

Disability-Related Income Tax Provisions

by Harry Beatty¹

"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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¹ Barrister and Solicitor. These materials were prepared for 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. Some revisions and corrections have been made subsequently, taking into account information from the Canada Customs and Revenue Agency (CCRA) that was not available at the time the paper was originally prepared.

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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 your practice does not include tax issues directly, it is helpful to you and your 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, family law and the law related to estate and incapacity planning.²

This paper will highlight federal and Ontario tax provisions related to disability, with an emphasis on the disability-related aspects of those provisions.³ While an attempt will be

² For some implications in the estate and incapacity planning area, see the author'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" elsewhere in these materials.

³ 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:

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, or all rules relating to the payment of support. Nor will we generally cover the details of how certain credits may be divided among two or more taxpayers.

A. Preliminary Administrative Issues

In Section A, there will be a discussion of some preliminary administrative 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) forms that are used in making disability-related tax claims
- 3) tax information from the Canada Customs and Revenue Agency ("CCRA") in accessible formats, sources and locations
- 4) the importance of filing a return to a person who pays or owes no tax
- 5) circumstances in which it is necessary to use the T1 General Return, rather than a Special Return
- 6) filing a return on behalf of a taxpayer with limited capacity
- 7) the meaning of key terms in interpreting eligibility for disability-related claims:
 - a) Support
 - b) Dependant and Dependent
 - c) Wholly Dependent
 - 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 Infirmary
 - k) Net Income and Taxable Income

B. Overview of Income Tax Provisions Related to Disability

In Section B, there will be a summary presented 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

<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://192.75.156.68/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".

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 *Income Tax Act* 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 to apply
- whether the provision requires a disability which meets the 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
- 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 taxpayer, 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
- (4) Infirm Dependant Credit (Amount for Infirm Dependents Age 18 or Older)
- (5) Caregiver Credit

- (6) Disability Tax Credit (Disability Amount)
- (7) Disability Tax Credit 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 (for Disability-Related Expenses)
- (11) Refundable Medical Expense Supplement
- (12) Attendant Care Expenses Deduction
- (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 Where the Child has a Disability or Infirmity
- (16) Increased Availability of the Child Care Expenses Deduction Where One Parent has a Disability
- (17) Full Education Amount Claim for Part-Time Study
- (18) Accessing the Lifelong Learning Plan for Part-Time Study
- (19) Extended Home Buyers' Plan for Persons who qualify for the Disability Tax Credit
- (20) Contributions to an RRSP from Canada Pension Plan Disability Benefits
- (21) RRSP/RRIF Rollovers for an Infirm Child or Grandchild (Including Adult Sons, Daughters, and Grandchildren)
- (22) Preferred Beneficiary Election for an Infirm Child or Grandchild (Including Adult Sons, Daughters, and Grandchildren)

C. *Disputes Involving Disability-Related Tax Claims*

In Section C, we will discuss disputes involving tax claims related to disability. The great majority of disputes involve eligibility for the Disability Tax Credit (DTC), but we shall look at some examples involving Medical Expense Tax Credit (METC) claims and 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 Disability Tax Credit;
- 2) leading cases on the Medical Expense Tax Credit;
- 3) cases on other tax provisions related to disability;
- 4) the process of appealing a DTC, METC or other Disability-Related Tax case – strategic considerations.

D. *New Developments and Law Reform Initiatives*

In Section D, we will discuss briefly new developments and law reform initiatives. The main new development is a new Disability Tax Credit (T2201) form which will be

available for use in making DTC claims for the 2003 taxation year.⁴ The major law reform initiative is the work of the Technical Advisory Committee on Tax Measures for Persons with Disabilities, appointed by the federal Ministers of Finance and of National Revenue. The learning objective is to enable practitioners to keep their knowledge of disability-related tax claims current. The topics covered are:

- 1) review of changes made by the 2003 Federal Budget
 - a) introduction of the Child Disability Benefit (CDB)
 - b) RRSP/RRIF Rollovers for an infirm child or grandchild (including adult sons, daughters, and grandchildren)
 - c) clarifying eligibility for the DTC with respect to feeding and dressing
 - d) new disability items included as medical expenses;
- 2) review of changes proposed by the 2003 Ontario Budget;
- 3) reports on the Disability Tax Credit and other disability-related tax provisions made by Parliamentary Committees, and the responses of the Government of Canada; and
- 4) the Technical Advisory Committee on Tax Measures for Persons with Disabilities ("Technical Advisory Committee")
- 5) the new Disability Tax Credit certificate (form T2201) for the 2003 taxation year.

A. Preliminary Administrative Issues

(1) Sources of Tax Information Related to Disability

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

<http://www.ccra-adrc.gc.ca/tax/individuals/topics/disabilities-e.html>

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

<http://www.ccra-adrc.gc.ca/E/pub/tg/rc4064/README.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" (IT519R2-CONSOLID):

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

⁴ The new DTC form has been made available by the Canada Customs and Revenue Agency ("CCRA") on its website as of the end of January, 2004, at:
<http://www.ccra-adrc.gc.ca/E/pbg/tf/t2201/README.html>

An overview of the main tax provisions related to disability is also found on the web site of the Technical Advisory Committee on Tax Measures for Persons with Disabilities:

<http://www.disabilitytax.ca/distax-e.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>

(2) 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 Disability Tax Credit (DTC) or "disability amount", as it is also referred to in CCRA publications. The DTC certificate is Form T2201. There has been considerable controversy regarding the fairness of the DTC certificate⁵, and during 2003 CCRA conducted a consultation with disability organizations and organizations representing health professionals which has resulted in a considerably revised T2201 form, available on the CCRA web site at:

⁶<http://www.cra-adrc.gc.ca/E/pbg/tf/t2201/README.html>

The only other income tax form specific to disability⁷ is the "Attendant Care Expenses" form (T929). This form is used for attendant care expenses that are incurred by the taxpayer himself or herself in connection with employment, a research contract, or education. As we shall see when we discuss attendant care claims in Section B of this paper, the T929 form applies to only a limited number of taxpayers with disabilities. The T929 form for the 2002 taxation year is found on the CCRA 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

⁵ See Part D of this paper for details of the current debate on the DTC form and administration of the DTC, especially Part D(3) dealing with the reports by the Parliamentary Sub-Committee on the Status of Persons with Disabilities.

⁶ The 2003 version of the T929 form was not yet available as of the date of revising this article.

⁷ 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>

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. The T2202 Form is found on the CCRA web site at:

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

Part B of the "Child Care Expenses 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 CCRA web site at:

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

There is a new Child Disability Benefit (CDB), which is a supplement for parents of children under 18 who qualify for **both** the DTC credit **and** the Canada Child Tax Benefit (CCTB).⁸ We will discuss the CDB in more detail in Part B(8) of this paper. The CDB will be paid for the first time in March, 2004, but the initial payments will be retroactive to July, 2003. Low-income and moderate-income parents of children with severe disabilities can apply now using **both** the DTC form (T2201) **and** the "Canada Child Tax Benefit Application" (RC66).⁹ The RC66 form is on the CCRA website at:

<http://www.ccra-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 CCRA web site at:

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

⁸ 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 CDB as a supplement to the CSA is on the CCRA web site at:

http://www.ccra-adrc.gc.ca/benefits/children_special_allowances-e.html

⁹ If parents have already 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.

(3) Tax Information from CCRA in Accessible Formats, Sources and Locations

CCRA 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 (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
- alternate format materials in Braille, large print, audiocassette, and computer diskette (early requests for alternate format materials are suggested)
- Internet access to forms and publications
- building modifications and office design to make CCRA premises more barrier-free.

For details, consult the CCRA guide "Information Concerning People with Disabilities".¹⁰

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

Many persons with disabilities receive Ontario Disability Support Program¹¹ (ODSP) benefits or Workplace Safety and Insurance Board¹² (WSIB) payments, neither of which 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 with a dependant with a disability, to file an income tax return¹³, 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, including the new Child Disability Benefit¹⁴
- to support the application of a spouse or common-law partner for the Canada Child Tax Benefit

¹⁰ See Section A(1) above.

¹¹ The Ontario Disability Support Program (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 a detailed discussion of the ODSP, see the article "Ontario Disability Supports: Income Support" by Dianne Wintermute elsewhere in these materials.

¹² The Workplace Safety and Insurance Board (WSIB) is Ontario's workers' compensation plan. The enacting legislation is the *Workplace Safety and Insurance Board Act, 1997*, S.O. 1997, c. 16, Schedule A.

¹³ CCRA now identifies the importance of the return to people who do not pay or owe tax by referring to it as the "general income tax **and benefit** return" (emphasis added).

¹⁴ See Part B(8).

- to document the basis on which a supporting person 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 incomes¹⁵
- to document an application to the Assistance for Children with Severe Disabilities (ACSD) program of the Ontario Ministry of Community, Family and Children's Services, for low-income and moderate-income parents of children with severe disabilities who have significant disability-related expenses¹⁶
- to document financial eligibility for the Guaranteed Income Supplement for seniors
- 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 Canada Pension Plan (required for persons with earnings over \$3500 for the year).¹⁷

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.

(5) Circumstances in which it is Necessary to use the T1 General Return, Rather Than a Special Return

CCRA produces several simplified returns:

- the T1S-A return containing the income, deduction, and credit amounts common to seniors

¹⁵ 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>

¹⁶ 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 Community, Family and Children's Services web site:

<http://www.cfcs.gov.on.ca/CFCS/en/programs/Children/ChildrenWithSpecialNeeds/assistanceforChildrenwithSevereDisabilities.htm>

Also see the article by Dianne Wintermute "Assistance for Children with Severe Disabilities" elsewhere in these materials.

¹⁷ Canada Pension Plan (R.S. 1985, c. C-8), s. 20(2) sets 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. See the "CPP Disability Benefits Application Memorandum" prepared by the Clinic Resource Office elsewhere in these materials.

- the T1S-C return for low-income individuals who only need to file a return to continue receiving GST/HST credit and Canada Child Tax Benefit (CCTB) payments
- 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 return¹⁸

CCRA has ensured in recent years that most disability-related tax claims can be made on these simplified returns, but the safest approach is to use the T1 General Return to ensure that all claims and provisions are considered.

(6) Filing a Return on Behalf of a Taxpayer with Limited Capacity

Subsection 150(1)(d) 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 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, or given a valid power of attorney for property, under the *Substitute Decisions Act, 1992*¹⁹, 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.²⁰ But the matter is not free

¹⁸ These descriptions are taken from the CCRA "Tax – Individuals - Frequently Asked Questions" web page at:

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

¹⁹ S.O. 1992, c. 30, as amended.

²⁰ After writing this article, the author received a response to a Technical Interpretation Request from CCRA, 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, CCRA's opinion was that the person appointed to act would qualify as the "legal representative" within the meaning of ss. 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".

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* does not have provisions dealing specifically with the filing of returns on behalf of people to obtain benefits, rather than to pay taxes.

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

Most of the key terms we will focus on²¹ 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 CCRA 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 CCRA 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 considered to have been paid by her for the

²¹ These key terms will be highlighted throughout the article, using a bold font.

support of her brother and she cannot claim the dependant tax credit²² 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 Ontario Disability Support Program 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.²³ But if the daughter or son rents a self-contained apartment in the parents' home and is basically self-sufficient, unless the parents provide payments for some other purpose it would be likely that this would not be considered a **support** situation.

(b) *Dependant and Dependent*²⁴

These terms are not generally defined in the *ITA*.²⁵ 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.

(c) *Wholly Dependent*

In certain provisions in the *ITA*²⁶, there is a reference to one person being not just **dependent** on another, but **wholly dependent**. There is no guidance as to what the

²² 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 author]

²³ 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.

²⁴ In the *ITA* and *CCRA* publications, **dependant** is used as a noun and **dependent** as an adjective.

²⁵ While **dependant** is not generally defined in the *ITA*, a specific meaning is assigned to this term for purposes of a provision we will be discussing, the Infirm Dependant Credit. This meaning is given by s. 118(6) of the *ITA*, and will be discussed in Part B(4) of this paper.

qualifier **wholly** adds, but it seems to indicate generally that a greater degree of support is required than just being **dependent**.

(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 s. 63, 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.²⁷ This is not a requirement for **support** with respect to other provisions within the *ITA*, however.

(e) *Child*

Generally, dependency claims for persons with disabilities in the income tax system depend, not only on whether support is being provided, but also on whether there is a family relationship between the individual providing support and the person with a disability. The definitions and interpretation of family relationship terms are important in this context.

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

(a) a person of whom the taxpayer is the natural parent whether the person was born within or outside marriage,

²⁶ 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) of the *ITA*, discussed in Part A(7)(e).

²⁷ We will return to this point in discussing child care expenses in Sections B(15) and B(16) of this paper.

(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,

(d) an adopted child of the taxpayer, and

(e) a spouse or common-law partner of a child of the taxpayer.

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 had, or immediately before the person attained the age of 19 years had, in law or in fact, the custody and control".

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*

CCRA 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*.

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 year²⁸, 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),²⁹

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;

With respect to the tax provisions discussed in this paper, there is currently no distinction between being a **spouse** and being a **common-law partner**, or between same-sex and opposite-sex relationships. While the recent history of changes in this regard must be considered carefully by practitioners providing advice to couples, we shall not review this history here, but simply use phrases such as **spouses and common-law partners**, **spouse or common-law partner**, and other variants.

²⁸ The 2003 General Income Tax and Benefit Guide contains the following clarification with respect to "common-law partner":

This applies to a person of the opposite or same sex who is **not your spouse** (see above), with whom you live and have a relationship and to whom at least **one** of the following situations applies. He or she:

- is the natural or adoptive parent (legal or in fact) of your child;
- has been living and having a relationship with you for at least 12 continuous months; or
- lived with you previously for at least 12 continuous months as your spouse or common-law partner.

Note

Under proposed changes, the last condition will no longer exist. The effect of this proposed change is that a person (other than the parent of your child) will be your common-law partner only after your **current** relationship with that person has lasted at least 12 continuous months. This proposed change will apply to 2001 and later years once it becomes law. If this change will affect your return for 2001 or 2002, contact us.

Reference to "12 continuous months" in this definition includes any period that you were separated for less than 90 days because of a breakdown in the relationship.

So effective retroactively to the 2001 taxation year, common-law partnerships will no longer include **past** relationships which have ended prior to the current taxation year.

²⁹ The effect of clause (b) is to read the definition of **child**, discussed above, in this context without including the extension to children of a spouse or common-law partner, and without including the extension to sons-in-law and daughters-in-law. [footnote added by author]

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

Subsection 252(2) of the *ITA* provides that all of the terms **brother, sister, grandparent, aunt, uncle, great-aunt, great-uncle, niece, and nephew** refer to a taxpayer's in-laws, whether through a **spousal** relationship or a **common-law partnership**.

(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.³⁰ 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 Infirmary

Eligibility for a number of tax claims based on disability requires the taxpayer, or a **dependant**, to qualify for the Disability Tax Credit. But there are several other claims which require only that the taxpayer or **dependant** have a **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 CCRA generally requires that a medical doctor sign a statement indicating that the person is **infirm**.³¹

Appendix "A" to Interpretation Bulletin It-513R, "Personal Tax Credits", contains the following explanation of **mental or physical infirmity**:

Mental or Physical Infirmary -- 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 credit³² or dependant tax credit³³ 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.

It is noted in the "Explanation of Changes" in the Interpretation Bulletin that:

The discussion of the term "mental or physical infirmity" has been revised. 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.

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".

³⁰ Aunts, uncles, nieces and nephews are, however, included in the class of persons with respect to whom the Infirm Dependant Credit and Caregiver Credit may be claimed. See Parts C(4) and C(5) of this paper.

³¹ The certification of **infirmity** is discussed in more detail in connection with several claims in Section B of this paper.

³² Now referred to as the "Amount for an Eligible Dependant". [footnote added by author]

³³ Now referred to as the "Infirm Dependant Credit". [footnote added by author]

Where a claim is made on the basis of **infirmary**, no form is required to be submitted. The taxpayer should obtain a physician's statement which confirms the nature, commencement and duration of the **infirmary**. The form does not have to be submitted to CCRA, but should be available should they wish to verify the claim.

(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 return, and **taxable income** is the amount calculated at Line 260.

Where payments are included in **net income** but not in **taxable income**, while no tax is paid on them, 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 **infirmary** 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.³⁴

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 seems to be whether the payments are regarded as "income from a source" by CCRA using traditional tax principles.

(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 Ontario Disability Support Program (ODSP).³⁵

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*.

³⁴ Social assistance and workers' compensation payments are discussed in the next Section of this paper, B(1)(a).

³⁵ See footnote 11 above.

Social assistance payments are reported using a T5007 form. 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.³⁶ If their **net income** is the same, the **spouse or 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 250.³⁷

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".³⁸ The CCRA publication "T5007 Guide – Return of Benefits" (T4115)³⁹ 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":

³⁶ *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 2003 General Income Tax and Benefit Guide clarifies this by 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).

³⁷ *ITA* s. 110(1)(f).

³⁸ *ITA* s. 56(1)(u).

³⁹ 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 CCRA web site at:

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

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 for these services would otherwise qualify for a deduction under section 63 of the *ITA*,
- 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 source⁴⁰, 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.

(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 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 Board⁴¹ (WSIB).

⁴⁰ A range of disability-related benefits and payments in Ontario is discussed in the papers by Lana Kerzner, Roberto Lattanzio and Tess Sheldon elsewhere in these materials.

⁴¹ See footnote 40 above.

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*.⁴²

Workers' compensation payments are reported using a T5007 form. 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.

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

Canada Pension Plan disability benefits, like other CPP payments, are taxable.⁴³ The taxability of CPP is set out at s. 56(1)(a)(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 section of this paper, Section B(2).

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

Long-term disability (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 himself or herself, and the employer made no contributions to the plan.⁴⁴ 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.⁴⁵

(e) *Personal Injury Awards and Settlements*

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

⁴² 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".

⁴³ Quebec Pension Plan (QPP) disability benefits are also taxable.

⁴⁴ *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.

⁴⁵ For details of the tax treatment of LTD and related plans, see Interpretation Bulletin IT-428, "Wage Loss Replacement Plans".

The general rule is that both the general and special damages components of personal injury awards are exempt from income.⁴⁶ 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.⁴⁷ A structured settlement which meets certain conditions provides non-taxable payments to the injured person on an on-going basis.⁴⁸

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,⁴⁹
- the Ontario Hepatitis C Assistance Plan,⁵⁰ and
- financial assistance provided to Canadians who were directly infected with HIV from the blood supply ("primary infections") under the federal Extraordinary Assistance Program (EAP) and a Multi Provincial-Territorial Assistance Program (MPTAP), and later to those who were secondarily infected.⁵¹

(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 CCRA, including:

⁴⁶ 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.

⁴⁷ *ITA* ss. 81(1)(g.1) and (g.2).

⁴⁸ IT-365R2, par. 5.

⁴⁹ See Clause 8.01 of the Settlement, found on the Internet at:

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

⁵⁰ 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/project/hepc/hepc.html> which indicates that the payments are tax-free.

⁵¹ I have been unable to find a specific reference for the tax-free status of HIV compensation payments in the *ITA* or any CCRA publication. The Health Canada news release announcing the compensation payments for those secondarily infected states that these payments will be tax-free:

http://www.hc-sc.gc.ca/english/media/releases/1998/98_102bke.htm

- automobile insurance accident benefits ("no fault" benefits),⁵²
- criminal injuries compensation payments,⁵³ and
- war veterans allowances (Including allowances based on disability from Canada's allies).⁵⁴

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

Disability income payments are sometimes received as retroactive lump-sums, typically because of delays in application, delays in processing of benefits, or as the result of successful appeals. Where taxable disability income payments are partially or totally 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 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 can also be provided from Human Resources Development Canada 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.⁵⁵

The taxation of retroactive lump-sum LTD payments was the subject of two recent Federal Court of Appeal decisions. In *Tsiaprailis*⁵⁶, the Court held 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 a component representing future entitlements, which the Court held not to be taxable. In a companion case, *Siftar*⁵⁷, the same approach was followed even though there was no specific basis in the facts to distinguish the two components. The case was referred back to the Minister of National Revenue to determine, based on information to be provided by the taxpayer, what a reasonable apportionment between the two components would be. The taxpayer in *Tsiaprailis* has applied for leave to appeal this

⁵² I have been unable to find a specific reference for this proposition in the *ITA* or any CCRA publication. The 2003 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 are received from insurance companies, rather than from the Government. Presumably this is just imprecise wording, and the intent is to indicate that such payments are non-taxable.

⁵³ See the 2003 General Tax and Benefit Guide, under the heading "Amounts that are not taxed", and IT-365R2, paragraphs 11-13.

⁵⁴ *ITA* ss. 81(1)(d) and (e).

⁵⁵ *ITA* ss. 56(8), 120(3).

⁵⁶ *Canada v. Tsiaprailis* 2003 FCA 136.

⁵⁷ *Canada v. Siftar* 2003 FCA 137.

case to the Supreme Court of Canada, so the matter may be clarified in future at that level.⁵⁸

Practitioners will have to consider these cases carefully before advising clients of the tax consequences of LTD settlements.

If the best advice is that part or all of retroactive LTD lump-sum payments are taxable, the amount of the retroactive lump-sum is included in the return at Line 130, and a request can be made to CCRA 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. Information regarding the payments for previous years should be provided by the insurer using Form T1198, "Statement of Qualifying Retroactive Lump-Sum Payment"⁵⁹, which is attached to the return.

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

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 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

This is a claim that is available, in certain circumstances, to taxpayers who have a **dependant** living with them, who is **related** to them, and who do not have a claim for a **spouse or common-law partner** dependent on them.⁶⁰ The disability or **infirmity** of the dependant for this claim is relevant **only** if the dependant is over 18, and is a child, grandchild, brother or sister of the taxpayer, or of his or her spouse or common-law partner. In that case, the dependant must be "infirm", although not necessarily eligible for the Disability Tax Credit. 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 "Amount for an Eligible Dependant" is a personal non-refundable credit, which may be reduced or eliminated by the **net income** of the dependant.

⁵⁸ For an interesting discussion of these cases, see: Mark Siegel, "Disability Payments", in the Gowling, Lafleur, Henderson *Taxation Law* newsletter (Number 45: May, 2003), at: <http://www.gowlings.com/resources/newsletterPDFs/045.pdf>

⁵⁹ The T1198 form is available on the CCRA web site at: <http://www.cca-adrc.gc.ca/E/pbg/tf/t1198/t1198-02e.pdf>

⁶⁰ LTD payments are in the category referred to as "wage loss replacement plans" on this form. This claim was called the "equivalent-to-spouse" claim for a number of years, up to and including the 2000 taxation year, and it was called the "equivalent-to-married" claim before that.

The Amount for an Eligible Dependant 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 form⁶¹.

The eligibility conditions for claiming the Amount for an Eligible Dependant 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;⁶²
 - resident in Canada, except for a claim with respect to a **child** of the taxpayer;⁶³
 - **wholly dependent** for support on the individual, or the individual and the other person or persons;⁶⁴ 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**⁶⁵.

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

⁶¹ Form ON 428.

⁶² See the discussion of **related** in Part A(7)(i) of this paper. Essentially, the *ITA* definition of who is **related** to the taxpayer limits the Amount for an Eligible Dependant 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 Dependant 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.

⁶³ Thus a taxpayer deemed resident in Canada may make the Amount for an Eligible Dependant claim only with respect to a child.

⁶⁴ As discussed in Part A(7)(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.

⁶⁵ See the discussion of **mental or physical infirmity** in Part A(7)(j) of this paper.

Only one claim for the Amount for an Eligible Dependant can be made by a household, even if there is more than one taxpayer and more than one **dependant** living there who would otherwise qualify.⁶⁶

For 2003, the federal value of the Amount for an Eligible Dependant tax credit is 16% of \$6,586, which provides a maximum federal tax reduction of \$1,054. The \$6,586 amount on which the credit is based is reduced dollar-for-dollar by the **net income** of the **dependant** over \$659, so that the credit is eliminated altogether at a **net income** of \$7,245. 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% of \$6,637, which provides a maximum provincial tax reduction of \$402. The \$6,637 amount on which the credit is based is reduced by the **net income** of the **dependant** over \$664, so that the credit is eliminated altogether at a **net income** of \$7,301.

Example:

Since social assistance is included in **net income**⁶⁷, where an Ontario Disability Support Program recipient lives with family and receives the standard boarder rate of \$708/month, or \$8,496/year, no family member would be able to make the Amount for an Eligible Dependant Claim with respect to the ODSP recipient. \$8,496/year is above both the federal limit of \$7,245 and the provincial limit of \$7,301.

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

The Infirm Dependant Credit is claimed by taxpayers who provide support to certain **infirm** relatives 18 or over. It is an alternative claim to the Caregiver Credit. Only one of the two credits may be claimed with respect to a dependant. Unlike the Caregiver Credit, the Infirm Dependant Credit may be claimed for a dependant who lives in a separate residence from the taxpayer. The Infirm Dependant Credit is a personal non-refundable credit, which may be reduced or eliminated by the **net income** of the dependant. While the maximum value of the Infirm Dependant Credit 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. If the Caregiver Credit is available, it should be claimed in preference to the Infirm Dependant Credit.

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

The Infirm Dependant Credit 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,

⁶⁶ *ITA* s. 118(4)(b).

⁶⁷ See the discussion in Part B(1)(a) of this paper.

aunt, uncle, niece, or nephew.⁶⁸ The claim may also 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 only be made with respect to a **dependant** who resided in Canada at some point during the year.

The Infirm Dependant Credit claim requires that the **dependant** reach her or his 18th birthday before the end of the year.

A taxpayer may combine a claim for the Infirm Dependant Credit with a claim for the Amount for an Eligible Dependant, 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 Amount for an Eligible Dependant claim is subtracted from the Infirm Dependant Credit claim. The effect is that the taxpayer is entitled only to the larger of the two claims.⁶⁹

For 2003, the federal value of the Infirm Dependant Credit is 16% of \$3,663, which provides a maximum federal tax reduction of \$586. The \$3,663 amount on which the credit is based is reduced by the **net income** of the **dependant** over \$5,197, so that the credit is eliminated altogether at a **net income** of \$8,860. 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% of \$3,684, which provides a maximum provincial tax reduction of \$223. The \$3,684 amount on which the credit is based is reduced by the **net income** of the **dependant** over \$5,238, so that the credit is eliminated altogether at a **net income** of \$8,922.

Example:

Since social assistance is included in **net income**⁷⁰, where an Ontario Disability Support Program recipient lives with family and receives the standard boarder rate of \$708/month, or \$8,496/year, while a family member would be able to make the Infirm Dependant Claim with respect to the ODSP recipient, it would be very limited in value. The amount - \$8,496/year - is only slightly below the federal limit of \$8,860 and the provincial limit of \$8,922. However, as discussed in the next Part of this paper, the taxpayer would be able to claim the full Caregiver Credit with respect to this **dependant**.

(5) Caregiver Credit

Introduced in the 1998 taxation year, the Caregiver Credit is claimed by taxpayers who provide support to certain **infirm** dependent relatives 18 or over who reside with them,

⁶⁸ The *ITA*, s. 118(1)(d), states that the Infirm Dependant Credit may be claimed with respect to "**dependants**", and goes on to provide a specific definition of this term in s. 118(6) which includes aunts, uncles, nieces or nephews, and persons standing in this relationship to the taxpayer's spouse or common-law partner. 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!

⁶⁹ *ITA*, ss. 118(1)(e), 118(4)(c).

⁷⁰ See the discussion in Part B(1)(a) of this paper.

or to parents or grandparents over 65 who need not be **infirm**. It is an alternative claim to the Infirm Dependant Credit. Only one of the two credits may be claimed with respect to a dependant. The Caregiver Credit is a personal non-refundable credit, 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 Infirm Dependant Credit, the level of **net income** of the dependant at which the credit is reduced is considerably higher than for the Infirm Dependant Credit. If the Caregiver Credit is available, then, it should be claimed in preference to the Infirm Dependant Credit.

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.

The Caregiver Credit may be claimed by a taxpayer who maintains a self-contained domestic establishment, 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**: a child or grandchild, brother, sister, aunt, uncle, niece, or nephew,⁷¹
- a parent or grandparent of the taxpayer 65 or over⁷², 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.

The Caregiver Credit claim requires that the dependant reach her or his 18th birthday before the end of the year. A parent or grandparent who reaches the 65th birthday during the taxation year is eligible without showing **infirmity**.

A taxpayer may combine a claim for the Caregiver Credit with a claim for the Amount for an Eligible Dependant, 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 Amount for an Eligible Dependant claim is subtracted from the Caregiver Credit claim. The effect is that the taxpayer is entitled only to the larger of the two claims.⁷³

For 2003, the federal value of the Caregiver Credit is 16% of \$3,663, which provides a maximum federal tax reduction of \$586. The \$3,663 amount on which the credit is based is reduced by the **net income** of the **dependant** over \$12,509, so that the credit is eliminated altogether at a **net income** of \$16,172. The credit amount and the income threshold at which the credit starts to be reduced are fully indexed to inflation.

⁷¹ The *ITA*, s. 118(1)(d), states that the Infirm Dependant Credit may be claimed with respect to "**dependants**", and goes on to provide a specific definition of this term in s. 118(6) which includes aunts, uncles, nieces or nephews, and persons standing in this relationship to the taxpayer's spouse or common-law partner. But for the Caregiver Credit, the same result is achieved more simply by listing the wider class of relatives!

⁷² A parent or grandparent who reaches the 65th birthday during the taxation year is eligible.

⁷³ *ITA* 118(1)(e), 118(4)(c).

The Ontario provincial value of the credit is 6.05% of \$3,684, which provides a maximum provincial tax reduction of \$223. The \$6,684 amount on which the credit is based is reduced by the **net income** of the **dependant** over \$12,606, so that the credit is eliminated altogether at a **net income** of \$16,290.

Example:

Although social assistance is included in **net income**⁷⁴, where an Ontario Disability Support Program recipient lives with family and receives the standard boarder rate of \$708/month, or \$8,496/year, a family member would be able to make the full Caregiver Credit claim with respect to the ODSP recipient. \$8,496/year is below the federal threshold of \$12,509 and the provincial threshold of \$12,606.

(6) Disability Tax Credit (Disability Amount)⁷⁵

The Disability Tax Credit (DTC), also referred to as the "Disability Amount" in CCRA publications, is a non-refundable credit available to taxpayers with disabilities who have a severe and prolonged mental or physical impairment, the effect of which is a marked restriction in their ability to perform a basic activity of daily living. Persons who require extensive therapy to sustain a vital function are also eligible, even if there is no marked restriction. 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**.

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 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 CCRA requests that this be done, or the previous certificate stated an anticipated time limit for the disability which ended prior to the taxation year in question.

⁷⁴ See the discussion in Part B(1)(a) of this paper.

⁷⁵ Because of the importance of the DTC, it is the subject of a separate article by Bill Holder in these materials, entitled "Introduction to the Disability Tax Credit", which covers the DTC in much more detail than we shall in the present paper.

(a) *Medical Eligibility for the DTC*

To qualify for the DTC, a Disability Tax Credit certificate (Form T2201)⁷⁶ 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. The questions asked of medical practitioners and other health professionals on the T2201 form in effect set out CCRA's position as to what is required to qualify for the DTC.

The health professionals who can certify impairments by completing the DTC T2201 form are:

- medical doctors, with respect to all types of impairments,
- optometrists, with respect to sight impairments,
- speech-language pathologists, with respect to speech impairments,
- audiologists, with respect to hearing impairments,
- occupational therapists, with respect to mobility impairments, and impairments in feeding and dressing, and
- psychologists, with respect to impairments in perceiving, thinking and remembering.⁷⁷

The health professional must be authorized to practice in the Canadian province or territory, or in another jurisdiction in which the individual resides.⁷⁸

Medical eligibility for the DTC⁷⁹ as certified using the T2201 form 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 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 the T2201 form. It is not an insured service within OHIP, nor does CCRA provide funding for completing the forms. The person with

⁷⁶ As noted in Section A(2) of this paper, at the time of writing this paper the DTC form is being revised substantially by CCRA for the 2003 taxation year.

⁷⁷ *ITA*, s. 118.3(1)(a.2)

⁷⁸ *ITA*, s. 118.4(2)

⁷⁹ The term "medical eligibility for the DTC" is used here to indicate that the person has a severe and prolonged impairment leading to a marked restriction in an activity 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.

a disability, or the family, must either 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.⁸⁰

There is no age restriction on eligibility for the DTC. A child born in the taxation year may be eligible, and so may be a senior. However, as we shall see, the age of the person is a factor to be considered in determining whether the person has a severe and prolonged impairment leading to a marked restriction in an activity of daily living.

Eligibility for the DTC requires that there be an impairment which is "severe" and "prolonged", leading either to a "marked restriction" in an activity 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 impairment" is essentially that it is an impairment leading to a marked restriction in an activity 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 difficult 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 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.

We now consider the "marked restriction" requirement. Subsection 118.1(4)(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."

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

⁸⁰ 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. The role of health professionals in disputed claims is discussed in more detail in Sections B(3) and B(4) of this paper.

difficult to assign a clear and precise meaning to whether the inability to function is present "all or substantially all of the time".⁸¹

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 practically 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 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.

A person who is "blind" qualifies as having a "marked restriction", if the blindness is certified by a medical doctor or optometrist. On the T2201 form, the question asked of the 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 is 20/200 (6/60) or less with the Snellen Chart or an equivalent, or when the greatest diameter of the field of vision in both eyes is 20 degrees or less."⁸²

For limitations in activities of daily living in areas other than seeing, 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) perceiving, thinking and remembering,
- (ii) feeding and 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

⁸¹ CCRA has, in the past, interpreted "all or substantially all of the time" to mean "90% of the time", but it is far from clear how such a percentage test can be applied in practice to a person with an episodic or variable disability.

⁸² This definitional test of "blindness" is used in a number of statutes and regulations, both federal and provincial/territorial, throughout Canada.

(vi) walking, and

(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.

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, the individual must have a marked restriction in one of the specific functioning areas listed.

Specific questions are used on the T2201 form 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.

However, as discussed in Part A(2) of this article, the T2201 form has undergone substantial revision for the 2003 taxation year as a result of a CCRA consultation process with disability organizations and organizations representing health professionals, and this revision will address at least some of the concerns about the questions. The new T2201 form sets out in more detail the criteria for each of the specific functioning areas listed, using more carefully worded questions, giving additional explanatory notes, and providing examples. The clear intent of the new form is to reflect more clearly 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 T2201 form carefully, and to ensure that your client's health practitioner who is completing the T2201 is aware that the form is different in some key respects than in previous years. You should explain to the health practitioner that the new T2201 form for 2003 has been re-designed carefully to better reflect the law, and ask her or him to consider the questions carefully with respect to your client.

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

The area of "perceiving, thinking and remembering" has been especially challenging for both CCRA and for doctors and psychologists. People with severe mental health disabilities, developmental disabilities, learning disabilities, Alzheimer's disease, and acquired brain injuries all continue to "perceive, think and remember". Typically their cognitive abilities are impaired in certain respects, which may impact in a profound way on their ability to care for themselves and manage their own affairs, but it is not easy to define this type of cognitive dysfunction, or to reduce the assessment of whether it constitutes a "marked restriction" to a few straightforward questions.

As well, the impact of these mental disabilities is often most significant in areas of cognitive and psychological functioning such as judgment, motivation and learning, which go beyond the *ITA* listing of "perceiving, thinking and remembering". If the person requires ongoing supervision in order to function on a day-to-day basis, or if there is an obvious impact of the mental disability such as an inability to leave the house, it is generally helpful if the health professional notes this in the "Effects of Impairment" section of the T2201 form.

With respect to the other activities of daily living, which are more physically oriented, it is often important to note that s. 118.1(4)(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 T2201 form for 2003: "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". Previously, there was a "yes/no" question on the form which asked whether the patient could walk 50 metres on level ground. The change in wording gives a somewhat different indication of what CCRA considers a "marked restriction" in walking (although the legislation has not changed).

The eligibility of many persons with significant hearing or speaking disabilities for the DTC is limited by the qualifications 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 to the individual" should not be interpreted to be limited to a family member or close friend who knows the person extremely well.

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, CCRA makes it clear in its publications, including the T2201 form, 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 effect of the therapy is to alleviate or avoid the marked restriction. Subsection 118.3(1)(a.1) of the *ITA* provides that where an individual has a severe and prolonged mental or physical impairment, and:

the effects of the impairment 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

(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.⁸³ The specific requirement that therapy be provided at least three times a week for not less than 14 hours limits eligibility for the DTC on this basis to persons with disabilities with conditions requiring extensive ongoing therapy, such as kidney dialysis.

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

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

For 2003, the federal value of the DTC credit is 16% of \$6,279, which provides a maximum federal tax reduction of \$1,005. The credit amount is fully indexed to inflation.⁸⁴ The Ontario provincial value is 6.05% of \$6,316⁸⁵, which provides a maximum provincial tax reduction of \$382.

Since the DTC is a non-refundable credit, it can only be used 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

⁸³ This provision was enacted to be effective for the 2000 and subsequent taxation years.

⁸⁴ The base amount was set at \$6,000 for the 2001 taxation year, close to a 30% increase from the 2000 level of \$4,293.

⁸⁵ Note that the Ontario DTC amount is set slightly above the federal DTC amount.

other person. 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". 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 for medical expenses. The DTC claim can be combined with an employment-, research- or study-related attendant care deduction claim (at Line 215).⁸⁶

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

While CCRA sometimes describes taxpayers as able to claim the DTC with respect to family members who are dependent on them, its publications also speak of 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 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.⁸⁷ 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 only claim a transfer of the DTC 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 Amount for an Eligible

⁸⁶ 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.

⁸⁷ 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.

Dependant (Line 305), the Infirm Dependant Amount (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 Amount for an Eligible Dependant (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, 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 taxpayer⁸⁸
 - **wholly dependent** for support on the individual, or the individual and the other person or persons⁸⁹
 - 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**⁹⁰.)

- ✓ a taxpayer may claim a transfer of the DTC from a **dependant** with respect to whom the taxpayer could have made an Infirm Dependant Claim (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**).

⁸⁸ See the discussion of **related** in Part A(7)(i) of this paper. Essentially, the *ITA* definition of who is **related** to the taxpayer limits the Amount for an Eligible Dependant 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 Dependant 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.

⁸⁹ As discussed in Part A(7)(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.

⁹⁰ See the discussion of **mental or physical infirmity** in Part A(7)(j) of this paper.

A taxpayer cannot claim a transfer of the DTC if the **spouse** or **common-law partner** of the person eligible for the DTC is already claiming either the DTC or any other non-refundable tax credit (other than medical expenses) with respect to the person.⁹¹

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 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 Amount for an Eligible Dependant claim, the Infirm Dependant Claim, and the Caregiver Credit claim, the transfer of the DTC depends on the relative's **taxable income** rather than **net income**. Thus, social assistance income such as ODSP, and workers' compensation income such as WSIB, will not affect eligibility for the DTC transfer.⁹²

The starting point for calculating a transfer of the federal DTC claim is the 2003 level of \$6,279 for this claim.⁹³

[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.⁹⁴

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.

⁹¹ *ITA*, s. 118(2)(a).

⁹² See the discussion of social assistance and workers' compensation income in Parts B(1)(a) and B(1)(b) of this paper.

⁹³ See Part B(6)(b) of this paper above.

⁹⁴ 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 Amount for an Eligible Dependant (Line 305), the Infirm Dependant Amount (Line 306), CPP or QPP Contributions (Line 308), Employment Insurance Premiums (Line 312), the Pension Income Amount (Line 314), and the Caregiver Amount (Line 315), and the Disability Tax Credit amount (Line 316). 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).

The starting point for calculating a transfer of the Ontario DTC claim is the 2003 level of \$6,316 for this claim.⁹⁵

[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 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 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.⁹⁶

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.

Example:

Although social assistance is included in **net income**, it is not included in **taxable income**⁹⁷. Accordingly where an Ontario Disability Support Program recipient lives with family and receives the standard boarder rate of \$708/month, or \$8,496/year, a family member who provides **support** to the ODSP recipient would ordinarily be able to get a transfer of the full DTC claim.

(7) Disability Tax Credit 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 the child reaches her or his 17th birthday.⁹⁸ The DTC Supplement increases the value of the DTC to those families.

The DTC Supplement is set out at s. 118.3(1) of the *ITA*, 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 2000.⁹⁹ For 2003, the Supplement provides an additional maximum federal tax reduction of up to \$586, or 16% of \$3,663. The \$3,663 supplement amount is reduced by the amount of child care expenses or attendant care expenses claimed by anyone with respect to the child over \$2,145. Both this threshold and the supplement amount itself are fully indexed to inflation.

⁹⁵ See Part B(6)(b) of this paper above.

⁹⁶ The list of personal credits that are included in the calculation for this purpose is the same as that given at footnote 94 for the federal calculation.

⁹⁷ See the discussion in Part B(1)(a) of this paper.

⁹⁸ CCRA describes this by saying that the "child is under 18 at the end of the year".

⁹⁹ The base amount was set at \$3,500 for the 2001 taxation year.

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 Part¹⁰⁰ 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 2003, both the Ontario Supplement amount of \$3,684, and the threshold of \$2,158 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 the lowest Ontario marginal rate of 6.05%, so the maximum reduction due to the DTC Supplement is \$223.

(8) Child Disability Benefit

The Child Disability Benefit ("CDB") is a new provision, announced in the 2003 Federal Budget. It is available to low-income and modest-income families who qualify financially for the Canada Child Tax Benefit (CCTB), and who have a child whose disability makes her or him eligible for the DTC. The CDB has a maximum value of \$1,600 tax-free annually, and is included as a supplement to the family's monthly CCTB payments. It will be paid for the first time in March, 2004, but the payments made at that time will be retroactive to July, 2003 to families who qualify.

The Child Disability Benefit has not yet been enacted into the Canada Child Tax Benefit section of the *ITA*.¹⁰¹

The full \$1,600 CDB will be provided for each eligible child to families having a **net income** less than the level at which the National Child Benefit (NCB) supplement is fully phased out (that is, \$33,487 in July 2003 for families having three or fewer children). Beyond that income level, the CDB will be reduced based on family income at the same rates as the NCB supplement.¹⁰² As of the date of writing this paper, Ontario has not announced any direct response to this federal initiative.

¹⁰⁰ Part B(6)(c).

¹⁰¹ S. 122.6

¹⁰² According to calculations provided by CCRA for the web site of the Technical Advisory Committee on Tax Measures for Persons with Disabilities: The full \$1,600 CDB will be provided for each eligible child to families having a net income below the amount at which the National Child Benefit (NCB) supplement is fully phased out (that is, \$33,487 in July 2003 for families having three or fewer children). Beyond that income level, the CDB will be reduced based on family income at the same rates as the NCB supplement. For the 2003-2004 benefit year, benefits will be reduced by 12.2 per cent for one disabled child, 22.7 per cent for two disabled children, and 32.6 per cent for three or more disabled children. Accordingly, the CDB will be reduced to zero as net family income reaches \$46,602 for a family caring for one disabled child, \$47,584 for a family caring for two disabled

Ontario has a separate program for working poor, as opposed to social assistance, families, called the "Ontario Child Care Supplement for Working Families".¹⁰³ It does not have any provision relating to the disability of a child.

(9) Ontario Tax Reduction for Taxpayers with Dependants 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 **dependants** 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 value of each claim for a child or dependant in 2003 is \$334, 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.¹⁰⁴ That is, the claim may be made twice with respect to the same **child**.

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

The Medical Expense Tax Credit (METC) is claimed by taxpayers who have medical expenses over a certain **net income** threshold. What is claimable as a medical expense depends on whether it is included in a detailed list of expenses created by the *ITA* and *Regulations*.

A number of disability-specific items and services, not necessarily "medical" in nature, have been included in the list of "medical expenses", especially over 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 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 Regulation 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" (IT519R2-CONSOLID), which is very useful with respect to the details of METC claims.

children, and \$48,211 for a family caring for three disabled children. The CDB amount and income thresholds will be indexed to inflation. See the Technical Advisory Committee web site at:

http://www.disabilitytax.ca/dtm/benefits_ts-e.html

¹⁰³ There is a brochure for this program 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

¹⁰⁴ See the reference to Lines 6097 and 6269 at Step 4 on the Ontario Tax form.

Medical expenses are claimed at Line 332 of the federal Return, and at Line 5876 of the Ontario return.

Taxpayers may claim the medical expenses that they, their spouses or common-law partners incur, as well as, in certain circumstances, expenses incurred by specified dependent relatives. The net income of a relative other than a spouse or common law partner may reduce or eliminate the medical expense claim, however. This is because of the Medical Expenses Adjustment at Line 331 of Schedule 1 (Federal Tax) and at Line 5872 of the Ontario Tax form, using the Provincial Worksheet. If the adjustment with respect to a dependant is greater than the medical expenses claimed, it is not to the taxpayer's advantage to claim medical expenses with respect to that dependant.

For 2003, the Federal credit equals 16 per cent, and the Ontario credit equals 6.05%, of qualifying medical expenses in excess of the lesser of \$1,755 (federal) or \$1,770 (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.

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 is often limited.

Example:

A taxpayer with \$50,000 in net income spends \$10,000 on exceptional medical expenses due to a disability. Three per cent of the \$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 22.05% (16% federal and 6.05% provincial) of \$8,500, or \$1,874. While helpful, this is far from a reimbursement of the medical expenses.

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

- reasonable incremental costs relating to the construction of the principal place of residence of a person who "lacks normal physical development" or has a severe and prolonged mobility impairment (as defined by the DTC criteria), to enable to person to gain access to, or to be more mobile or functional within the dwelling
- reasonable incremental costs relating to renovations or alterations of the 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 to person to gain access to, or to be more mobile or functional within, the dwelling
- power-operated lifts or transportation equipment designed exclusively for use by or for a disabled individual to allow the individual access to different areas of a building or to assist the individual to gain access to a vehicle or to place his or her wheelchair in or on a vehicle
- a power-operated guided chair installation used in a stairway

- 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 (not to exceed \$2,000) 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 be claimed as work-related moving expenses as well)
- 20% of the cost of a van, up to a maximum of \$5,000, 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)
- devices designed exclusively to enable an individual with a mobility impairment to operate a vehicle (may be combined with the previous claim)
- telephone closed caption decoders for the deaf
- any device to aid the hearing of a deaf person including bone-conduction telephone receivers, extra-loud audible signals and devices to permit volume adjustment of telephone equipment above normal levels
- any equipment and accessory that enables a deaf or non-speaking person to make and receive telephone calls including visual ringing indicators, acoustic couplers, teletypewriters (TTY's) – also amounts paid in providing additional equipment and accessories to others in order to make telephone communications possible with those persons
- sign language interpreter fees paid to a person in the business of providing such services, for an individual with a speech or hearing impairment
- electronic speech synthesizers that enable non-speaking individuals to communicate using a portable keyboard
- optical scanners or similar devices designed to be used by a blind individual to enable him or her to read print
- synthetic speech systems, Braille printers and large print-on-screen devices that enable blind persons to utilize computers
- electronic or computerized environmental control systems designed exclusively for the use of an individual with severe and prolonged mobility restrictions (as defined by the DTC criteria)

- expenses associated with the use of a guide dog or other service animal
- 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 limit of \$1,000
- amounts paid for a person or a relative 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.

The 2003 Federal Budget adds the following disability items and services to the list of eligible medical expenses:

- the cost of real-time captioning used by individuals with a speech or hearing impairment,
- the cost of note-taking services used by individuals with mental or physical impairments,
- the cost of voice recognition software used by individuals with a physical impairment, and
- the incremental cost of gluten-free food products for individuals with celiac disease who require a gluten-free diet¹⁰⁵.

Attendant care 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 one heading. For some claims, such as full-time care in a nursing home or attendant care over \$10,000 (\$20,000 in the year of death), the medical expenses claim can only be made if the DTC claim is not made. The taxpayer must choose which of the two claims to make.

(11) Refundable Medical Expense Supplement

Introduced in 1997 as solely a Federal tax measure, the Refundable Medical Expense Supplement (RMES) 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 level. The RMES may be claimed together with the non-refundable METC by some taxpayers. 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 have higher medical expenses, including disability-specific expenses.

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

¹⁰⁵ This is part of a "package" of amendments that will affect persons with celiac disease, discussed in more detail in Part D(1)(c) and (d) below.

For 2003, the maximum supplement is the lesser of \$544 or 25 per cent of the allowable portion of expenses that can be claimed under the METC. The credit is available to workers with earnings above \$2,719. To target assistance to those with low incomes, the credit is reduced by 5 per cent of family income in excess of \$20,621. Individuals claiming the refundable supplement may also claim the non-refundable METC. This supplement is fully indexed to inflation.

(12) Attendant Care Expenses Deduction

The Attendant Care Expenses Deduction is available to taxpayers who are eligible for the Disability Tax Credit and who pay for their own attendant care to earn employment, business or research income, or to attend school. It is a deduction from **total income** used in calculating the taxpayer's **net income**.

The Attendant Care Expenses Deduction is provided for in Section 64 of the *ITA*. It is claimed using Form T929, "Attendant Care Expenses". The Form requires the name of the attendant to whom the payments are made, and the attendant's Social Insurance Number. The Form 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 CCRA.

The Interpretation Bulletin "Medical Expense and Disability Tax Credits and Attendant Care Expense Deduction" (IT519R2-CONSOLID) explains this deduction in detail at paragraphs 68-71.

Paragraph 68 of the IT519R2 notes that the deduction is available only for expenses related to "personal care". It gives as an example that providing transportation for someone to work would not qualify.

For personal care to qualify for this deduction, according to the wording of s. 64, it must be provided to "enable" the taxpayer to work, conduct research or attend school. There is no specific requirement that the attendant care be provided in the work, research or school setting, so payments to an attendant who provides personal care in the taxpayer's home to help the taxpayer get ready for the day should qualify.

There are certain restrictions on claiming the Attendant Care Expenses Deduction:

- only a taxpayer who is eligible personally for the DTC may claim this deduction, not a **person providing support to a person with a disability**;
- the attendant to whom payments are made cannot be the spouse or common-law partner of the taxpayer;
- the attendant must be 18 years of age or older;
- the deduction is limited to 2/3 of the taxpayer's **earned income**;
- for students, the maximum deduction is 2/3 of the taxpayer's earned income plus 2/3 of the lesser of (a) the taxpayer's income from other sources (up to \$15,000)

and (b) \$375 times the number of weeks of attendance at a designated educational institution or secondary school; and

- the attendant care expenses claimed have not been claimed by anyone as medical expenses.

Generally, where expenses can be claimed by a taxpayer under the Attendant Care Expenses Deduction, this will be more valuable than claiming them as medical expenses.

Under certain circumstances, as provided in Section 64.1 of the *ITA*, the Attendant Care Expenses Deduction may be claimed by a taxpayer who lives outside Canada for all or part of the year.

As relatively few persons with disabilities who qualify for the DTC have sufficient income to pay their own attendants, the Attendant Care Expenses Deduction is available to a very limited number of taxpayers.

(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 have a severe and prolonged impairment that markedly restricts the employee's ability to perform a basic activity of daily living. That is, 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 2003-2004*¹⁰⁶, paragraph 2.4, 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 section, attendant care must be personal in nature. The *Employers' Guide Taxable Benefits 2003-2004*, paragraph 2.4, gives as examples "readers for persons who are blind, signers for persons who are deaf, and coaches for persons who are intellectually impaired".

¹⁰⁶ On the CCRA web site at: <http://www.ccra-adrc.gc.ca/E/pub/tg/t4130/README.html>

Allowances and benefits exempted from taxation under this provision must be "reasonable". Paragraph 71 of the IT519R2 states that "an 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.

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

Subsection 20(1)(qq) covers 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. While modifications to an elevator are covered, the full cost of purchasing and installing an elevator would not be covered.

Under the regulations made pursuant to s. 20(1)(qq), employers and businesses are also 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 devices for individuals who have a hearing impairment, and
- a disability-specific computer software or hardware attachment.

There is also an Ontario provincial Workplace Accessibility Tax Incentive ("WATI"), introduced in 1998, to support businesses that hire new employees with a disability. This tax incentive applies to building modifications such as the installation of ramps, modification of elevators, bathrooms and doorways. It also includes the purchase of devices or equipment that is required by an employee to perform job duties.

The legislation covering the WATI is s. 13.3 of the Ontario *Corporations Tax Act*,¹⁰⁷ s. 8(15.3) and s. 8.4 of the Ontario *Income Tax Act*¹⁰⁸.

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

The Child Care Expenses Deduction is available to single parents and two-earner families who spend money on child care in the course of earning employment or business income, pursuing education or performing research. The rules regarding the Child Care Expenses Deduction 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 child care expense deduction claim is increased for a child who has a disability.

The Child Care Expenses Deduction is covered primarily by Section 63 of the *ITA*. The deduction is claimed using Form T778, the "Child Care Expenses Deduction". There is an Interpretation Bulletin, IT-495R2, dealing with "Child Care Expenses".

The usual maximum Child Care Expenses Deduction 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 Disability Tax Credit, the maximum claim is \$10,000 regardless of age. A child who qualifies for the DTC can be over 16, and the maximum claim to the parent or other **supporting person** is still \$10,000. If a child is over 16 and is **infirm**, but does not qualify for the DTC, a maximum claim of \$4,000 may be made under the Child Care Expenses Deduction (i.e. the same maximum claim as if the child were aged 7-16).

(16) Increased Availability of the Child Care Expenses Deduction Where One Parent has a Disability

As we saw in the overview given of the Child Care Expenses Deduction in the previous Part, 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 deduction. 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 Child Care Expenses Deduction 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 Child Care Expenses Deduction 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".

¹⁰⁷ *Corporations Tax Act*, R.S.O. 1990 c. C-40, as amended.

¹⁰⁸ *Income Tax Act*, R.S.O. 1990 c. I-2, as amended.

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 a Child Care Expenses Claim for that period on a *pro rated* 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 Disability Tax Credit (Disability Amount), or
- they are limited to part-time studies by a mental or physical impairment, as certified by a medical doctor, optometrist, audiologist, occupational therapist, psychologist, or speech-language pathologist.

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. The student's educational institution completes and gives the student either Form T2202, the "Education Amount Certificate", or Form T2202A, the "Tuition and Education Amounts Certificate", to confirm the period in which the student was enrolled in a qualifying program. Form 2202, or 2202A, is attached to the return.

For students not reasonably expected to carry a full-time course load because of a mental or physical impairment, this is certified by the student's health professional at Part 3 of Form 2202 or 2202A.

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

(18) Accessing the Lifelong Learning Plan for Part-Time Study

The Lifelong Learning Plan permits RRSP annuitants, who are residents of Canada, to access their RRSP savings on a tax-free basis up to a \$20,000 lifetime maximum to finance full-time studies by themselves, or their spouse or common-law partner. (The Lifelong Learning Plan cannot be used to finance the education of children or other relatives.) There is a \$10,000 annual maximum as well.

Part-time students with disabilities may access the Lifelong Learning Plan on the same basis as they qualify for the Education Amount discussed in the previous section. That is, they may either qualify for the DTC, or be certified by a health professional in the

appropriate categories to be not reasonable expected to carry a full-time course load because of a mental or physical impairment.

Funds withdrawn from an RRSP under the Lifelong Learning Plan 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 3 months.) The obligation to repay, however, will start 5 years after the withdrawal of the funds in any event.

(19) Extended Home Buyers' Plan for Persons who Qualify for the Disability Tax Credit

The Home Buyers' Plan generally allows first-time home buyers to withdraw up to \$20,000 from a Registered Retirement Savings Plan (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).

As of the 1999 taxation year, persons with disabilities who qualify medically for the DTC as having a severe and prolonged impairment leading to a marked restriction in activities of daily living, 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. 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 would qualify for the DTC as having a severe and prolonged impairment, leading to a marked restriction in an activity of daily living. A health professional has completed the T2201 form on Fred's behalf. 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 condominium.

(20) 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*.

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

Upon the death of the annuitant under a registered retirement savings plan (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 on RRSP or RRIF distributions made after death is provided in certain circumstances. 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 **infirmary**. In this case, the RRSP or RRIF proceeds may be transferred without tax to the RRSP of the child, or may be used to purchase an immediate life annuity.

For taxation years 2002 and earlier, a child or grandchild was presumed to be financially dependent if the child's **net income** for the year preceding the year of death was below the basic personal amount for that year. A child with an income above this amount may also have been considered to be financially dependent, but only if the dependency could be demonstrated based on the particular facts of the situation. In recognition of the need to provide ongoing care for dependent infirm children and to provide supporting parents and grandparents with greater certainty in their estate planning, the Federal Budget 2003 increased the level of income used to determine the presumption of financial dependence of an infirm child or grandchild from \$7,634 to \$13,814 (indexed after 2003).

As of the date of writing this paper, this change had not yet been enacted into law. The existing *ITA* provisions dealing with rollovers of RRSP's and RRIF's are:

- s. 60(1) – 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 to an RRSP
- s. 146.3(6.2) – rollover to an RRIF

However, the existing provisions do not contain a separate "financial dependence" test for children and grandchildren who are **infirm**. There is only a general "financial dependence" test for all children and grandchildren, so the 2003 Budget change will require a new provision.

This change is important to families who have dependent adult sons and daughters receiving ODSP¹⁰⁹, as prior to the increase in the threshold, the sons and daughters would have been presumed not to be "financially dependent" because of the level of ODSP income. As noted previously in this paper¹¹⁰, for adult sons and daughters living at home with their parents and receiving ODSP, the monthly income benefit is \$708, or \$8,496 annually. Typically the income benefit is higher where the sons and daughters are living independently as tenants or home owners.

C. Disputes Involving Disability-Related Tax Claims

(1) Leading Cases on the Disability Tax Credit

Many cases on the Disability Tax Credit have been argued in the Tax Court of Canada, and a few have been reviewed judicially by the Federal Court of Appeal.¹¹¹ 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.¹¹² 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.

A case which is often cited as to the general principles governing the Disability Tax Credit is the decision of Judge Bowman of the Tax Court in *Radage*.¹¹³ With respect to the DTC, the Judge stated, in a frequently-quoted passage:

"The legislative intent appears to provide a modest amount of tax relief to persons who fall within a relatively restricted category of markedly 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.

¹⁰⁹ Where RRSP or RRIF funds are rolled over to an ODSP recipient, a trust must be established to preserve the ODSP entitlement. For details, see the author's article "Estate Planning for Beneficiaries with Disabilities in Ontario: Inheritances, Trusts and the Ontario Disability Support Program" in these materials.

¹¹⁰ For example, at the end of Part B(3).

¹¹¹ No DTC case has yet reached the Supreme Court of Canada.

¹¹² *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, as amended, s. 18.28.

¹¹³ *Radage v. Canada*, [1996] 3 C.T.C. 2510, 96 D.T.C. 1615, [1996] T.C.J. No. 730 (T.C.C.).

...

...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. ..."14

This passage was expressly approved by Létourneau J.A. of the Federal Court of Appeal in *Johnston*.¹¹⁵

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 anosia, 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."¹¹⁶

This is another passage often cited in cases dealing with limitations related to "perceiving, thinking and remembering".

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 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

¹¹⁴ *Radage*, paragraph 45.

¹¹⁵ *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.).

¹¹⁶ *Radage*, paragraph 45.

shows 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"). The most recent case from the Federal Court of Appeal indicates that there is a limited power in the court to correct a wrongly-completed certificate.¹¹⁷

(2) Leading Cases on the Medical Expense Tax Credit

As with cases on the DTC, cases on the medical expense credit are typically 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, 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.

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*.¹¹⁸ In *Collins*¹¹⁹, 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 considerable guidance in other cases dealing with this issue. In *Attas*¹²⁰, 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*¹²¹, an air conditioner purchased by the spouse of a person with multiple sclerosis was found to have been "designed to assist a crippled individual in walking" within the meaning of subsection 5700(i) of the *Regulations* and its cost was therefore deductible as a medical expense. In *Williams*¹²², the court allowed as medical expenses the cost

¹¹⁷ *Buchanan v. Canada*, 2002 D.T.C. 7397 (F.C.A.). See the paper by Bill Holder in these materials for more detail on this issue, and other court decisions on the DTC.

¹¹⁸ 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."

¹¹⁹ *Collins v. The Queen*, (1998) 3 CTC 2980.

¹²⁰ *Attas v. The Queen*, Tax Court of Canada 1999-3793-IT-I; 1999-3794-IT-I.

¹²¹ *Brown v. Minister of National Revenue* (1994), 95 DTC 5126 (Fed. Ct., T.D.) Subsequently the *ITA* and *Regulations* were amended to permit a 50% claim for air conditioners required for medical reasons.

¹²² *Williams v. The Queen*, [1998] 1 C.T.C. 2813.

of a chemical free mattress, and removing carpets and replacing the same with hardwood flooring. In *Crockart*¹²³ 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.

(3) 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 specifically to pay for these 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*¹²⁴ and *Wignall*¹²⁵ cases, the *Charter* and the *Canadian Human Rights Act*¹²⁶ were used to challenge the taxation of the BSWD as a violation of the equality rights of persons with disabilities, but both cases have thus far been unsuccessful.

(4) The Process of Appealing a DTC, METC or other Disability-Related Tax case – Strategic Considerations

A discussion of the tax appeals process is beyond the scope of this paper. A basic overview of the process is given in CCRA's pamphlet "Your Appeal Rights Under the Income Tax Act" (P148).¹²⁷

Here we will only discuss a few strategic considerations relevant to Disability Tax Credit (DTC) or Medical Expense Tax Credit (METC) cases.

If your client has been denied the DTC, the first step is to obtain the DTC certificate (T2291 form) 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

¹²³ *Crockart v. The Queen*, [1999] 2 C.T.C. 2409

¹²⁴ *Simser v. R.* (22 May 2003) 2003TCC366 (Tax Court of Canada).

¹²⁵ *Wignall v. Canada (Department of National Revenue)* [2001] C.H.R.D. No. 9, CHRT, aff'd F.C.A. 2003 FC 1280

¹²⁶ R.S.C. 1985, c. H-6, as amended

¹²⁷ Found on the CCRA web site at:

<http://www.ccradrc.gc.ca/E/pub/tg/p148/README.html>

See also Bill Holder's article on the Disability Tax Credit in these materials.

given that there is a new DTC form for 2003, 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 CCRA 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 CCRA. 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 1985. At the same time, if there is weak medical evidence that your client met the DTC criteria several years ago, for example, it may make getting the credit currently more difficult if you require CCRA 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. New Developments and Law Reform Initiatives

(1) Review of Changes made by the 2003 Federal Budget

In the 2003 Budget, the government of Canada announced a number of changes to the *ITA* provisions dealing with disability.¹²⁸ While these changes have not yet been enacted into law, as is its usual practice CCRA will no doubt include them as "proposed changes" in the 2003 tax forms, in anticipation of the subsequent passage of the legislation.

(a) *Introduction of the Child Disability Benefit (CDB)*

¹²⁸ Details of these changes are set out in the 2003 Budget Plan. See Chapter 4, "Investing in Canadian Families and Their Communities", and Annex 9, "Tax Measures: Supplementary Information and Notice of Ways and Means Motion". The Budget Plan is on the Department of Finance web site at: <http://www.fin.gc.ca/budget03/bp/bptoce.htm>

The Child Disability Benefit was discussed in Part B(8) of this paper. As noted there, it is a supplement to the Canada Child Tax Benefit for families whose child qualifies for the Disability Tax Credit. The Budget Plan notes that "this measure will bring maximum total support under the CCTB to \$4,232 in July 2003, growing to \$4,982 in July 2007 for a child age 7 or over with a disability".

The Budget Plan also states that "the Government will work with provinces and territories to ensure that families receiving income support from the province or territory will realize the full benefit of the new Child Disability Benefit". Several provinces, including Ontario, have previously "clawed back" the full amount of the CCTB from families receiving social assistance. That is, the government of Ontario reduced the payments of parents receiving Ontario Works and ODSP by the full amount of the CCTB, so their income level was not increased by the CCTB. The Budget Plan statement indicates that the government of Canada will negotiate with the provinces and territories to "pass through" the CDB to social assistance families. No public announcement on this issue is available as of the date of writing this paper.

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

As discussed in Part B(21) of this paper, the 2003 Budget increased the threshold for the presumption of dependence to qualify for this RRSP/RRIF rollover from \$7,634 to \$13,814, where a child or grandchild is dependent by reason of infirmity.

(c) *Clarifying Eligibility for the DTC with respect to Feeding and Dressing*

In the 2003 Budget, the federal government made changes to the DTC eligibility criteria with respect to feeding and dressing. The changes, and the reasons for them, are set out as follows in Annex 9 to the Budget Plan:

In March 2002, the Federal Court of Appeal rendered a decision that has been interpreted as expanding eligibility for the DTC to individuals who, because of food allergies or other similar conditions, must spend an inordinate amount of time to shop for and prepare suitable food. Such an expansion of eligibility goes far beyond the intent of the DTC and could increase the fiscal cost significantly.

Draft amendments to clarify the DTC eligibility criteria were released on August 30, 2002. On November 29, 2002, the Minister of Finance announced that the Department of Finance would consult further to develop revised proposals to deal with the issues arising from the court decision. The budget proposes the following three measures relating to the DTC.

The first measure ensures that individuals markedly restricted in either feeding or dressing themselves will continue to qualify for the DTC. This measure was originally put forward in the proposed changes released last August, and follows from a

recommendation of the Standing Committee on Human Resources Development and the Status of Persons with Disabilities.

The second measure specifies that the activity of "feeding oneself" does not include any of the activities of identifying, finding, shopping for or otherwise procuring food, or the activity of preparing food to the extent that the time associated with that activity would not have been necessary in the absence of a dietary restriction or regime. Accordingly, individuals who are markedly restricted in their ability to prepare a meal for reasons other than a dietary restriction (such as severe arthritis) will continue to be eligible for the DTC.

The third measure specifies that the activity of "dressing oneself" does not include the activities of finding, shopping for and otherwise procuring clothes.

These measures contribute to ensuring that the DTC continues to be provided to those most in need. These amendments are proposed to apply to the 2003 and subsequent taxation years.

The Federal Court of Appeal decision referred to is the *Hamilton* case¹²⁹, in which the Court found that a taxpayer who had celiac disease was markedly restricted in feeding because he had to spend an inordinate amount of time in food selection, purchasing, and preparation. The effect of the announced changes to the DTC is to reverse the decision in *Hamilton* legislatively. At the same time, the changes will clarify that a marked restriction in either one of feeding or dressing will qualify a person for the DTC – a marked restriction in both is not required.

As we shall see in the next Part of this paper, while limiting eligibility to the DTC for persons whose primary limitation is requiring a special diet, for persons with celiac disease the cost of the special diet will now be included as a medical expense, again as a result of the 2003 Federal Budget.

(d) *New Disability Items Included as Medical Expenses*

The 2003 Federal Budget expanded the list of medical expenses¹³⁰ to include three new items:

- the cost of real-time captioning, paid to persons engaged in the business of providing such services, on behalf of individuals with a speech or hearing impairment,
- the cost of note-taking services used by individuals with mental or physical impairments and paid to persons engaged in the business of providing such services, and the cost of voice recognition software used by individuals with a physical impairment (the need for these services or the software must be certified by a medical practitioner), and

¹²⁹ *The Queen v. Ray F. Hamilton*, (F.C.A.) 2002 DTC 6836, affirming 2001 DTC 3720

¹³⁰ Medical expenses are discussed in Part B(10) of this paper.

- the incremental cost associated with the purchase of gluten-free food products for individuals with celiac disease who require a gluten-free diet.

The final item addresses to some extent the extra expenses of persons with celiac disease, many of whom will not be eligible for the DTC because of the legislative reversal of *Hamilton* just discussed. However, it will not assist those who require special diets for reasons other than celiac disease.

(2) Review of Changes Proposed by the 2003 Ontario Budget

The 2003 Ontario Budget proposed improvements to the provincial tax income system for persons with disabilities and their families. Although these changes were subsequently not enacted into law by the new Government of Ontario, they are of interest and are therefore reproduced here as proposed in the Budget documents.

Increased Support for Caregivers

Ontario's tax system currently provides assistance to individuals with disabilities or infirmities and relatives who care for them through a number of non-refundable tax credits, including the disability credit, caregiver credit and infirm dependant credit. However, the care provided by individuals for an infirm spouse or common-law partner goes unrecognized by the current income tax system, as do the efforts of adult children to help their infirm parents or grandparents with modest incomes remain in their own homes.

Three enhancements are proposed to these credits, effective January 1, 2003.

First, the amounts on which these tax credits are based would be increased to \$6,637.

Second, the Budget proposes to expand the caregiver credit and the infirm dependant credit to include spouses or common-law partners who are dependent by reason of mental or physical infirmity, and to provide support to more caregivers living apart from dependent relatives.

Third, the dependant's income level at which the caregiver credit and infirm dependant credit are reduced would be raised to \$13,050, and both credits would be eliminated when the dependant's income reaches \$19,687.

This increased tax support would provide annual benefits of \$50 million to about 165,000 family caregivers and people with disabilities, providing average savings of about \$300 each.¹³¹

¹³¹ Budget Highlight Paper "Supporting our Seniors: The Right Choices", on the Ontario Ministry of Finance web site at: <http://www.gov.on.ca/FIN/bud03e/budhi2.htm>

The above description provided of the proposed changes includes some significant improvements, but also leaves some questions of interpretation open.

In the first of the three proposed changes, there is a reference to raising "these tax credits" to \$6,637, but exactly which tax credits are meant is not specified. It appears that besides the DTC, the credits to be raised to this level would include the Infirm Dependent Credit and the Caregiver Credit, which would be a very significant increase for each. Some commentators on the Ontario Budget 2003 also stated that the DTC Supplement for Children would be increased to this level, but it is not specifically mentioned in the description of the proposed changes.

The second of the three proposed changes, including spouses and common-law partners in the list of **dependants** with respect to whom the Infirm Dependant Credit and Caregiver Credit could be claimed, would be a significant advance in recognizing the circumstances of couples where one has a disability. There is also a reference to improving these credits "to provide support to more caregivers living apart from dependent relatives", but details are not provided. (This may simply be a reference to the improvement in the Infirm Dependent Credit discussed next.)

The third improvement would be to raise the **dependant's** income threshold at which the Infirm Dependant Credit and the Caregiver Credit begin to be reduced to \$13,050. This would be a modest improvement with respect to the Caregiver Credit, but a significant improvement with respect to the Infirm Dependant Credit. This change would eliminate (for purposes of Ontario tax) the difference between the calculation of the two credits, and the existing difference between the tax relief provided for an infirm **dependant** living with the taxpayer, as opposed to an infirm **dependant** not living with the taxpayer.

(3) Reports on the Disability Tax Credit and other Disability-Related Tax Provisions made by Parliamentary Committees, and the responses of the Government of Canada

During the fall of 2001, CCRA reviewed older DTC claims, and sent out approximately 106,000 letters to taxpayers who had previously had the DTC claim accepted, asking them to submit a new DTC form (T2201) to determine eligibility for the 2001 and subsequent taxation years. This action generated a considerable public response, and many complaints to members of Parliament.

One result was the creation of a coalition of disability organizations to advocate for more fairness with respect to the DTC.¹³² The coalition is coordinated by mental health activist and family member Lembi Buchanan, and continues to be very involved with this

¹³² ARCH has participated in the coalition, with the author as its representative prior to leaving ARCH in April, 2002, and Bill Holder as its representative subsequently. The author has continued to participate as an individual.

issue. Information about the DTC and related issues is maintained by Ms. Buchanan on her "Fighting for Fairness" web site.¹³³

The Parliamentary Sub-Committee on the Status of Persons with Disabilities held public hearings on the DTC issue, and considered other tax issues related to disability as well. On March 21, 2002, together with its parent committee, the Standing Committee on Human Resources Development and the Status of Persons with Disabilities, it tabled its report in the House of Commons. The report contained 16 recommendations, including the following:

- an apology by CCRA to the 106,000 Canadians who received a poorly explained letter from the Agency indicating that they were no longer eligible for the DTC, despite the fact that these individuals have been receiving this credit for anywhere between six and seventeen years,
- compensation for the expenses of those who successfully re-certify,
- no new reassessment of claimants until the certification process is revised and new procedures and forms put in place,
- immediate amendments to the *ITA*, so that it incorporates recent court decisions,
- consultations with the disability community and medical professionals to draft amendments to the *ITA* that spell out exactly the eligibility criteria for the tax credit that reflect the reality of living with a disability,
- re-designing the Form T2201 that establishes eligibility for the tax credit and streamlining the approval process,
- an educational campaign for the public, medical practitioners and tax preparers, and
- an evaluation of the Disability Tax Credit and a re-examination of all tax measures affecting persons with disabilities.¹³⁴

The government tabled its response to the Parliamentary Committee's Report on August 21, 2002. While the response indicated that an evaluation of the DTC would be conducted by CCRA starting in the Spring of 2003, generally the Report was a defense of the manner in which the DTC program was being administered.¹³⁵

¹³³ The web site address is: <http://www.disabilitytaxcredit.com/>

¹³⁴ The full report, entitled *Getting it Right for Canadians: The Disability Tax Credit* is on the Parliamentary web site at: <http://www.parl.gc.ca/InfocomDoc/37/1/HUMA/Studies/Reports/humarp07-e.htm>

¹³⁵ The response is on the Parliamentary web site at: <http://www.parl.gc.ca/information/about/process/house/GeneralInformation/GovtRsp7th-e.pdf>

Unsatisfied with this response, the Parliamentary Committee and Sub-Committee released a second report on the DTC and related concerns on December 11, 2002.¹³⁶ This report contained seven additional, more specific, recommendations.

In response to the concerns raised, in the 2003 Federal Budget the Government announced the appointment of the Technical Advisory Committee on Tax Measures for Persons with Disabilities, to conduct a review of the DTC and other tax provisions related to disability. The Technical Advisory Committee and its mandate will be discussed in Part D(4) of this paper.

As well, during the summer and fall of 2003 CCRA carried out a consultation with representatives of disability organizations and health professional organizations to redesign the DTC T2201 form, within the context of the existing legislation. The changes made to the form will be discussed in Part D(5) of this paper.

(4) The Technical Advisory Committee on Tax Measures for Persons with Disabilities

Announced in the 2003 Federal Budget, the Technical Advisory Committee was appointed in April 2003 by John Manley, Deputy Prime Minister and Minister of Finance and Elinor Caplan, Minister of National Revenue, to address issues related to tax measures benefiting persons with disabilities. There are 12 members of the Technical Advisory Committee¹³⁷, all appointed from outside government, and officials of the Departments of Finance and of National Revenue take part in the Committee's discussions of issues as well.

Further details as to the Terms of Reference of the Technical Advisory Committee, its work, and a significant amount of background information on tax provisions related to disability, can be found on the Committee's website.¹³⁸

(5) The new Disability Tax Credit Certificate (form T2201) for the 2003 Taxation Year

During 2003, CCRA conducted a consultation with representatives of disability organizations and health professional organizations regarding a re-drafting and re-organization of the DTC T2201 form, within the context of current legislation.¹³⁹ Substantial revisions to the design and wording of the form have resulted from this consultation. As of the date of writing this paper, the new DTC certificate has not been officially released by CCRA, so the changes to it can only be described in general terms:

¹³⁶ "Tax Fairness for Persons with Disabilities", on the Parliamentary web site at: <http://www.parl.gc.ca/InfoComDoc/37/2/HUMA/Studies/Reports/HUMArp1/intro-e.htm>

¹³⁷ The author is a member of the Technical Advisory Committee.

¹³⁸ The Committee's web site is: <http://www.disabilitytax.ca/>

¹³⁹ The author participated in the consultations on behalf of the Council of Canadians with Disabilities.

- specific wording changes have been made to better reflect the intent of the legislation;
- the form has been made more "user-friendly" for the health professionals authorized to complete it through the use of more detailed explanations and the inclusion of examples; and
- while the fundamental structure of the new T2201 form is the same as the previous one, it is now 8 pages in length rather than 4 (however, the qualified health professional only has to complete those sections relevant to the individual's impairment).

If your client, or your client's family member, has been denied the DTC in the past by CCRA, or her or his doctor or other qualified health professional has indicated that the person is not eligible for the DTC, as discussed in Part B(6) of this paper, it may be very important to have the matter reconsidered in light of the new T2201 form.