 1.

III. Eligibility

Section 118.3(1) of the *Income Tax Act* provides that the DTC is available to persons meeting certain criteria,²⁹ including the following:

- (a) the individual must have a “severe and prolonged mental or physical impairment”³⁰ the effects of which are such that the individual’s “ability to perform a basic activity of daily living is markedly restricted”³¹ or would be markedly restricted but for life-sustaining therapy;
- (b) a qualified health professional has completed a Disability Tax Credit Certificate (form T2201) certifying the information from (a) above;³² and
- (c) the Disability Tax Credit Certificate, referred to in (b) above, has been filed with the Minister of National Revenue.³³

Life-sustaining therapy is such therapy that is “essential to sustain a vital function” and administered at least three times *per week* for a duration of not less than 14 hours *per week*.³⁴ This means that taxpayers receiving such therapy (e.g., kidney dialysis or breathing therapy) cannot have their therapy taken into account when considering whether they are markedly restricted in performing a basic activity of daily living. Even though someone, while receiving the therapy, may not have a marked restriction, they will be eligible for the DTC.

²⁹ Excluded from this discussion is the criterion, listed at s. 118.3(1)(c) and discussed briefly at note 19, that eligible taxpayers must have claimed no nursing home costs and less than \$10,000 in attendant care costs. For criticism of the criterion, refer to Duff, *supra* note 5 at 837.

³⁰ *Income Tax Act*, *supra* note 1 at s. 118.3(1)(a). The word “prolonged” is defined at s. 118.4(1)(a).

³¹ *Income Tax Act*, *supra* note 1 at s. 118.3(1)(a.1). What is meant by being “markedly restricted” with respect to a basic activity of daily living is set out at s. 118.4(1)(b). The basic activities of daily living are defined at ss. 118.4(1)(c), (d), (e), and (f).

³² Section 118.3(1)(a.2) of the *Income Tax Act* sets out the various health professionals who are able to complete the DTC Certificate, and for which conditions. Section 118.4(2) further defines the qualifications of eligible health professionals. The eligible health professionals are medical doctors, optometrists, speech-language pathologists, audiologists, occupational therapists, and psychologists. Although not discussed here, the requirement has been criticized, for example, as being onerous for taxpayers residing in remote areas. Refer to “Getting it Right,” *supra* note 1 at 7. Note that the DTC Certificate is not just filled out for the purpose of accessing the DTC. It is also must be completed in order to access other benefits and credits such as the Child Disability Benefit.

³³ The Federal Court of Appeal has found this requirement to be mandatory and not merely directory. Refer to *Canada (A.G.) v. MacIsaac*, [1999], 2000 D.T.C. 6020 (F.C.A.) at 6022.

³⁴ *Income Tax Act*, *supra* note 1 at s. 118.3(1)(a.1). Although without statutory authorization, the CRA excludes from consideration time spent with respect to “travel, medical appointments, or to recuperate after therapy” (refer to the DTC Certificate). In *Sullivan v. Canada*, [2004] T.C.J. No. 310 (QL) at paragraph 4, the Court defined “therapy” in accordance with a definition in the *Concise Oxford Dictionary* as follows: “1. The treatment of physical or mental disorders, other than by surgery, 2. A particular type of such treatment.” The Court accepted that therapies are not restricted to medical interventions, and include therapies that can be provided by parents, including monitoring the blood sugar levels of a child (living with Type 1 Insulin Dependant Diabetes).

The Federal Court of Appeal has confirmed that the *Income Tax Act* must be interpreted humanely and compassionately, not so restrictively that the legislative intent is negated or compromised.³⁵

A. Severe and Prolonged Impairment

Section 118.4(1)(a) of the *Income Tax Act* prescribes that a “severe and prolonged” impairment exists “where it has lasted, or can reasonably be expected to last, for a continuous period of at least 12 months.”³⁶

The definition of “severe and prolonged” has been criticized for being too restrictive because it excludes long-term disabling conditions that cannot be said to last for continuous periods of 12 months:

Multiple sclerosis, for example, is a cyclical, unpredictable, progressive and degenerative disease. And because of its episodic nature, many individuals with this disease are unable to qualify for the DTC because attacks do not last for a continuous period of 12 months, even though the disabling effects of MS are recurrent and long lasting. Mental illness is another serious impairment that can be severe and long term, but episodic in nature.³⁷

Moreover, these serious, but periodic, impairments also entail additional non-discretionary spending on basic daily living, which, of course, inhibits the ability to pay tax just like those of people whose impairments last for a continuous period of at least 12 months. The critical element for determining the prolonged nature of the impairment should be its continued or recurrent existence over a long period of time.³⁸

The Department of Finance has stated that these criticisms of the eligibility requirement “require further study.”³⁹

³⁵ *Johnston v. Canada*, *supra* note 21 at 6171. Refer also to Vern Krishna, *The Fundamentals of Canadian Income Tax*, 5th Ed. (Toronto: Carswell, 1995) at 51-59 and to Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th Ed. (Toronto: Butterworths, 2002) at 446-456. Sullivan notes, at 450, that ambiguities may be resolved in accordance with a residual presumption in favour of the taxpayer. To the extent that the *Income Tax Act* furthers – and delivers – the social policies of the Canadian Government and may therefore be characterized as “social welfare legislation,” ambiguities in the legislation should be resolved in favour of taxpayers. Refer to Sullivan, *ibid.* at 404.

³⁶ The word “severe” in the *Income Tax Act* has no legal meaning separate from being “markedly restricted” with respect to a “basic activity of daily living.” The rationale for restricting tax relief only to persons whose disabilities are severe is based on statistical information suggestive that “for those incurring out-of-pocket expenses, average expenses generally increase with severity of disability and . . . the relationship is particularly marked for the most severe categories of disability. Refer to “Disability Tax Credit: Evaluation of Recent Experience,” *supra* note 5 at 45.

³⁷ “Getting it Right,” *supra* note 1 at 5.

³⁸ “Tax Fairness,” *supra* note 1 at 15-16.

³⁹ “Canada’s Response to ‘Tax Fairness,’” *supra* note 1.

B. Activities of Daily Living

Section 118.4(1)(c) of the *Income Tax Act* defines a “basic activity of daily living” to be in relation to the following:

- (i) perceiving, thinking, and remembering;
- (ii) feeding oneself or dressing oneself;
- (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.

The definition, unfortunately, creates an exhaustive non-expanding list of the activities of daily living, entailing that taxpayers must meet at least one of the criteria.

The definition goes on (at s. 118.4(1)(d)) to state “for greater certainty, no other activity, including working, housekeeping or social or recreational activity, shall be considered as a basic activity of daily living.” This exclusionary provision is inexplicably inconsistent with the purpose of the DTC, which is to recognize the extra costs associated with day-to-day living of persons with disabilities.⁴⁰

The feeding criterion is qualified by the exclusion of the activities of identifying, finding, shopping for or procuring food. Also, extra time required for the preparation of food is excluded if the cause is a dietary restriction or regime.⁴¹

The dressing criterion is qualified by the exclusion of the activities of identifying, finding, shopping for or procuring clothing.⁴²

The criteria with respect to “perceiving, thinking and remembering,” although written conjunctively, are interpreted disjunctively. That is, the word “and” is read as an “or.”⁴³

The Tax Court of Canada has ascribed the following definitions to “perceiving, thinking, and remembering:”

Perception: The reception and recognition of sensory data about the external world that conforms reasonably to common human experience.

⁴⁰ For criticism regarding this section, refer to Duff, *supra* note 5 at 833 and 838.

⁴¹ *Income Tax Act*, *supra* note 1 at s. 118.4(1)(e).

⁴² *Income Tax Act*, *supra* note 1 at s. 118.4(1)(f).

⁴³ Refer, e.g., to *Lawlor v. Canada*, [1996] 2 C.T.C. 2005 (T.C.C.) and *Radage v. Canada*, [1996] 3 C.T.C. 2510 (T.C.C.). Until an amendment was made to the *Income Tax Act* in June of 2003, the activities of “feeding and dressing” were also written conjunctively but read disjunctively. Refer, e.g., to *Tanguay v. Canada*, [1998] 2 C.T.C. 2693 (T.C.C.).

Thinking: A rational comprehension, marshalling, analysis and organization of that which the person has perceived and the formulation of conclusions therefrom that are of practical utility or theoretical validity.

Remembering: The mental activity of storing perceived data and of retrieving it in a manner that enables the person reasonably to perform the function of thinking.⁴⁴

These criteria have been interpreted by the Federal Court of Appeal as necessitating a functional consideration of whether the taxpayer is “unable to perform the necessary mental tasks required to live and function independently and competently in every day life.”⁴⁵

It is noted that “breathing” is not listed as a basic activity of daily living. However, it may be given consideration by the Tax Court either as an unstated prerequisite to each of the enumerated activities of daily living or as being related to a “marked restriction” associated with an enumerated activity.⁴⁶

The requirement that speech and hearing disabilities be assessed “in a quiet setting” has been criticized as being unreasonable, since the daily activities of persons with hearing disabilities do not take place in quiet settings.⁴⁷ The requirement that speech and hearing disabilities be assessed with respect to “another person familiar with the individual” has been criticized as being “artificial” and unreasonable, insofar as the daily activities of such individuals involve speech with and being heard by strangers.⁴⁸

C. Marked Restriction

Section 118.4(1)(b) of the *Income Tax Act* provides as follows:

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

⁴⁴ *Radage v. Canada*, [1996] 3 C.T.C. 2510 (T.C.C.).

⁴⁵ *Canada (Attorney General) v. Buchanan* (2002), 291 N.R. 152 (F.C.A.) at para. 27. The current version of the DTC Certificate takes a functional approach to eligibility under these criteria. For example, it is implied that eligibility exists where “[y]our patient is independent in some aspects of everyday living; however, despite medication and therapy, needs daily support and supervision due to an inability to accurately interpret her environment.”

⁴⁶ In *Fillion v. The Queen*, [1999] 3 C.T.C. 2543, the respiratory limitations associated with cystic fibrosis were found to meet the eligibility criteria for the DTC. In *Renken v. The Queen*, [1996] 2 C.T.C. 2687, the consequences of severe asthma, with respect to the time it took the taxpayer to dress and walk, were considered to meet the eligibility criteria. The Standing Committee has recommended that “breathing” be added to the list of activities of daily living. Refer to “Tax Fairness,” *supra* to note 1 at 6.

⁴⁷ “Getting it Right,” *supra* note 1 at 5-6.

⁴⁸ Refer to Duff, *supra* note 5 at 832 and 837.

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.

The definition provides that blindness will automatically qualify a taxpayer for the DTC.⁴⁹

The phrase “all or substantially all of the time” is currently interpreted to mean “90 per cent or more.”⁵⁰ The “90% rule” is borrowed from interpretations of the phrase “all or substantially all of the time” as it is used elsewhere in the *Income Tax Act*. The rule has met with great criticism:

While [the 90% rule] may be the administrative interpretation used by the Department of Finance or the CRA in other income tax matters (e.g., deductions and business expenses), the Committee is opposed to its use as the benchmark for qualifying one’s ability to perform a basic activity of daily living. . . . Obviously, an individual who, for example, is unable to perform a basic activity of daily living 75% of the time is markedly restricted in this aspect of daily living. In addition, it might be more appropriate to apply a different threshold to different impairments. As noted in *Getting it Right for Canadians: The Disability Tax Credit*, individuals who, for example, are unable to remember half of the time may be more markedly restricted in their daily living than individuals who cannot hear 90% of the time.

The administrative interpretation is even more onerous when one considers the fact that the 90% rule is applied individually to each activity of daily living. What about individuals who have multiple impairments? In our view, the cumulative impact of multiple impairments could easily result in a marked restriction in basic activities of daily living.⁵¹

The phrase “even with therapy and the use of appropriate devices and medication” has been criticized for not taking into account whether therapy, appropriate devices, and medication happen to be available to the taxpayer or are contraindicated due to associated health risks.⁵²

⁴⁹ The word “blind” is not defined in the *Income Tax Act*. Blindness is tested in the DTC Certificate in accordance with visual acuity and field of vision standards. The test that is applied in the T2201 is the following: “Your patient is considered blind if, all or substantially all the time, even with the use of corrective lenses or medication: visual acuity in both eyes 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.” In the case of *Peter v. Her Majesty the Queen* (22 March 2004), the Tax Court of Canada found that an individual can qualify for the DTC by virtue of being “effectively blind.”

⁵⁰ Canada’s Response to ‘Getting it Right,’ *supra* note 1. Refer also to the CRA Interpretation Bulletin IT-519R2 at 3.

⁵¹ “Tax Fairness,” *supra* note 1 at 16-17. Refer also to Duff, *supra* note 5 at 838-839. Note, however, that the Tax Court has recognized the cumulative effect of multiple disabilities even if the CRA does not. Refer, e.g., to *Watkin v. Canada*, [2003] 1 C.T.C. 2324 (T.C.C.).

⁵² Refer to Duff, *supra* note 5 at 832. Some of the criticisms brought to bear on the DTC are borrowed by Duff from disability groups such as, in this case, the Council of Canadians with Disabilities.

The CRA recognizes that eligibility for the DTC must be determined on a case-by-case, individual basis and is not determined in accordance with the type of condition with which the taxpayer lives.⁵³

IV. DTC Certificate

Section 118.3(1)(b) of the *Income Tax Act* requires that the Disability Tax Credit Certificate (“DTC Certificate,” form T2201), which must be filled out by a qualified health professional (a qualified person, or “QP”) referred to in s. 118.3(1)(a.2), be filed with the Minister of National Revenue.⁵⁴ Judicial interpretation of these mandatory provisions has suggested that the form that is filed must positively certify that the taxpayer qualifies for the DTC.⁵⁵

The DTC Certificate, in accessible formats, can be obtained at CRA tax services offices, by making a request by mail, telephone, or TTY, or on the website of the CRA.⁵⁶ The Certificate consists of two parts; the first, informational part, is filled out by the taxpayer and the second, medical part, is filled out by a QP.⁵⁷

For persons with permanent disabilities, it should only be necessary to submit, once, a single DTC Certificate to establish long-term eligibility. For persons with non-permanent or temporary disabilities, the CRA will typically require the submission of additional DTC Certificates in succeeding years (in accordance with CRA-determined approval periods) in order to establish ongoing eligibility. DTC

⁵³ CRA, Interpretation Bulletin IT-519R2 at 3. The Bulletin provides that “Disabling ailments and conditions must generally be considered on a case-by-case basis, since it is the effect of the impairment on the ability to perform the activities of daily living, which effect differs between individuals, rather than the ailment or condition itself, which determines whether an individual is eligible for the disability tax credit.”

⁵⁴ When the DTC became tied to a general definition of disability in 1986, the original plan had been for governmental personnel to determine eligibility. This plan was panned and rejected “on the grounds that it was inconsistent with the self-assessment basis of the tax system and [because] individuals’ personal physicians were the best qualified to decide whether they were markedly restricted in activities of daily living.” Refer to “Disability Tax Credit: Evaluation of Recent Experience,” *supra* note 5 at 4. The Statutes of Canada were revised in 1986 by c. 6 to indicate that certification was by “the Minister of National Health and Welfare” and revised again by c. 55 to indicate that certification was by “a medical doctor licensed to practice under the laws of a province of Canada.” Taxpayers are generally asked to perform self-assessments with respect to claims made on income tax returns and are subject to CRA audits to confirm their claims. It is curious that persons with disabilities are not trusted to self-assess with respect to eligibility for the DTC and must, in all cases, ask QPs to fill out their DTC Certificates in order to access the credit.

⁵⁵ *Canada (A.G.) v. MacIsaac*, [1999], 2000 D.T.C. 6020 (F.C.A.) at 6022. There is limited discretion for a judge of the Tax Court to correct a DTC Certificate that does not positively certify that the taxpayer qualifies for the DTC. Refer to *Buchanan v. Canada*, 2002 D.T.C. 7397 (F.C.A.).

⁵⁶ The toll-free telephone number of the CRA is 1-800-267-1267. The text teletypewriter number is 1-800-665-0354. The website address is listed in the section of this paper titled “Further Information.”

⁵⁷ The taxpayer is asked on the DTC Certificate to authorize their QP to provide information “for the purpose of determining eligibility” contained in their “clinical record.” The QP must “certify” that “to the best of my knowledge the information given . . . is correct and complete.”

Certificates can be submitted at any time of the year and not just when filing an Income Tax Return.

After a DTC Certificate is submitted to the CRA, it is possible that a letter will be sent, or a telephone call will be made, to the taxpayer or the QP who filled out the Certificate, if it is deemed that clarification is needed with respect to eligibility. Even though taxpayers must engage the services of a health professional to obtain a positive DTC Certificate, a CRA bureaucrat who is not a health professional may nevertheless deny eligibility in the face of such a Certificate.

Although the benefit of the tax is modest, the costs charged by QPs to persons with disabilities to fill out a DTC Certificate – generally, \$25 to \$150⁵⁸ – significantly reduces the value of the benefit, and act as a deterrent to making an application.⁵⁹ Another deterrent is the possibility that the CRA will ask a claimant to reapply (even where the health condition is irreversible and genetically-based), forcing them to pay their health professional again to fill out the DTC Certificate.⁶⁰

The effect of requiring persons with disabilities to ask their QPs to perform the act of certification is to place persons with disabilities in a precarious situation. QPs across the country have different levels of knowledge regarding the DTC and differing views regarding the purpose of the DTC and the relevant eligibility criteria. Individual QPs across the country interpret the questions on the Certificate inconsistently and eligible persons with disabilities, consequently, can face difficulties obtaining a positive Certificate. A Parliamentary Standing Committee has been critical of the application process:

How consistently are the tax criteria for people with disabilities applied by medical practitioners? The whole process of applying for a Disability Tax Credit is highly discretionary and depends upon medical recommendations. This invites a hit or miss system that permits situations where people with the same severity of disability are, in fact, treated differently.⁶¹

QPs who make negative determinations on a DTC Certificate leave their patients in a vulnerable position because an appeal to the Tax Court in such a situation may be futile, even if the negative determination was erroneous. Taxpayers have been

⁵⁸ “Getting it Right,” *supra* note 1 at 13. The report also notes that it may costs thousands of dollars – many times the value of the DTC – to obtain certification of a learning disability.

⁵⁹ The DTC Certificate indicates that taxpayers “may be able to claim these fees as medical expenses on line 330” of their tax returns, and s. 118.2(2)(a) of the *Income Tax Act* defines medical expenses as being related to medical services provided to patients. The Medical Expense Tax Credit can only be claimed with respect to expenses in excess of the lesser of 3% of net income or, in 2004, \$1813.

⁶⁰ The CRA infamously made, in 2001, a demand to 106,000 Canadians with disabilities to reapply for the DTC. If every QP charged \$100 their patient to fill out Certificates in this reapplication process, then the demand made by the CRA had the social effect of transferring more than \$10 million from the hands of persons with disabilities into the hands of QPs. In the process, more than 31,000 persons who reapplied had their claims disallowed. Almost 17,000 Canadians who did not respond to the demand were deemed disentitled to the DTC.

⁶¹ Refer to “As True as Taxes,” *supra* note 5 at 7.

denied entitlement to the DTC, in many instances, despite the presence of obvious errors made by their QPs. Tax Court decisions provide that denials have been or would be upheld even in the following situations:

- (i) the QP's determination in the Certificate was "absurd;"⁶²
- (ii) the QP's determination in the Certificate was "contrary to the evidence;"⁶³
- (iii) it was "impossible" to get a QP to complete the Certificate;⁶⁴
- (iv) the QP's determination in the Certificate was "unreliable;"⁶⁵
- (v) the QP's determination in the Certificate was "contradictory;"⁶⁶
- (vi) the QP's determination in the Certificate was "confusing;"⁶⁷
- (vii) the QP's determination in the Certificate was "sloppy;"⁶⁸
- (viii) the QP "deliberately" filled out the Certificate improperly;⁶⁹
- (ix) the QP "negligently" filled out the Certificate improperly;⁷⁰ and
- (x) the QP "refused" to sign the Certificate.⁷¹

It is extremely important that persons with disabilities, or their representatives, ensure that the QPs who fill out the DTC Certificate do so carefully and completely.⁷² It is advisable, if a health professional has improperly completed the DTC Certificate and refuses to complete another one, to get a different health professional to complete a second Certificate. In order to qualify for the DTC, it is only necessary that one Certificate, perhaps among many (although "negative" Certificates do not have to be filed with the CRA), clearly certify the taxpayer as being eligible.⁷³ It is advisable to enter into evidence at least one Certificate positively certifying eligibility.

Typically, in litigation involving entitlement to disability benefits under the *Canada Pension Plan*⁷⁴ and, in Ontario, to benefits under the *Ontario Disability Support Program Act*⁷⁵ and the *Workplace Safety and Insurance Act*,⁷⁶ advocates will try to obtain evidence, in the form of supplementary medical reports, from physicians to bolster a claim. These reports are then submitted to adjudicators in the course of appeals seeking to overturn denials of benefits. In DTC litigation, such reports will

⁶² *Noaille v. Canada* (21 June 2001), T.C.J. No. 603 (T.C.C.).

⁶³ *Ibid.*

⁶⁴ *Radia v. Canada*, [2000] 2 C.T.C. 24722 (T.C.C.).

⁶⁵ *Morrison v. Canada*, [2000] 3 C.T.C. 2291 (T.C.C.).

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² Harry Beatty, "Ten Tax Tips for the 2003 Taxation Year," *ARCH ALERT*, 27 February 2004. Note that the DTC Certificate can be submitted after death: refer to Michael Mallin, "Preparing Your Income Tax Returns: 2004 Edition for 2003 Returns" (Toronto: CCH, 2004) at 645 (¶ 1209).

⁷³ *Morrison v. Canada*, [2000] 3 C.T.C. 2291 (T.C.C.).

⁷⁴ R.S.C. 1985, c. C-8, as amended.

⁷⁵ S.O. 1997, c. 25.

⁷⁶ S.O. 1997, c. 16.

probably be insufficient on an appeal to the Tax Court, if a positive Certificate has not also been submitted.

The DTC Certificate has received a great deal of criticism,⁷⁷ in large part because the questions posed to medical practitioners in the Certificate have not conformed to the eligibility requirements as set out in the *Income Tax Act*.

For example, the [DTC Certificate] has substituted the word "excessive" for "inordinate" (1991), described a mobility impairment as "necessarily confined to a bed" (1989), described a mobility impairment as reliance "on a wheelchair for more than half the day" (1993), [and] described "basic activities of daily living" as "essential survival skills" (1993).⁷⁸

There is little room in the form to describe a disabling condition, and the form seems crafted to assist CRA bureaucrats more than taxpayers.⁷⁹

As well, the DTC Certificate, and the questions asked within it, keep changing. For example, whereas the DTC Certificate in 1991 had a box for medical practitioners to check off with respect to "mobility," in 1993 the box changed to include a question with respect to whether the taxpayer could walk 100 metres. In 1994, the box changed to inquire whether the taxpayer could walk 50 metres. The present Certificate has reverted to asking a question about walking 100 metres. Whereas no changes have been made to the statutory definition of what constitutes a "marked restriction" with respect to walking, eligibility questions on the DTC Certificate imply otherwise. Many health professionals, understandably, find the DTC Certificate confusing.⁸⁰

In response to the many criticisms that have been made regarding the DTC Certificate, the CRA engaged in a consultation with community groups in 2003 and it consequently made significant revisions to the Certificate. While the new Certificate represents a great improvement over what was being used previously, it remains the case that not all problems were eliminated.

Given that there is a "new and improved" DTC Certificate, it is recommended that persons who applied unsuccessfully for the DTC before 2003 try reapplying with the new DTC Certificate. This advice is especially relevant to individuals whose lack of success in a prior application can be attributed to faults related to previous versions of the DTC Certificate.

⁷⁷ Refer, e.g., to "Tax Fairness," *supra* note 1 at 18.

⁷⁸ ARCH, "Submissions to the Technical Advisory Committee on Tax Measures for Persons with Disabilities" (5 November 2003) at 12. The submissions are available on the website of ARCH, the address of which is www.archlegalclinic.ca.

⁷⁹ "Tax Fairness," *supra* note 1 at 18.

⁸⁰ "Getting it Right," *supra* note 1 at 12.

Individuals who are found eligible for the DTC and can establish that their eligibility commenced prior to the year in which they are applying can have the credit applied retroactively. Individuals in this situation can ask the CRA to adjust their past income tax returns in accordance with the number of years for which they are deemed eligible, going back to 1985. Beginning in 2005, it is expected that individuals will only be able to ask for adjustments going back ten years.⁸¹

V. Appealing a DTC Denial

If the DTC is denied (usually without any explanation for the denial), it may be in the interests of the taxpayer to appeal. Many appeals have been successful.⁸²

If a claim to the DTC is denied by the CRA, then the taxpayer will be notified through a Notice of Assessment.⁸³ Taxpayers who wish to object to the denial may do so by filing a Notice of Objection before the later of two dates: the anniversary of the taxpayer's filing due-date or 90 days from the "day of mailing the notice of assessment."⁸⁴ Because the time limit for filing may be measured from the "day of mailing the notice of assessment," it is a good idea to keep on file the postmarked envelope in which the Notice of Assessment was sent. Taxpayers may apply to the Minister of National Revenue for an extension of time in which to file a Notice of Objection, if needed.⁸⁵ An application to the Tax Court must be made to overturn a refusal to extend time.⁸⁶

The prescribed Notice of Objection form – T400A – may be obtained from a tax office or on the CRA's website, but failing to use the form is not fatal to an

⁸¹ Refer to Annex 9 to the 2004 Budget Plan of the Government of Canada, titled "Tax Measures: Supplementary Information and Notices of Ways and Means Motions," at 373.

⁸² In KPMG's publication titled *Tax Planning for You and Your Family* (Toronto: Carswell, 2001) at 30, the following tip is offered: "If the [CRA] challenges your disability claim, consider objecting. It is often difficult to determine whether one qualifies or not, and the Tax Court of Canada has issued a slew of decisions interpreting these rules. In some cases, the Court has found the [CRA's] view to be incorrect. Therefore, if you believe you fit within the *Income Tax Act's* definition of disabled, you should consider pursuing your claim if it is denied."

⁸³ *Income Tax Act*, *supra* note 1 at s. 152(2).

⁸⁴ Refer to s. 165(1) of the *Income Tax Act* and the CRA's document titled "Your Appeal Rights Under the *Income Tax Act*."

⁸⁵ Refer to s. 166.1(1) of the *Income Tax Act*. Section 166.1(2) indicates that the contents of an application for an extension are simply the reasons why the notice of objection was not served in time. An application for an extension of time is made by writing to the Chief of Appeals in a local tax office. In its publication titled "Your Appeal Rights Under the *Income Tax Act*," the CRA states that requests for extensions must be made no later than one year after the deadline for filing an objection. The publication furthermore states that the taxpayer should explain why they were unable to object during the objection period, that an application was made as soon as possible, and that it would be fair to grant the application for an extension.

⁸⁶ *Income Tax Act*, *supra* note 1 at s. 166.2(1). There are 90 days (as of the date that a CRA denial was mailed) in which to apply to the Tax Court to have an extension of time granted. The procedure for applying to the Tax Court is described at s. 166.2(2) of the *Act*.

objection.⁸⁷ Information that should be included on the Notice of Objection is listed in the CRA's publication "Your Appeal Rights Under the *Income Tax Act*."⁸⁸ The Notice of Objection must be addressed to the Chief of Appeals and mailed to a District Office or Taxation Centre of the CRA. An address should be listed on the taxpayer's Notice of Assessment.

A CRA appeals officer – a CRA employee – will consider the Notice of Objection. If the appeals officer allows the objection, then the taxpayer will receive a Notice of Reassessment, recalculating the income tax return of the taxpayer with credit given for the DTC. If the appeals officer denies the objection, then a Notice of Confirmation of the denial will be sent to the taxpayer.⁸⁹ A confirmed denial must be appealed to the Tax Court for overturning.

An appeal to the Tax Court of Canada must be launched within 90 days of "the day notice has been mailed to the taxpayer that the Minister has confirmed the assessment"⁹⁰ (alternatively, an appeal may be launched if the CRA has not responded within 90 days to an objection⁹¹). In order to appeal a confirmed denial after the 90-day period has expired, an application first must be made to the Tax Court for an extension of time.⁹²

There are two procedural options available to taxpayers when appealing to the Tax Court. The options are to follow either the "informal procedure" or the "general procedure." The informal procedure is only available where the amount of federal tax and penalties and interest in dispute is no more than (or limited to) \$12,000. In both procedures, the CRA will be represented by a lawyer from the Department of Justice.

The informal procedure is governed by s. 18 of the *Tax Court of Canada Act*⁹³ and the corresponding *Informal Procedure Rules* used by the Tax Court. The general procedure is governed by s. 17 of the *Tax Court of Canada Act* and the corresponding *General Procedure Rules* used by the Tax Court.

For taxpayers who elect the general (*i.e.*, formal) procedure, they may only be represented by (if not themselves) a lawyer.⁹⁴ Under the general procedure, usual

⁸⁷ Section 165(1) of the *Income Tax Act* describes the Notice of Objection as being a document "in writing, setting out the reasons for the objection and all relevant facts."

⁸⁸ The information consists of the following: the taxpayer's name, address, and telephone number; the date of the Notice of Assessment and the taxation year; the taxpayer's social insurance number; the facts and reasons for objection; the documents in support of the objection; and the name and address of a representative, if applicable. The objection should be signed and dated. The CRA encourages taxpayers to include a copy of their Notice of Assessment with the objection to help with processing.

⁸⁹ *Income Tax Act*, *supra* note 1 at s. 165(3).

⁹⁰ *Ibid.* at s. 169(1).

⁹¹ *Ibid.* at s. 169(1)(b).

⁹² *Ibid.* at s. 167(1).

⁹³ R.S.C. 1985, c. T-2, as amended.

⁹⁴ *Tax Court of Canada Act* at s. 17.1.

court procedures apply (entailing discoveries, documentary disclosure, strict rules of evidence, and so on).⁹⁵ A decision of the Tax Court under the general procedure may be appealed to the Federal Court of Appeal.⁹⁶

For taxpayers who elect the informal procedure, they may be represented by (if not themselves) either a lawyer or an agent (*i.e.*, a non-lawyer).⁹⁷ A formal “Notice of Appeal” document need not be filed; all that is technically required is that a “written appeal” be mailed (or faxed, or sent electronically) to the Tax Court.⁹⁸ There is a filing fee of \$100 but the fee may be waived by the Court if the taxpayer asks the Court to do so on the basis that the fee would cause “severe financial hardship.”⁹⁹ Under the informal procedure, relaxed rules of evidence apply to the proceedings.¹⁰⁰

The powers of the Tax Court on appeal are to dispose of the appeal in one of the following ways:

- (a) dismissing it; or
- (b) allowing it and
 - (i) vacating the assessment,
 - (ii) varying the assessment, or
 - (iii) referring the assessment back to the Minister for reconsideration and reassessment.¹⁰¹

Costs cannot be awarded against a taxpayer in the informal procedure.¹⁰² An appeal of a decision of the Tax Court under the informal procedure lies to the Federal Court of Appeal.¹⁰³ Where the CRA appeals an informal-procedure decision of the Tax Court that was positive to the taxpayer, the CRA must pay the costs of the taxpayer with respect to the proceeding in the Federal Court of Appeal.¹⁰⁴

An appeal to the Federal Court of Appeal must be made within 30 days of the decision made by the Tax Court.¹⁰⁵

⁹⁵ *Ibid.* at s. 17.3 (examinations for discovery). The *Tax Court of Canada Rules (General Procedure)* have rules respecting discovery of documents (Rules 78-91), examination for discovery (Rules 92-118), and evidence (Rules 143-146).

⁹⁶ *Ibid.* at s. 17.6.

⁹⁷ *Ibid.* at s. 18.14.

⁹⁸ *Ibid.* at ss. 18.15(1) and 18.15(3.1).

⁹⁹ *Ibid.* at s. 18.15(3.4).

¹⁰⁰ *Ibid.* at s. 18.15(4). Despite the relaxed nature of the Informal Procedure, there are still 20 rules constituting the *Tax Court of Canada Rules (Informal Procedure)*.

¹⁰¹ *Income Tax Act*, *supra* note 1 at s. 171(1).

¹⁰² Refer to the *Tax Court of Canada Act* at s. 18.26(1) (where power is only granted to award costs to an appellant) and *Wawota Energy Products v. The Queen*, [1998] 2 C.T.C. 331 (F.C.A.). Where an appeal is allowed, the appellant is automatically awarded at least the filing fee.

¹⁰³ *Tax Court of Canada Act* at s. 18.24. Until mid-2003, a decision of the Tax Court under the informal procedure could not be appealed and could only be challenged through a judicial review application to the Federal Court of Appeal. The procedure was amended as a consequence of the Tax Court becoming, in 2003, a superior court of record; refer to s. 3 of the *Act*.

¹⁰⁴ *Tax Court of Canada Act* at s. 18.25.

¹⁰⁵ *Federal Court Act*, R.S.C. 1985, c. F-7, as amended, s. 27(2).

VI. Future of the DTC

In response to mounting criticism regarding the DTC, and in response to recommendations made to it by parliamentary committees,¹⁰⁶ the Government of Canada formed in 2003 a Technical Advisory Committee on Tax Measures for Persons with Disabilities. The Committee's 18-month mandate, ending in October of 2004, is to "advise the Minister of Finance and Minister of National Revenue on addressing issues related to tax measures benefiting persons with disabilities in a manner that is consistent with the objectives of these measures and that takes into account available fiscal resources."¹⁰⁷ The Committee is also examining census data¹⁰⁸ regarding persons with disabilities and is examining the following:

- eligibility criteria for the DTC, particularly for persons who live with episodic and mental health disabilities;
- the list of activities of daily living relevant for qualification for the DTC;
- the identification of professionals allowed to certify eligibility; and
- the administrative policy and procedures surrounding the determination of eligibility.¹⁰⁹

On 22 December 2003, the Technical Advisory Committee provided an interim report to the aforementioned Ministers advising that it supports the extension of tax relief through the DTC to persons with mood disorders, learning disabilities, and episodic disabilities, who currently have great difficulty accessing the DTC. The Committee is exploring ways to improve the administration of the DTC by the CRA, and ways to improve public awareness of the DTC.

In 2004, the CRA commenced a consultation with community groups in an effort to improve the language it employs in various letters that are sent to persons with disabilities and caregivers in the DTC application process. The consultation is expected to be completed in time for changes to be made to communications relevant to DTC applications made, in 2005, with respect to the 2004 tax year.

¹⁰⁶ Refer to "Getting it Right," *supra* note 1 at 13, and "Tax Fairness," *supra* note 1 at 29. In "Canada's Response to 'Tax Fairness,'" *supra* note 1, the Department of Finance responds to the Standing Committee by stating that it has established the Technical Advisory Committee.

¹⁰⁷ This is quoted from the website of the Committee, the address of which is listed in the section of this paper titled "Further Information."

¹⁰⁸ Participation and Activity Limitation Survey (2001).

¹⁰⁹ This is quoted from the website of the Committee, the address of which is listed in the section of this paper titled "Further Information."

VII. Further Information

For further information regarding the DTC, visit the website of Lembi Buchanan (Chair of the Coalition for Disability Tax Credit Reform) at disabilitytaxcredit.com, the website of the Technical Advisory Committee on Tax Measures for Persons with Disabilities at disabilitytax.ca, or the website of ARCH at archlegalclinic.ca.

For further information regarding the CRA, visit its website at cca-arc.gc.ca. For further information regarding the Tax Court, visit its website at tcc-cci.gc.ca.