

**Submission to Senate Standing  
Committee on Social Affairs, Science  
and Technology**

**There is an urgent need for fair  
tax treatment for Canadians living  
with mental and physical impairments**

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## Overview

The Disability Tax Fairness Alliance is a coalition of health charities, non-profits and individuals committed to raising awareness among Members of Parliament, Senators and policy-makers of the urgent need to ensure that the administration of the Disability Tax Credit (DTC) reflects Canada's values as well as the principles of inclusion and accommodation as confirmed by the Tax Court of Canada and the Federal Court of Appeal.

In one of the most important and influential decisions relating to the DTC is *Radage v. The Queen*, former Chief Justice of the Tax Court of Canada, Donald G.H Bowman provided the following sensible, practical and compassionate interpretation of the legislation:

"The legislative intent appears to be to provide a modest amount of tax relief to persons who fall within a relatively restricted category of markedly physically or mentally impaired persons... The court must, while recognizing the narrowness of the tests enumerated in sections 118.3 and 118.4, construe the provisions liberally, humanely and compassionately and not narrowly and technically."

We recognize that the federal government has made significant measures to improve the administration of the DTC with the appointment of the Technical Advisory Committee on Tax Fairness Measures (2003-2004) and the Disability Advisory Committee (2004-2005). A number of concerns regarding the eligibility criteria for recognized and the *Income Tax Act* was amended in 2005.

However, there is considerable and growing evidence that many Canadians with disabilities who have previously qualified for these benefits for 10, 20 years and more are being denied the tax credit on questionable grounds when asked to reapply for the DTC.

We are certainly pleased that Minister of National Revenue, the Honourable Diane Lebouthillier, has responded to our request to reinstate the Disability Advisory Committee with a "mandate to advise CRA on the needs and expectations of persons living with disabilities; review and provide feedback on the CRA's administrative practices; and make recommendations on how the CRA can enhance the quality of the service we provide to persons with disabilities."

Nevertheless, there is an urgent need to resolve a number of systemic problems with the administration of the DTC. Although an unjust decision can be appealed all the way to the Tax Court of Canada, and even the Federal Court of Appeal not everyone has the knowledge, stamina or financial resources to tackle such a daunting challenge.

## Disability Tax Credit

The Disability Tax Credit (DTC) has become an important benefit since it is the basis of an increasing number of federal and provincial income support programs including the Registered Disability Savings Plan (RDSP).

And yet, an increasing number of Canadians with disabilities are being unjustly denied the DTC without being provided enough information for a meaningful appeal. The following concerns with the administration of the DTC need to be addressed without further delay.

1. Not all of the criteria in Form T2201 Disability Tax Credit Certificate as well as related publications accurately reflect the parliamentary and legislative intent of the *Income Tax Act*. The CRA has created an insurmountable barrier for many individuals living with severe and chronic mental and physical impairments by imposing the inflexible guideline that defines being markedly restricted in a basic activity of daily living “all or substantially all of the time” as being “at least 90% of the time.” Furthermore, the mathematical model is not an appropriate measure of disability for people living with mental disorders and other diseases with episodic manifestation of symptoms such as epilepsy, since there are no tools to accurately measure brain activity. Furthermore, such an arbitrary interpretation of the *Income Tax Act*.
  - i. has no statutory basis;
  - ii. is not supported as a strict quantitative measure in CRA’s own policy document, *Income Tax S1-F1-C2, Disability Tax Credit Folio*
  - iii. is not recognized by the Tax Court of Canada as an absolute threshold in both DTC and GST cases.
2. Many of the questions in the follow-up “clarification letters” sent to qualified health-care practitioners are not legal tests for the determination of eligibility for the DTC and are not relevant to the physical or mental impairment of the applicant.
3. Concerns about the reliability of the assessment of the Form T2201 and the clarification letter by staff are reflected in the inconsistencies of the adjudication process in the Tax Services Offices across the country.
4. The CRA exercises the right to question some or all of the medical evidence certified by qualified health-care practitioners in Form T2201 and the clarification letter without providing a reason, valid or otherwise.
5. The Notice of Determination disallowing the DTC is a form letter that does not provide specific details of the basis for rejecting the claim. In some cases, the reasons contradict the information certified by qualified health-care practitioners.
6. The CRA abuses the internal appeal process by withholding documentary evidence. Although the Notice of Determination may refer to the additional

information in the follow-up questionnaire provided by the qualified health-care practitioner, it does not include a copy with the Notice. Nor does CRA inform claimants that they may request a copy of the “clarification letter” which may have formed the basis to reject the application for the DTC. This lack of disclosure defies the fundamental principles of due process and natural justice.

7. The Notice of Determination no longer provides a booklet with detailed information how to appeal by filing an Objection with the Appeals Branch and if that fails, filing a Notice of Appeal with the Tax Court of Canada. This lack of full disclosure is unfair and unjust to disabled Canadians who are unable to afford legal counsel to protect their rights.

Although information is available online, not everyone, in particular seniors, have access to a computer. Others, with mental impairments are disadvantaged since they may not understand the requirement to appeal the decision, especially if they previously received the DTC.

8. CRA does not provide detailed information in its Notice of Determination to holders of RDSPs who have been disallowed the DTC noting that their RDSP is at risk of being terminated. Even if they are appealing the decision, an “Election” must be filed with CRA by the financial institution to ensure that the RDSP will remain open throughout the appeal process.

## **Registered Disability Savings Plan**

The Registered Disability Savings Plan (RDSP) is a long-term savings plan to help Canadians with disabilities and their families save for the future. Individuals with RDSPs may also be eligible for grants and bonds contributed by the federal government to help with long-term savings.

Eligibility for the DTC is a requirement to open an RDSP at a financial institution. However, the RDSP will be terminated if an individual (beneficiary) loses the DTC unless steps are taken to protect the investment. Otherwise the financial consequences can be devastating.

CRA requires an “Election” to be filed by the financial institution holding the RDSP before the end of the year following the year that the individual is no longer eligible for the DTC. In order to ensure that the RDSP remains open during the appeal process, the holder of the plan is required to submit a letter to the financial institution (issuer of the plan) from a licensed medical doctor, certifying in writing that his or her patient is likely to become eligible for the DTC in the foreseeable future.

If the individual is unable to successfully appeal the decision to disallow the DTC, the financial institution will be required to terminate the RDSP. All grants and bonds contributed by the federal government in the previous 10 years will have to be repaid. Any assets remaining in the RDSP must be paid to the beneficiary.

There is no rationale that supports such an untenable position. Indeed, the decision for the government to claw-back its contributions is unconscionable. How can an individual eligible for the DTC for a number of years be treated as if he or she was never eligible for the tax credit?

The unintended consequence of individuals having to reapply for the DTC, even when the disabling effects of their mental or physical impairment have not improved, and then being unjustly denied, is the loss of a substantial portion of an investment designed to assist with future financial needs.

These individuals never abused the system. These individuals never broke the rules. Surely, these individuals are no less deserving, even though they may no longer qualify for the DTC.

Colin of Peterborough received the DTC for a number of years, but lost it when asked to reapply. In a letter to his MP, he wrote the following:

*"How does the government justify creating a program to help those with disabilities and challenges, and then take back what they have given after the fact? This is not only unfair, it is wrong, it is unjust... Please do the right thing and fix this."*

## **Recommendations**

1. Address the systemic problems with the administration of the DTC without further delay.
2. Remove questions from the clarification letters that are not legal tests for eligibility for the DTC.
3. Unless there is clear evidence of fraud, evaluate the medical evidence certified by health-care practitioners acting in good faith against the legislative requirements of the DTC to determine eligibility.
4. Stop requiring individuals with life-long mental and physical impairments disabilities to reapply for the DTC every three to five years.
5. Stop undermining the internal appeals process by withholding documentary evidence.
6. Provide clear information regarding the Election process for maintaining RDSP status in the Notice of Determination when the DTC is disallowed for persons previously eligible for the tax credit.
7. Do not claw-back contributions made by the federal government while Canadians with disabilities were eligible for the DTC if the RDSP is terminated.