

**Submission to House of Commons Standing
Committee on Human Resources, Skills and
Social Development and the Status of
Persons with Disabilities**

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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.

Section 12 of the Interpretation Act, R.S.C., 1985 reads as follows: Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

Former Chief Justice of the Tax Court of Canada
The Honourable Donald G.H. Bowman
Radage vs. The Queen 96 DTC 1615

The **Disability Tax Fairness Alliance** is a coalition of health charities and individuals committed to raising awareness among Members of Parliament, Senators and policy-makers to ensure that the administration of the Disability Tax Credit (DTC) reflects the realities of the lives of people with disabilities, Canada's social values as well as the principles of inclusion and accommodation.

I am also a member of the Disability Advisory Committee established by the Honourable Minister of National Revenue, Diane Lebouthillier in November 2017. Our mandate is to advise the Canada Revenue Agency (CRA) on interpreting and administering tax measures for Canadians living with disabilities in a fair, transparent and accessible way.

For more than 20 years, I have advocated fairness for individuals living with chronic and persistent psychiatric disorders where individuals are markedly restricted in their mental functions, all or substantially all of the time, even though the external signs and symptoms may be perceived to be intermittent or "episodic."

In 1998, my husband Jim, severely impaired by his bipolar disorder, was denied the Disability Tax Credit (DTC) because the federal government did not believe that people living with mental illnesses were as severely impaired as those with physical impairments. I successfully appealed on his behalf to the Tax Court of Canada and the landmark decision was upheld by the Federal Court of Appeal.

People living with so-called episodic disabilities face unique barriers qualifying for and accessing the DTC, a modest tax benefit. Also, qualifying for the DTC enables them to access numerous other federal and provincial government income support programs including the Registered Disability Savings Plan (RDSP).

Although psychiatric disorders are chronic medical conditions, many individuals benefit from a variety of mood stabilizers and psychotropic medications and are able to live well. Still, a small percentage continue to be vulnerable to a wide range of symptoms affecting the way they think, feel and relate to others. The unpredictability of the episodic symptoms of the disease, which is always present, can create marked restrictions.

I was a member of the Technical Advisory Committee on Tax Measures for Persons with Disabilities established in 2003 by the Ministers of Finance and National Revenue. This committee spent considerable time discussing the implications of episodic diseases including MS, epilepsy and mental illness that were not addressed by a combination of ill-defined and inappropriate eligibility criteria that was more appropriate for the determination of eligibility of individuals living with severe and prolonged physical impairments.

In our December 2004 report, *Disability Tax Fairness*, we noted that the interpretation by the CRA of an individual's ability to perform a basic activity of daily living is markedly

restricted “all or substantially all of the time” as being “at least 90% of the time” discriminated against individuals living with medical conditions that are associated with relapse and a remitting course of symptoms. Such a measure is inappropriate for those who may have signs and symptoms that wax and wane in their expression, that is, not always present, despite the severity of the disabling effects of their impairment.

In 2005, the CRA attempted to clarify its narrow and technical interpretation of the legislation as being at least 90% of the time by providing the following guideline for medical professionals of “mental functions necessary for everyday life” in Form T2201, the Disability Tax Credit Certificate and the document, Disability-Related Information RC 4064:

“You experience psychotic episodes several times a year. Given the unpredictability of your psychotic episodes and the other defining symptoms of your impairment (for example, lack of initiative or motivation, disorganized behaviour and speech), you continue to need daily supervision.”

CRA has eliminated its guidelines from Form T2201. The 90% measure, as defined and applied by the CRA, is the determining factor even though such a narrow and inflexible interpretation is not supported by diagnostic criteria, legislation, jurisprudence, or even CRA’s own guidelines.

Imposing the inflexible 90% guideline has created an insurmountable barrier for many individuals living with severe and prolonged mental and physical impairments. They have reported that their doctors refuse to complete Form T2201 even though they may have qualified in previous years. Health care professionals lack clarity and understanding of the eligibility criteria and are therefore hesitant to complete Form T2201 on behalf of their patients.

There are numerous Tax Court of Canada cases indicating that the 90% threshold is not a suitable guideline for chronic and persistent mental illness.

In *Albertin v. The Queen*, Judge Gerald J. Rip noted that Mrs. R.'s "mental problem was not continuous; her erratic behaviour was not constant." He estimated that she was impaired only 50% of the time since the Appellant, her son-in-law testified that "she was unpredictable... her decisions were not rational decisions..." Nevertheless, Judge Rip allowed the DTC noting the following:

“(Mrs.R) was exhibiting a course of conduct that was potentially dangerous to her. The fact is that her erratic behaviour could be triggered without warning at any time during a lucid period.”

In *Bruno Maltais v. The Queen*, Judge Alain Tardif also recognized that individuals living with mental impairments did not exhibit these symptoms continuously, stating the following:

"The vulnerability for a relapse was always present even though the outward signs are not always visible or apparent. Moreover, a person who has such a disability may break down at any time without there being any indications or warning signs."

In *Buchanan v. The Queen*, Judge Diane Campbell concluded that the Appellant's bipolar disorder was severe enough to allow the credit, providing the following explanation:

"Although the Appellant is certainly able to operate adequately in some areas, his impairment permeates his entire existence. The facts support that while engaged in some seemingly rational activity to an outsider, all other thought processes are exploding in an array of erratic, bizarre and potentially harmful activities. However, the Appellant's ability to perceive, think and remember, although not non-existent, is of such a severity that his entire life is affected to such a degree that he is unable to perform the necessary mental tasks required to live and function independently and competently."

In *Peggy Doe v. The Queen*, Judge Gerald. J. Rip also noted in his ruling the special circumstances of an individual diagnosed with epilepsy as well as a number of psychiatric disorders including anorexia nervosa, obsessive compulsive disorder and post-traumatic stress disorder:

"When a person does not know from one moment to another when a seizure will occur - but knowing a seizure will occur, even with medication - that person's ability to perform any activity, including an activity of daily living, as defined, is markedly restricted."

And yet, CRA stubbornly maintains its narrow and technical interpretation of the legislation with impunity. The data for the taxation year 2016 – 2017 is a shocking revelation of how difficult it has become for people living with schizophrenia, bipolar disorder and other psychotic disorders to access the DTC. The majority of individuals living with mental impairments are required to reapply for the DTC every five years. And yet, individuals whose conditions have remained unchanged and who have been receiving the tax credit for 5, 10 even 20 years or more are now denied eligibility on dubious grounds.

There is no question that it is becoming more difficult for people living with invisible disabilities, despite the severity of their condition, not only to access the DTC but also benefit from the RDSP. Last year, there was an unprecedented 60% increase in the number of rejections of applications from people who are markedly restricted in their mental functions.

There is considerable evidence of systemic problems with the administration of the DTC in recent years. Taken together, these circumstances suggest that it is becoming an institutional tactic by the CRA to challenge taxpayers on questionable grounds and rely on the fact that the system is too complicated or expensive for people to fight these decisions.

This is a major concern for our Alliance that represents more than 25 health charities and hundreds of thousands of members. In addition to the modest tax benefit, the loss of DTC eligibility also means the loss of an RDSP. These individuals, who have been eligible to receive government grants and bonds year after year, must repay these contributions when denied the DTC, and their plan. The Government of Canada has the right to claw back any contributions it has made to the plan in the previous 10 years when they withdraw their funds.

The cumulative total “repayment” of government contributions since 2010 is \$52 million.

Such a practice is unconscionable.

Such a practice is also discriminatory.

The recommendations of our Alliance are the following:

1. Address the systemic problems and inequities in the administration of the government income support programs by amending eligibility criteria such that the myriad of debilitating disabling effects of a chronic and persistent mental impairment can qualify for the DTC and income support programs, including when those effects manifest as a marked departure from the normal range of mental functioning and accepted human behaviour even though the external signs and symptoms may be perceived to be intermittent.
2. Amend the terms of RDSP withdrawals when the plan is terminated because they no longer qualify for the tax credit to prevent claw backs of contributions made by the government during the years that Canadians with disabilities were eligible 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."

There is an urgent need to ensure equity in government policies and programs for Canadians living with episodic disabilities, including severe mental illness, to prevent discriminatory practices toward some of our most vulnerable citizens who have few advocates. Many of these individuals face higher rates of poverty, higher rates of unemployment and higher rates of social exclusion and isolation than people who do not live with disabilities. They also incur additional costs related to their disability. We must ensure that they have access to all of the federal and provincial income support programs designed to relieve some of the financial burden related to their physical and mental impairments and also take advantage of the RDSP when applicable.