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# **Submissions to the Technical Advisory Committee On Tax Measures for Persons with Disabilities**

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## **Table of Contents**

- I. Introduction
- II. Disability Tax Credit
  - A. Dissonance Between the Purpose of the DTC and the Eligibility Criteria
  - B. Eligibility Criteria Should Reflect the Purpose of DTC
    - (i) Severe Impairment
    - (ii) Prolonged Impairment
    - (iii) Markedly Restricted
    - (iv) Basic Activity of Daily Living
    - (v) Perceiving, Thinking and Remembering
    - (vi) Feeding Oneself or Dressing Oneself
    - (vii) Speaking
    - (viii) Hearing
    - (ix) Eliminating
    - (x) Walking
    - (xi) Inordinate amount of time
    - (xii) Attendant and Nursing Home Care
  - C. Administration Should Reflect the Purpose of the DTC
    - (i) Vision
    - (ii) Walking
    - (iii) Hearing
    - (iv) Feeding
    - (v) Perceiving, Thinking, and Remembering
    - (vi) Life-Sustaining Therapy
    - (vii) CCRA Decision-Making
  - D. Consistent Name for the DTC Should be Chosen
  - E. Unnecessary Imposition of Application Costs upon Taxpayers
  - F. Impact of Maclsaac Decision
  - G. Convert Credit into a Deduction
  - H. Increase Public Knowledge of the DTC
  - I. Allow Transfers to Any Supporting Person
- III. Medical Expense Tax Credit
- IV. Disability Expense Tax Credit
- V. Refundable Disability Accommodation Credit
- VI. Taxation of Accommodations
- VII. Canada Pension Plan Disability Benefits
- VIII. Provincial Clawbacks of Federal Programs
- IX. Extend Mandate of the TAC
- X. Summary of Recommendations

## **I. Introduction**

These submissions take the form primarily of specific suggestions to reform the Disability Tax Credit. We have also indicated other areas in which tax measures for persons with disabilities may be, we believe, generally improved. With respect to new measures to forward disability policy through the tax system, we propose for discussion a Disability Expense Tax Credit and a Disability Accommodation Credit. We invite the Technical Advisory Committee on Tax Measures for Persons with Disabilities (“TAC”) to contact us with respect to any questions or concerns that may arise from its consideration of these submissions.

We regret that time has not permitted us to prepare submissions that are as comprehensive as we would have wished, and we thank the TAC for the extension of time granted to us with respect to submitting these suggestions.

## **II. Disability Tax Credit**

The income tax system requires that Canadians pay taxes, but only in accordance with one’s ability to pay. Non-discretionary costs associated with living with a disability in Canada reduce the ability of persons with disabilities to pay tax. The Disability Tax Credit (“DTC”) exists to offset tax payable for persons with disabilities in recognition of this reduced ability to pay tax.

The purpose, as just explained, of the DTC is not controversial. The DTC exists to fulfill the social policy of ensuring that taxes get paid only in accordance with ability to pay. There is consensus with respect to the purpose, shared by the Department of Finance, the Canada Customs and Revenue Agency (“CCRA”), and the courts.

The extra costs associated with living with a disability which are addressed by the DTC are those additional day-to-day expenses that are difficult to itemize and regarding which it would be onerous to be required to keep an accounting. The expenses can include extra costs associated with transportation, utilities, laundry, bedding, clothing, assistive devices, specialized hardware and software, home accommodations, home delivery of commercial items, and personal supports and services. The costs can be minor or major; either way, because the costs are cumulative, they are substantial.

A simple example of a day-to-day disability-related expense that is difficult to itemize is, for persons with mobility disabilities who use automobiles, vehicle maintenance. Persons with mobility disabilities may have to travel farther than persons without disabilities, on a regular basis, to reach accessible retail stores and services (e.g., grocers, doctors, dentists, optometrists, laundrettes, restaurants, hardware stores, bookstores, clothiers, and so on). Because local stores and services cannot be counted on to be accessible, persons with mobility disabilities must often drive farther than would

otherwise be necessary and consequently spend more of their resources on vehicle maintenance.

Our society could have been planned in accordance with the principles of universal design so that persons with disabilities would not have to pay many of the extra costs they are presently forced to bear, such as vehicle maintenance in the example noted above. But our society was not planned in such a way. Our society was designed without much, if any, consideration given to persons with disabilities. An unfortunate but inevitable consequence is that it is more costly for persons with disabilities to live in our society. Our society is socially constructed in a way that forces persons with disabilities to pay more to live in it.

The importance of the DTC in the *Income Tax Act* is that it recognizes and takes into account the extra costs that persons with disabilities incur in large part because our society was designed without giving consideration to their needs and interests. The DTC attempts to address and compensate for a largely social problem affecting persons with disabilities. The DTC recognizes that the day-to-day disability-related expenses incurred by persons with disabilities to live in our society reduce their ability to pay tax. The DTC addresses this reduced ability to pay tax by offsetting taxes otherwise payable. Without the DTC, persons with disabilities would be required to pay more than their fair share of tax.

Our primary submission regarding the DTC is that it is defined in the *Income Tax Act* and administered by the CCRA in a manner that is inconsistent with, and works contrary to, the purpose as just explained. The result is that many persons with disabilities, who either should be or are eligible for the DTC — because they have disability-related expenses that reduce their ability to pay tax — cannot access it and are compelled to pay more than their fair share of tax.

#### *A. Dissonance Between the Purpose of the DTC and the Eligibility Criteria*

In order to access the credit for having disability-related expenses, the *Income Tax Act* sets out eligibility criteria that, remarkably, do not address (and are not necessarily even related to) the question of whether the taxpayer incurs disability-related expenses. This is a fundamental problem. One would expect that, to gain access to a credit for disability-related expenses, one would have to meet eligibility criteria that relate to disability-related expenses. Instead of setting out eligibility criteria related to disability-related expenses, however, the *Income Tax Act* sets out criteria for determining whether the taxpayer has an arbitrarily-defined and medically-certifiable disability.

The dissonance between the purpose of the DTC and the eligibility criteria can be looked at in another way. The purpose of the DTC is to address a social problem, in which persons with disabilities are forced to pay more to live in a society that has not been planned or developed with advertence to their needs and interests. Given the social nature of the problem, one could reasonably expect eligibility criteria that inquire

with respect to the magnitude of the social problem experienced by individual taxpayers. Rather than operating in this way, the *Income Tax Act* sets out medical criteria for eligibility, and requires doctors and other health professionals to certify eligibility.

In recent years, persons with disabilities have been resisting the application of a 'medical model' of disablement to their experience of disability. The medical model of disablement is a clinical approach that locates the 'problem' of disablement in persons with disabilities themselves, rather than in their environment. Persons with disabilities believe that it is more appropriate to consider the nature of disablement through the employment of a 'social model' of disablement. The social model recognizes that there are environmental factors that cause, in whole or in part, any disablement that they experience. Inaccessible stores, for instance, cause disablement. Persons with functional limitations related to mobility would not be disabled from entering stores but for the widespread social problem in which inaccessible stores get designed and erected in the first place. In the 'social model,' the problem of disablement is located, properly, in the social environment in which persons with functional limitations live.

The *Income Tax Act* takes an inconsistent approach to the concept of disability where the DTC is concerned. The *Act*, through the DTC, rightly seeks to address a social problem faced by persons with disabilities. However, despite the employment of the social model of disability to recognize the problem, the *Act* resorts to the medical model of disability when defining eligibility for relief from this problem.

The inconsistent approach entails that some persons, who have disability-related expenses and who should, therefore, qualify for the DTC, become disqualified from the DTC if they do not meet arbitrary medical eligibility criteria.

The problem with the eligibility criteria for the DTC can be likened to the problem that would arise, for instance, if the *Income Tax Act* required taxpayers wishing to claim a tuition credit to prove not that they paid tuition but that they met criteria corresponding to a particular conception of "student." The inevitable result would be that some persons with tuition expenses would be disqualified from the credit because, although they incurred tuition expenses, they did not meet arbitrary criteria related to what constitutes a "student."

The same problem which would affect tuition-payers in the example above affects persons who incur disability-related expenses presently and seek to have their expenses recognized through the DTC. Persons with disability-related expenses, who have a reduced ability to pay tax, must prove not that they have disability-related expenses, but that they have a "disability." They must prove that they have a medical condition, in accordance with narrow criteria, in order to access the DTC.

Persons with disability-related expenses fail to comprehend — quite understandably — being denied access to the DTC, in the face of their disability-related expenses. We can

only advise such persons that their failure to comprehend is not their fault. Rather, it is the fault of an incoherent tax policy.

In order for the eligibility criteria for the DTC to fulfill the purpose of the DTC, the criteria should be amended in such a way that they ascertain whether taxpayers incur disability-related expenses. The criteria must cease to employ a medical approach to a social problem. The criteria should not be related to medical conditions. Rather, the criteria should be related to disability-related expenses.

We question why a claim for disability-related expenses would have to be certified but, if certification must continue, then it could be handed over to persons who have knowledge of the expenses incurred by persons with disabilities.

One of the problems that persons with disabilities have had with respect to being certified by medical professionals for the DTC has been the exorbitant costs charged by such professionals. Eliminating the certification process, or permitting knowledgeable persons to attest to disability-related expenses, would help to address the problem associated with the imposition of such costs onto persons with disabilities.

### ***B. Eligibility Criteria Should Reflect the Purpose of DTC***

Currently, the eligibility criteria for the DTC ensure that the purpose of the DTC is unfulfilled. That is to say, the eligibility criteria as set out in the *Income Tax Act* preclude access to the DTC for many taxpayers whose day-to-day disability-related expenses reduce their ability to pay tax. Consequently, such taxpayers end up having to pay more than their fair share of tax.

We have already made submissions regarding the incongruity between the social purpose of the DTC and the medical eligibility criteria. We urge the Technical Advisory Committee to recommend the amendment of the *Income Tax Act* so that the eligibility criteria address the social, rather than the medical, status of persons with disabilities.

It may be that the *Income Tax Act* will nevertheless retain medical eligibility criteria for the DTC. In what follows, therefore, we look at the medical eligibility criteria as they exist and discuss shortcomings. The current criteria as set out in the *Income Tax Act* are counterproductive with respect to the purpose of the DTC.

#### **(i) Severe Impairment**

The criterion that a disability be “severe” before a taxpayer is considered eligible for the DTC bears no relationship to the purpose of the DTC, which is to recognize the day-to-day extra costs of living with a disability. This criterion therefore serves to prevent taxpayers, whose disabilities are not severe but nevertheless cause them to incur day-to-day expenses, from accessing the DTC. Although their disabilities reduce their ability

to pay tax, they are precluded from accessing the tax relief afforded by the DTC. Consequently, they are compelled to pay more than their fair share of tax.

The criterion that a disability be “severe” also introduces confusion into the question of eligibility for the DTC. The nature of the confusion is twofold:

- (a) “Severe” is undefined in the *Income Tax Act* but has been interpreted to have no legal meaning separate from other eligibility criteria. “Severe” can only be interpreted to mean the same thing as being “markedly restricted” with respect to a “basic activity of daily living.” Because the word “severe” serves no separate function than other criteria in determining eligibility, it is superfluous. It is confusing, to those of us who must try to make sense of the eligibility criteria DTC, to have to deal with superfluous words contained in the *Income Tax Act*; and
- (b) “Severe” has a medical meaning and, especially because medical practitioners are required to play a role in certifying eligibility for the DTC, the use of the word “severe” in the eligibility criteria risks conflation, by medical practitioners, of the legal meaning with the medical meaning.

The problem with using eligibility criteria that are confusing is that it will inevitably result in diminished access, to eligible taxpayers, to the tax relief afforded by the DTC.

There is no legitimate policy reason for making eligibility to the DTC contingent upon proof of one’s degree of disability. The criterion that requires proof of severity acts to gratuitously hinder access to the DTC.

## **(ii) Prolonged Impairment**

The criterion that a disability be “prolonged” before a taxpayer is considered eligible for the DTC bears no relationship to the purpose of the DTC, which is to recognize the day-to-day extra costs of living with a disability. This criterion therefore serves to prevent taxpayers, whose disabilities are not prolonged — as defined in the *Income Tax Act* — but which nevertheless cause them to incur day-to-day expenses, from accessing the DTC. Although their disabilities reduce their ability to pay tax, they are precluded from accessing the tax relief afforded by the DTC. Consequently, they are compelled to pay more than their fair share of tax.

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

The requirement that a disability last for a continuous period of 12 months is unduly restrictive and prevents many persons with disabilities, who incur day-to-day disability-

related expenses, from accessing the DTC. Persons whose disabilities are cyclical, periodic, episodic, or recurrent do not fit the definition.

### **(iii) Markedly Restricted**

The criterion that a disability “markedly restrict” a taxpayer with respect to a “basic activity of daily living” before a taxpayer is considered eligible for the DTC bears no relationship to the purpose of the DTC, which is to recognize the day-to-day extra costs of living with a disability. This criterion therefore serves to prevent taxpayers, whose disabilities are not markedly restricted but which nevertheless cause them to incur day-to-day expenses, from accessing the DTC. Although their disabilities reduce their ability to pay tax, they are precluded from accessing the tax relief afforded by the DTC. Consequently, they are compelled to pay more than their fair share of tax.

In order to be considered to be “markedly” restricted, the *Income Tax Act* provides that the restriction must be present “all or substantially all of the time.” Once again, this qualification is not necessarily related to the purpose of the DTC.

The expression “all or substantially all of the time” is interpreted by both the Department of Finance and the CCRA to mean “90% of the time.” The Department of Finance and the CCRA interpret the phrase in this way because that is how the phrase is interpreted elsewhere in the *Income Tax Act*. For some reason, the Department of Finance and the CCRA believe it appropriate for the phrase, as it is interpreted with respect to dry tax concepts, to be applied to real persons with disabilities in regard to their functional limitations. We consider it insulting and inappropriate to treat persons with disabilities in this way. Furthermore, the use of a “90% rule,” as opposed to an “89% rule,” or any other rules, unjustifiably and arbitrarily prevents access to the DTC.

When one remembers that the purpose of the DTC is to recognize the day-to-day extra costs associated with living with a disability in Canada, it is difficult to make sense of the 90% rule. Why should persons, whose disabilities do not markedly restrict them 90% of the time with respect to basic activities of daily living, but who nevertheless incur substantial disability-related expenses, be denied access to the DTC?

The 90% rule, which we do not think should be applied at all, is currently applied to particular disabilities, without consideration of a cumulative effect. This means that, for a person who has an 89% restriction with respect to one disability and an 89% restriction with respect to another disability, they will not qualify for the DTC, even though their disabilities, considered together, would surpass — almost doubling — the 90% threshold. The 2001 Participation and Activity Limitation Survey (“PALS”) reported that more than 80% of persons with disabilities have multiple disabilities. It is a fact of life that most persons with disabilities live with more than one functional limitation. To consider their disabilities in isolation from one another, as the eligibility criteria for the DTC do, provides an unrealistic picture of what living with a disability means for them. It also unfairly restricts clearly eligible taxpayers from access to the DTC.

The definition of being “markedly restricted” is stated to mean “even with therapy and the use of appropriate devices and medication.” Once again, however, it is difficult to understand what the qualification has to do with the purpose of the DTC. It is hard to comprehend why therapy and the use of appropriate devices and medication should disqualify a taxpayer from accessing the DTC, if indeed they have disability-related expenses and need the tax relief provided by the DTC.

It should be noted that a taxpayer who pays for therapy, appropriate devices, and medication may, by virtue of these costs alone, need to have access to the DTC to recognize their reduced ability to pay tax. It is nonsensical to disqualify a taxpayer from the DTC because they incur disability-related costs.

We note further that the expression “with therapy and the use of appropriate devices and medication” has been interpreted to mean that it does not matter that the therapy, devices, or medication are not available (because of cost or for some other reason) to the taxpayer. It also does not matter if the therapy, devices, or medication would cause other problems (including possible adverse health consequences) for the taxpayer. This reason for being disqualified for the DTC is harsh, and acts contrarily to the purpose of the DTC.

To be “markedly restricted” in the *Income Tax Act* means, finally, that one is “unable” or “requires an inordinate amount of time” to perform an activity of daily living. Our primary concern with this qualification is that it imposes a medical test for a credit that is designed to offset a social problem. We have already addressed, however, this problem and will not belabour the point.

#### **(iv) Basic Activity of Daily Living**

As with all of the foregoing criteria, we must point out that the requirement of being restricted with respect to an activity of daily living is not necessarily related to whether a taxpayer incurs day-to-day disability-related expenses. However, at least this criterion is partly related to whether taxpayers incur disability-related expenses.

The definition of what constitutes a “basic activity of daily living,” unfortunately, is narrow. There are only a limited number of activities of daily living that are listed. For taxpayers who have restrictions related to activities of daily living that are not recognized by the definition, they are out of luck. This has been a problem for persons with breathing disabilities, for example. Fortunately for them, judges have gone out of their way to interpret the definition to somehow include “breathing” as an unlisted activity of daily living. Other taxpayers have not been so lucky.

It does not make sense for the activities of daily living to be listed in a finite fashion. If taxpayers have restrictions in unlisted activities of daily living that cause them to incur disability-related expenses, then they should be able to access the DTC.

At s. 118.4(1)(d) of the *Income Tax Act*, it is provided that “for greater certainty, no other activity, including working, housekeeping or social or recreational activity, shall be considered as a basic activity of daily living.” This exclusionary provision is inexplicably inconsistent with the purpose of the DTC, which is to recognize the extra costs associated with day-to-day living of persons with disabilities. There can be no justification for this exclusionary provision. If a person with a disability incurs thousands of dollars in disability-related expenses related to employment, housekeeping, or social and recreational activities, then their ability to pay tax is compromised as a result. Their disability-related reduced ability to pay tax should be recognized and they should be afforded the tax relief provided by the DTC.

#### **(v) Perceiving, Thinking and Remembering**

The criteria with respect to “perceiving, thinking and remembering,” although written conjunctively, are interpreted by the courts disjunctively. That is, the word “and” is read as an “or.” If medical eligibility criteria are to be retained with respect to the DTC, then we recommend that the *Income Tax Act* be amended to replace the aforementioned “and” with an “or” so that there can be no further confusion with respect to the meaning of the perceiving, thinking, and remembering criteria. If it can be established that a taxpayer is unable to think, then they will qualify for the DTC regardless of whether they are also unable to perceive and remember. Surely this is a sensible way to read the *Income Tax Act*. It would not make sense for these criteria to be read as a package, requiring the demonstration of not only an inability to perceive, but also an inability to think *and* an inability to remember, before qualification for the DTC is considered established.

The aforementioned criteria with respect to having a continuous disability that restricts 90% of the time have wreaked havoc on claims to the DTC made by persons whose disabilities relate to perceiving, thinking, or remembering. Persons living with mental health disabilities are disqualified, for example, from the DTC if their disability is cyclical and restrictive only 50% of the time. This is true even if the nature of their disability requires them to live under supervision 100% of the time. It is also true even if, during the 50% of the time during which they are actively living with a restriction, they make decisions that cause the loss of tens of thousands of dollars.

Part of the problem that taxpayers face in qualifying for the DTC under the criteria for perceiving, thinking, or remembering is that the other criteria disqualify them. Another problem is that their functional limitations do not seem to be taken into account in the list of activities of daily living.

Although the *Income Tax Act* does not take into account the functional limitations associated with perceiving, thinking, or remembering, the Federal Court of Appeal has found that it is appropriate to consider such functional limitations nonetheless.

In the case of *Canada (A.G.) v. Buchanan* (2002), 29 N.R. 152, 3 C.T.C. 301, 2002 D.T.C. 7397 (F.C.A.), the court stated (at paragraph 27) that to determine eligibility consideration must be given to a taxpayer's ability to "perform the necessary mental tasks required to live and function independently and competently in every day life."

We recommend, therefore, if medical eligibility criteria are retained in the *Income Tax Act*, that a functional test be employed to determine the extent of limitations associated with perceiving, thinking, and remembering.

#### **(vi) Feeding Oneself or Dressing Oneself**

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

It is unclear why the feeding and dressing criteria exclude the activities of identifying, finding, shopping for or procuring food and clothing. If a taxpayer is unable, because of a disability, to shop for food and clothing, then they will undoubtedly have to incur costs associated with delivery services to obtain their food and clothing. Since the purpose of the DTC is to recognize such disability-related expenses, it seems confounding that the eligibility criteria explicitly will not recognize such expenses.

Since these criteria pertain to two personal care activities among many, we question why other personal care activities have been excluded from consideration as "basic activities of daily living." Personal care activities such as washing, bathing, personal grooming, and so forth have been unnecessarily excluded. Persons who are unable to wash or groom will inevitably incur disability-related expenses with respect to personal care, and it does not make sense for such persons to be excluded from the tax relief provided by the DTC.

#### **(vii) Speaking**

The eligibility criterion for speaking is inconsistent with the purpose of the DTC, which is to recognize the extra disability-related costs associated with day-to-day living. By restricting eligibility for the DTC, as it regards speaking, to "quiet settings" and with respect to interlocutors who are "familiar with the individual," the DTC is brought out of the realm of day-to-day living and into imaginary environments. Persons who have some ability to speak will, in day-to-day living, try to speak in noisy environments and with strangers. The eligibility criterion with respect to speaking disabilities does not allow qualification with regard to real day-to-day environments. This prevents access to the DTC, to persons who have disability-related costs in actual day-to-day settings, contrary to the purpose of the DTC.

**(viii) Hearing**

The eligibility criterion for hearing is, like the speaking criterion, inconsistent with the purpose of the DTC, which is to recognize the extra disability-related costs associated with day-to-day living. By restricting eligibility for the DTC, as it regards hearing, to “quiet settings” and with respect to interlocutors who are “familiar with the individual,” the DTC is brought out of the realm of day-to-day living and into imaginary environments. Persons who have some ability to hear will, in day-to-day living, try to hear in noisy environments and with strangers. The eligibility criterion with respect to hearing disabilities does not allow qualification with regard to real day-to-day environments. This prevents access to the DTC, to persons who have disability-related costs in actual day-to-day settings, contrary to the purpose of the DTC.

**(ix) Eliminating**

We have no specific commentary to add with respect to the criterion pertaining to eliminating, except as it is affected by the “inordinate amount of time” criterion that will be discussed below.

**(x) Walking**

It is significant that this criterion is not interpreted to include ascending and descending stairs, which are clearly basic activities of daily living. For this reason, a more inclusive criterion that could be substituted for “walking” is “ambulation.” We have no further commentary to add with respect to the criterion pertaining to walking, except as it is affected by the “inordinate amount of time” criterion that will be discussed below.

**(xi) Inordinate amount of time**

In order for a taxpayer to be considered markedly restricted with respect to a basic activity of daily living, they must either be unable to perform the activity or take an “inordinate” amount of time to do so. The problem with this criterion is that in individual cases it is interpreted differently by CCRA staff and the judiciary. While the *Income Tax Act* includes a vague test pertaining to an “inordinate amount of time,” which is subject to many interpretations, there will continue to be inconsistent decisions regarding eligibility. There will also continue to be cases in which persons who should be granted the DTC are denied, with the result that they pay more than their fair share of tax.

**(xii) Attendant and Nursing Home Care**

Eligibility for the DTC is restricted to persons who have not made certain attendant care and nursing home claims under the Medical Expense Tax Credit. The *Income Tax Act* seems to assume that persons who pay for attendant or nursing home care do not for that reason also have such unitemizable disability-related expenses as are

contemplated by the DTC. The assumption is incorrect, and we therefore recommend strongly that s. 118.3(1)(c) be repealed.

### *C. Administration Should Reflect the Purpose of the DTC*

It is not just the eligibility criteria for the DTC that ensure that the purpose of the DTC is undermined. It is also the case that the purpose of the DTC is thwarted because of the way in which it is administered. The consequence is that eligible taxpayers become precluded from accessing the DTC.

The DTC is administered by the CCRA. The CCRA is responsible for preparing the application form for the DTC and for reviewing applications. The form for the DTC bears the reference number "T2201."

Historically, the T2201 has worked at cross-purposes to the legislative intent behind the DTC. The T2201 has often had the effect of preventing access to the DTC to eligible taxpayers. Accordingly, in what follows, we will examine the sections of the T2201 that work to hinder access, by eligible taxpayers, to the DTC.

The T2201 has justifiably been criticized for introducing, over the years, confusing non-statutory language and tests into the eligibility criteria for the DTC. For example, the T2201 has substituted the word "excessive" for "inordinate" (1991), described a mobility impairment as "necessarily confined to a bed" (1989), described a mobility impairment as reliance "on a wheelchair for more than half the day" (1993), described "basic activities of daily living" as "essential survival skills" (1993), and reduced the eligibility criteria to simplistic "yes or no" questions (beginning in 1993). Beginning in 2000, the T2201 prevented access to the DTC through the employment of language directed at qualified persons that signalled that the criteria were to be interpreted in an overly narrow fashion. With respect to each criterion, qualified persons were unquestionably discouraged from allowing eligibility. The complex language used in the form, for each criterion, was the following: "Answer **no** [*i.e.*, certify eligibility] only if, all or almost all of the time, even with therapy, medication, or a device, your patient cannot . . ."

We understand that the CCRA is well-aware of the historical problems with the T2201 and is presently, because of the problems, revising the form. We will therefore try to restrict our comments to the anticipated form for the 2003 tax year.

#### **(i) Vision**

Beginning in 1993, the T2201 introduced "visual acuity" and "field of vision" standards for qualification for the DTC, without any statutory authority. The consequence, for taxpayers with vision disabilities who have disability-related expenses but cannot meet the arbitrary criteria, is that they cannot access the DTC for the tax relief which they need. This is still a problem with the 2003 T2201 form.

**(ii) Walking**

Beginning in 1993, the T2201 introduced a “100 meters” test for walking “on level ground.” In 1994, the test was “50 meters on level ground.” The new T2201 still includes a “100 meters” consideration. The T2201 indicates that only walking, and not ascending or descending, will be considered. These tests and considerations are not statutorily authorized and have the effect of arbitrarily preventing taxpayers, who should be eligible for the DTC, from accessing it.

**(iii) Hearing**

The criterion for hearing in the T2201 has, for a long time, been restricted to persons who are completely deaf. The test has been “completely unable to hear” (1989) and “cannot hear (without lip reading)” (2000) despite the fact that the statutory test is not meant to restrict access only to persons who are completely deaf. For instance, the statutory test contains a consideration of whether a taxpayer’s hearing, so as to understand, takes an “inordinate amount of time.”

The new T2201 thankfully opens up the possibility that, consistent with the *Income Tax Act*, persons who take an “inordinate amount of time” to hear so as to understand may be eligible for the DTC.

As a guide to qualified persons, the new DTC provides examples of persons who will qualify for the DTC under the hearing criterion. One example is someone who must “rely completely on lip reading or sign language.” The use of the word “completely” will unfortunately imply, for some readers, that those who do not rely completely on lip reading will not qualify. This example provided by the CCRA, therefore, may prevent eligible persons from accessing the DTC.

The new T2201 indicates that cochlear implants are devices for hearing that may be taken into consideration when determining eligibility for the DTC. For instance, if a qualified person believes that a cochlear implant would improve the hearing of a taxpayer, then the taxpayer who does not have the implant will be denied access to the DTC. Some taxpayers have legitimate reasons for not wanting a medical device implanted into their heads, but these reasons are not considered to be legitimate by the T2201. For example, the Therapeutic Products Directorate of Health Canada updated and confirmed on 17 February 2003 an earlier notice in which it identified recipients of cochlear implants as being at greater risk of developing bacterial meningitis than the general population.

By ignoring in the T2201 such legitimate reasons for not using such devices as the cochlear implant, the CCRA is preventing eligible taxpayers from accessing the DTC.

#### **(iv) Feeding**

The criterion of feeding has changed from including the “preparation” of meals (1989) to excluding “food preparation” (1993). Thankfully, the new T2201 has reverted to the inclusion of “preparing food.” It is unclear how, in the face of no changes having been made to the statutory language, the CCRA has been able to include and exclude the same examples on the face of the T2201. It seems clear that more safeguards need to be put in place to prevent such amendments from being made by the CCRA in the future.

#### **(v) Perceiving, Thinking, and Remembering**

Taxpayers have, historically, had the greatest difficulty meeting the eligibility criteria under this category. The T2201 has been for the most part responsible for access problems. It is our hope that the new T2201 will improve access. However, a central problem with the T2201 was not corrected by the new amendments made to it for the 2003 tax year.

The *Income Tax Act* has been interpreted judicially and a determination has been made that qualification for the DTC does not depend upon showing a marked restriction with respect to each of the three criteria (which would be onerous), but to at least one of the criteria. The proper way to read the *Income Tax Act* with respect to perceiving, thinking, and remembering is to consider the terms disjunctively. If it can be established that a taxpayer is unable to think, then they will qualify for the DTC regardless of whether they are also unable to perceive and remember.

In the 2003 T2201, however, qualified persons are only permitted to allow eligibility for a taxpayer who has a marked restriction with respect to all three criteria combined. The failure of the CCRA to update the T2201 so that it conforms to the correct legal interpretation of the *Income Tax Act* continues to prevent access to the DTC by eligible taxpayers.

#### **(vi) Life-Sustaining Therapy**

We are not aware of any statutory provisions authorizing the CCRA, through the T2201, to restrict access to the DTC to only those persons whose life-sustaining therapy transpires for a duration of at least 14 hours *per* week exclusive of “time needed for travel, medical appointments, or to recuperate after therapy.” The exceptions listed in the T2201 hinder access to the DTC for eligible taxpayers.

#### **(vii) CCRA Decision-Making**

At ARCH, we receive telephone calls from persons across Ontario on a wide range of legal issues related to disability. One type of recurring call comes from taxpayers whose physicians have certified them as being qualified for the DTC but whose applications

have nevertheless been rejected by CCRA staff. We are often perplexed by how the opinion of a physician gets overturned by the opinion of a non-physician at the CCRA, in the circumstance in which access to the DTC currently decided based upon medical criteria.

We also become perplexed by practices on the part of the CCRA in which large numbers of DTC recipients are asked to reapply. In 2001, after the CCRA asked over 100,000 recipients to reapply for the DTC, almost 50,000 lost access to it.

These questionable practices, and others, of the CCRA prevent eligible taxpayers from accessing the DTC.

#### *D. Consistent Name for the DTC Should be Chosen*

The DTC is called the “disability amount” in the Income Tax Return. In the *Income Tax Act* it is called the “credit for mental or physical impairment.” On the T2201, it is called the “Disability Tax Credit.”

We urge the TAC to recommend the harmonization of the name of the credit.

#### *E. Unnecessary Imposition of Application Costs upon Taxpayers*

Taxpayers who apply for credit under most income tax programs do not have to pay for their application. For taxpayers with disabilities, however, there is a requirement for a qualified person to certify eligibility. This is an anomaly that should be addressed. If the reason for requiring certification is that persons with disabilities are believed by the Government of Canada to be untrustworthy, then the certification requirement should cease.

It has been reported to us that qualified persons charge between \$25 and \$150 to fill out a T2201. For persons with disabilities, the costs can be prohibitive. According to the latest PALS figures, persons with disabilities have average incomes equal to only 74% of that earned by persons without disabilities. The average income of persons with disabilities is very close to the poverty line. For many persons with disabilities, they do not possess disposable income sufficient to apply for the DTC.

The costs of applying for the DTC are especially problematic in the context of the CCRA continually asking recipients to reapply.

We recommend that the costs of applying for the DTC, whether or not a taxpayer is successful, at least be explicitly recognized for the Medical Expense Tax Credit (or, preferably, under a Disability Expense Tax Credit that we will propose).

We also urge the TAC to lend its support to Recommendation 3.5 of the *Listening to Canadians* Report (of the Standing Committee on Human Resources and the Status of

Persons with Disabilities) and recommend the creation of a common application form for all federal disability-related programs. If there was only one form, then there would at least be only one fee that would be paid to a qualified person for the purposes of making an application to any and all federal programs.

### *F. Impact of Maclsaac Decision*

Section 118.3(1)(b) of the *Income Tax Act* requires that the T2201, which must be filled out by a qualified person referred to in s. 118.3(1)(a.2), be filed with the Minister of National Revenue. Judicial interpretation — extending from *Maclsaac v. Canada*, 2000 D.T.C. 6020 (F.C.A.) — of these mandatory provisions has suggested that the form that is filed must positively certify that the taxpayer qualifies for the DTC. This puts persons with disabilities in a precarious position — in the hands of individual qualified persons — with respect to accessing the DTC, because an appeal to the Tax Court may be futile if the T2201 that was filed is negative (even if erroneously so).

Taxpayers have been denied entitlement from the DTC, in many instances, because the qualified person (“QP”) who filled out the T2201 failed, erroneously, to certify that the taxpayer qualified for the DTC. Tax Court decisions indicate that denials will be upheld even in the following situations:

- (i) the QP’s determination in the T2201 was “absurd;”
- (ii) the QP’s determination in the T2201 was “contrary to the evidence;”
- (iii) it was “impossible” to get a QP to complete the T2201;
- (iv) the QP’s determination in the T2201 was “unreliable;”
- (v) the QP’s determination in the T2201 was “contradictory;”
- (vi) the QP’s determination in the T2201 was “confusing;”
- (vii) the QP’s determination in the T2201 was “sloppy;”
- (viii) the QP “deliberately” filled out the T2201 improperly;
- (ix) the QP “negligently” filled out the T2201 improperly; and
- (x) the QP “refused” to sign the T2201.

The position of the CCRA, *that has been taken in open court*, regarding the problems faced by some persons with disabilities in having their doctors fill out the T2201, is that such persons should just change their doctors. The CCRA suggests that if one doctor fills out the T2201 improperly, then the applicant to the DTC should just find another doctor to fill out the T2201 properly. We find it disappointing that the CCRA encourages this kind of “doctor-shopping,” and we urge the TAC to reject such a position on the grounds of public policy.

The Government of Canada should not encourage persons with disabilities to change their doctors when problems arise with respect to qualifying for the DTC. Good doctor-patient relationships are extremely important to persons with disabilities. Establishing trusting relationships with doctors is not easy, and often takes years. Good relationships should not hastily be abandoned. There is a shortage of doctors in Canada, especially

in rural areas, and there are sometimes just no other doctors available. This is particularly true for persons with disabilities, whose choices for doctors may be even more limited due to a lack of accessible transportation and a lack of doctors with accessible offices, especially in rural areas.

We recommend that the *Income Tax Act* be amended to give latitude to the CCRA and the Tax Court to receive evidence and make determinations regarding eligibility in the face of unfiled or negative T2201 forms. Surely the Government of Canada has an interest in seeing to it that persons with disabilities access the relief afforded by the DTC if they qualify for it, whether or not application rules are followed strictly. The current — inflexible — rules regarding the application process needlessly prevent access to the DTC, encourage the dissolution of doctor-patient relationships, and should be changed.

### *G. Convert Credit into a Deduction*

The DTC currently operates as a non-refundable credit, which offsets tax that may otherwise be payable. We submit that it would be more appropriate for the DTC to operate as a deduction from income (as it did prior to 1988), so that the costs of disability may be directly deducted from taxable income.

### *H. Increase Public Knowledge of the DTC*

In 1996, the Federal Task Force on Disability Issues (“Scott Task Force”) reported (in *Equal Citizenship for Canadians with Disabilities: The Will to Act*) that few persons with disabilities know about the Disability Tax Credit. In the most recent data from the PALS survey, this fact was confirmed. The PALS survey reports that more than 900,000 Canadians with disabilities do not know about the DTC. Alarming, the majority of Canadians with “very severe” disabilities do not know that the DTC exists.

The consequence of so many Canadians with disabilities being unaware of the existence of the DTC is that they are not claiming the credit and are paying more than their fair share of tax. It is unconscionable for the Government of Canada to benefit from this lack of knowledge on the part of persons with disabilities.

It is essential that the Government of Canada engage in educational programs with respect to the DTC and encourage eligible Canadians who have not been claiming it to ask for its retroactive application to their Income Tax Returns.

### *I. Allow Transfers to Any Supporting Person*

The list of persons to whom credit for the DTC may be transferred is limited to spouses, parents, grandparents, children, grandchildren, siblings, aunts, uncles, nieces, and nephews. By limiting the transfer of the credit to such persons, the Government of Canada is sending the message that there are only a limited number of legitimate supporting relationships that exist for persons with disabilities.

We recommend that the Government get out of the business of declaring which supporting relationships are and are not legitimate for persons with disabilities and that the Government permit any supporting person to receive credit for the DTC.

### **III. Medical Expense Tax Credit**

We recognize that some persons with disabilities sometimes have medical expenses and that they sometimes have disability-related expenses. We believe that there are good reasons for distinguishing between the two types of expenses. Accordingly, we therefore recommend that the *Income Tax Act* recognize a new tax credit, called the “Disability Expense Tax Credit” (“DETC”). We will have more to say about the DETC in the next section.

The PALS survey has determined that approximately 25% of persons with disabilities who apply for the METC do not receive it. This could be because the METC does not recognize many disability-related expenses commonly incurred by persons with disabilities. We urge the TAC to recommend that this matter become the subject of research, to determine why such a large percentage of persons with disabilities are being refused the METC.

The PALS survey also pointed out that approximately 20% of persons with very severe disabilities were not able to confirm whether they applied for relief through the METC. The explanation could be that someone else completed their tax returns for them. The explanation could also be that they lack knowledge regarding the METC. We urge the TAC to recommend that this matter become the subject of research, so that it may be determined whether an educational program regarding the METC should be directed toward persons with disabilities.

The METC currently operates as a non-refundable credit, which offsets tax that may otherwise be payable. We submit that it would be more appropriate for the METC to operate as a deduction from income, so that the costs of medical expenses may be directly deducted from taxable income.

Similar to our submissions regarding the DTC, we believe that any supporting person should be able to receive credit for medical expenses paid with respect to a person with a disability.

### **IV. Disability Expense Tax Credit**

A good reason for creating a DETC, separate from the METC, is due to judicial doubt that has been expressed regarding the propriety of disability-related expenses being claimed as medical expenses. In the case of *Simser v. Canada*, 2003 D.T.C. 627

(T.C.C.) at paragraph 112, Mr. Justice Rowe opined that “just because the person spending funds on sign language interpretation . . . is referred to within the subsection as a ‘patient,’ that does not deem it so.” In other words, the Tax Court may only allow METC claims in medical settings.

Mr. Justice Rowe’s remarks are understandable. Disability-related expenses cannot appropriately be described as being equivalent to “medical expenses.” We recommend that disability-related expenses therefore be removed from the ambit of the METC and placed within the domain of our proposed DETC. In what follows, we will make suggestions regarding the improvement of the DETC, as if it had already been created but was operating as the METC does currently.

We have already submitted that the DETC should explicitly recognize the costs of applying for the DTC as an eligible expense.

We urge the TAC to recommend that internal impediments to claiming disability expenses under the DETC be removed. For instance, in order for a student to claim the DETC for note-taking expenses, they must prove currently that the note-taker is “in the business of providing such services” and the student must be “certified in writing” by a medical practitioner to be a person who requires such services. In practice, these procedural requirements act as barriers to accessing the tax relief that should be available to those who need note-taking services.

There are many significant disability-related expenses that are currently not recognized as expenses for which a claim can be made under the DETC. One example is the cost of wheelchair repairs. We urge the TAC to recommend either that the list of eligible disability-related expenses be expanded to properly reflect the types of expenses frequently incurred by persons with disabilities, or that the list be abandoned in favour of an approach in which persons simply submit claims for expenses. The latter approach may be advisable, since a comprehensive list of disability-related expenses may be, because of the individualized nature of disability-related expenditures, impossible to draft.

The DETC, if modeled after the METC, would only recognize the effect of above-average disability-related expenses with respect to a taxpayer’s ability to pay tax (due to the effect of a threshold over which expenses must pass before any benefit may be realized). This may — or may not — be appropriate for medical-expense claims but, with respect to disability-expense claims, it is clearly inappropriate. All Canadians may incur medical expenses, but only Canadians with disabilities incur disability-related expenses. There should not be a threshold over which persons with disabilities must pass with respect to their disability-related expenses before they will earn credit. To impose a threshold upon persons with disabilities singles them out for disadvantageous tax treatment without any obvious justification. We therefore recommend that DETC claims not be subject to an eligibility threshold.

We submit that it would be appropriate for the DETC to operate as a deduction from income, so that the costs of disability may be directly deducted from taxable income.

Similar to our submissions regarding the DTC, we believe that any supporting person should be able to receive credit for DETC expenses paid with respect to a person with a disability.

## **V. Refundable Disability Accommodation Credit**

Persons with disabilities cannot access and realize all of the benefits of citizenship without accommodation. Too often, persons with disabilities pay for these accommodations out of their own pockets. We consider this to be inappropriate. The Government of Canada, which bestows citizenship, should do so equally and not effectively require persons with disabilities to pay more than do others to gain access to the benefits of citizenship. Some itemizable self-absorbed accommodation costs are presently recognized in the tax system through the operation of the METC, and would become recognized through the operation of the DETC that we have proposed. However, a problem with the METC and our proposed DETC is that they are not refundable. Since we believe that persons with disabilities should have the costs of accommodations returned to them, we submit that it would be appropriate for accommodation measures to be removed from the ambit of the METC, or our proposed DETC, and grouped into a new “Disability Accommodation Credit.”

We recommend that accommodation costs borne by persons with disabilities be recognized by this new credit in the income tax system, and that the credit be fully refundable. The reason why the credit should be refundable is because no Canadians should have to pay for the benefits of citizenship, beyond what is considered one’s “fair share” of tax. Persons with disabilities should not have to pay extra in order to be included. Persons with disabilities should not have to pay more than others to access the benefits of citizenship and if they do (*i.e.*, by being forced to pay for the accommodations necessary to access the benefits of citizenship), then they should be fully reimbursed.

It is our view that it would be discriminatory for the Government of Canada not to reimburse persons with disabilities for accommodation costs associated with accessing their rights as citizens. We believe that the creation of Disability Accommodation Credit would promote the full citizenship of persons with disabilities, consistently with the objectives of the Government of Canada as expressed in such reports as *In Unison: A Canadian Approach to Disability Issues* and *Future Directions to Address Disability Issues for the Government of Canada: Working Together for Full Citizenship*.

## **VI. Taxation of Accommodations**

The Tax Court of Canada and the Canadian Human Rights Tribunal have heard cases in which students with disabilities have had their educational accommodation funding (in the form of Canada Study Grants) taxed by the CCRA. The effect of this taxation entailed, for the students, that they were forced to pay more for their education than students without disabilities. The students with disabilities paid not only tuition to go to school, but also tax on the accommodation funding that they received, without which they would not have been able to attend school.

While both the Tax Court and the Tribunal in the cases to which we are referring remarked on the unfortunate situation caused by the taxation of accommodation funding, neither were able to find that the taxation constituted discrimination against the students (it should be noted that the Tribunal decision was upheld on appeal and that the Tax Court case is pending appeal). The Tribunal, in particular, stated that a strong argument can be made that taxing accommodation measures is “unfair.” We agree. So did the Scott Task Force in 1996, but no changes have yet been made to the income tax system.

Accommodations are designed to “level the playing field.” To tax Canadians for receipt of an accommodation has the effect of unbalancing the playing field that was otherwise level. The Government of Canada generally does not tax accommodation measures (e.g., accommodation measures that are provided by employers are not considered “taxable benefits”), and it is nonsensical for exceptions to remain in the tax system.

We urge the TAC to recommend that the Government of Canada cease its practice of taxing accommodation measures that have been received by persons with disabilities.

## **VII. Canada Pension Plan Disability Benefits**

We support Recommendation 5.3 in the *Listening to Canadians* report (of the Standing Committee on Human Resources Development and the Status of Persons with Disabilities), so that the taxation of Canada Pension Plan-Disability (“CPP-D”) is eliminated.

## **VIII. Provincial Clawbacks of Federal Programs**

The PALS survey, as mentioned, has confirmed that persons with disabilities are significantly poorer than persons without disabilities. Persons with disabilities are disproportionately represented amongst the group of persons who are in receipt of provincially-funded social assistance programs. Because persons with disabilities are financially disadvantaged, it is essential that federal program funding reach persons with disabilities.

For persons with disabilities in receipt of provincially-funded social assistance programs, however, federal program funding often does not reach them. This is because the value of such assistance gets deducted from assistance being provided through provincial income support programs. Provincial governments effectively “clawback” the value of the federal assistance and use the savings generated to pay for other priorities, including provincial tax breaks which disproportionately benefit persons without disabilities (because they have significantly higher incomes, on average, than persons with disabilities). Examples of federal programs which are affected by clawbacks in Ontario include disability benefits under the Canada Pension Plan and the National Child Benefit Supplement.

We are worried that the value of the Child Disability Benefit will also become the subject of provincial government clawbacks and we encourage the TAC to recommend the enactment of laws that would prevent such from happening.

## **IX. Extend Mandate of the TAC**

The TAC has a limited mandate, which is scheduled to end late next year. We recommend that the TAC have an ongoing mandate to monitor tax measures affecting persons with disabilities, to conduct research, and to make recommendations.

The concerns of persons with disabilities will not end late next year, and any changes imposed upon the income tax system, based upon recommendations made by the TAC, will need to be monitored to determine if the desired effects were achieved. We therefore urge the TAC to recommend that its existence be extended beyond its current 18-month mandate.

## **X. Summary of Recommendations**

1. Amend the eligibility criteria for the DTC so that they reflect the purpose of the DTC. Ensure that eligibility is tied to whether unitemizable disability-related expenses were incurred rather than to an arbitrary medical definition of “disability.” Eliminate the need to have anyone certify eligibility with respect to the new criteria.
2. Ensure that the CCRA administers the DTC in a manner that is consistent with the purpose of the DTC.
3. If the eligibility criteria are not amended as indicated in paragraph 1, then we make the following recommendations regarding the DTC:
  - (i) remove the criterion that a disability be “severe;”

- (ii) remove the criterion that a disability be “prolonged,” the effect of which is to exclude persons whose disabilities are cyclical, periodic, episodic, or recurrent;
- (iii) cease the interpretation of “all or substantially all of the time” to mean “90% of the time;”
- (iv) allow for the consideration of the cumulative effect of multiple disabilities when determining eligibility;
- (v) remove the provision that disqualifies persons with disabilities from the DTC if there exists some therapy, device, or medication that might address an impairment, unless consideration is given to the availability and propriety of the therapy, device, or medication;
- (vi) express the list of “basic activities of daily living” in a manner that is not exhaustive, and include breathing, working, housekeeping, and social and recreational activities;
- (vii) amend the “perceiving, thinking and remembering” activity so that it reads disjunctively;
- (viii) ensure that functional criteria are considered with respect to the “perceiving, thinking and remembering” activity;
- (ix) include the acts of identifying, finding, shopping for, and procuring to the activities of feeding and dressing;
- (x) include other personal care activities, such as washing, bathing, and personal grooming, to the list of basic activities of daily living;
- (xi) allow consideration of speaking disabilities in regard to loud settings, when speaking with strangers;
- (xii) allow consideration of hearing disabilities in regard to loud settings, when listening to strangers;
- (xiii) allow consideration of other ambulatory activities such as ascending and descending stairs;
- (xiv) amend the criterion of spending an “inordinate amount of time” on an activity of daily living so that there is a clear but less-onerous test;
- (xv) repeal s. 118.3(1)(c) of the *Income Tax Act*;

- (xvi) Establish an oversight body to monitor the CCRA with respect to the ongoing changes being made to the T2201 to ensure that the changes are consistent with the *Income Tax Act*, and that the T2201 determines eligibility in a manner that is fair;
  - (xvii) Remove the arbitrary “visual acuity” and “field of vision” standards from the T2201;
  - (xviii) Remove references to certain distances that can or cannot be walked from the T2201;
  - (xix) Remove references to being “completely” unable to hear from the T2201; and
  - (xx) Remove from the T2201 the words that restrict access to the DTC those persons whose life-sustaining therapy takes at least 14 hours exclusive of the time needed for travel, medical appointments, and recuperation after therapy;
4. Choose a consistent name for the DTC;
  5. Permit the application costs associated with the DTC to be claimed under the METC (or a proposed DETC);
  6. Create a uniform application form for all federal disability-related programs;
  7. Eliminate the mandatory provisions with respect to filing a positively-certified, “official” T2201 form with the CCRA;
  8. Convert the DTC from a credit to a deduction;
  9. Increase public knowledge regarding the DTC;
  10. Allow transfers of the DTC to any supporting persons;
  11. Conduct research into the question of why 25% of persons with disabilities who apply for the METC do not receive it;
  12. Conduct research into the question of why approximately 20% of persons with very severe disabilities do not know whether they applied for the METC;
  13. Convert the METC from a credit into a deduction;
  14. Permit persons with disabilities to transfer the METC to any supporting persons;
  15. Establish a DETC, without an eligibility threshold, that would operate as a deduction, and which could be transferred to any supporting persons;

16. Remove internal impediments (which exist presently with respect to the METC) from any eligibility requirements for the proposed DETC;
17. Either provide a comprehensive list of eligible expenses under the DETC or permit persons with disabilities to submit claims for any disability-related expenses;
18. Establish a Disability Accommodation Credit that would be fully refundable and cover out-of-pocket accommodation costs.
19. Cease the taxation of accommodations and accommodation funding received by persons with disabilities;
20. Cease the taxation of disability benefits under the Canada Pension Plan;
21. Prohibit provincial clawbacks of federal disability programs; and
22. Extend the mandate of the TAC.